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A TREATISE

ON THE

LAW OF AGENCY

INCLUDING NOT ONLY A DISCUSSION OF THE GENERAL SUBJECT

BUT ALSO

SPECIAL CHAPTERS ON

ATTORNEYS AUCTIONEERS BROKERS AND FACTORS

By FLOYD R. MECHEM, LL.D.

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SECOND EDITION

IN TWO VOLUMES.

VOLUME I

CHICAGO

CALLAGHAN AND COMPANY

1914

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PREFACE TO SECOND EDITION

The writer would deem himself sadly lacking in appreciation if he did not at the outset endeavor to express the gratitude he feels for the exceedingly kind reception extended to the first edition of this work, and for the unfailing support which has been given to it during the past twenty-five years. He sincerely trusts that in its revised form the book will be found worthy of continued favor.

A new edition should have appeared many years ago, but the writer has not been able to supply it until now. To properly prepare such an edition is no trifling task. Outside of the time required for his regular work of teaching, the writer has worked hard and steadily upon this edition for more than ten years. The entire book has been revised, and, in large measure, rewritten. The writer has made no attempt to make it a mere digest of the cases. Neither has he endeavored to cite every case. Hundreds of cases have been examined and discarded because they were so purely cumulative or so relatively unimportant as not to seem to justify the use of space in citing them. Nevertheless the citation of new cases will be found very extensive. The writer has felt that if, after working more or less constantly in this field for so many years, he could contribute anything of value to the profession, it would be in endeavoring to analyze and weigh the general principles which underlie the subject. This he has attempted to do, and he has stated his conclusions freely, though, he hopes, not without due consideration and becoming modesty. That he will be found to be justified in all of his conclusions, he has no right to hope.

It seems desirable to point out,—what perhaps sufficiently appears from the text itself,—that, although the title Agency in modern times is quite frequently made to include the relation of Master and Servant

as well as that of Principal and Agent, this book is primarily designed to deal with the latter subject, and the former subject is dealt with only incidentally and for the purpose of rounding out the discussion of the latter. The proper discussion of the law of Master and Servant, in all of its bearings, would require volumes, rather than the few sections which can be given to it here.

The general arrangement and classification have not been materially changed, but the great addition of new matter has made it necessary to number the sections anew. It is hoped that the index will be found sufficiently specific to enable those who are familiar with the old edition to find what they are looking for in this one.

Although the amount of matter in this edition is nearly three times as great as that in the first edition, it has, by the use of a large page and very generous measure, been kept within the compass of two volumes.

It is proper to say, so far as it bears upon the citation of recent cases, that more than a year has been consumed in putting the book through the press.

FLOYD R. MECHEM.

The University of Chicago,
June 1, 1914.

PREFACE TO FIRST EDITION

What here follows is the result of an earnest endeavor to make a reliable, useful and comprehensive statement of the law of Agency, including not only its general form, but certain also of its more important special forms. How far this effort has been successful, those who use the book can alone determine.

The plan pursued has been to state in as clear and accurate form as possible, the principles of law involved, supported by a full citation of the authorities, and to illustrate and fortify these statements by examples and quotations from leading and characteristic cases. Upon doubtful questions there has been given, either in the text or in the notes, a more or less full presentation of the conflicting views, and the writer has endeavored to extract from them what seemed to him to be the true principle. This has involved, in many cases, an expression of his own opinion, for which he is, of course, alone responsible.

For the benefit of those to whom complete libraries are not accessible,—and they embrace the great majority of the profession,—he has, in many instances, made the statements of cases and the excerpts from the opinions of the courts, fuller than might otherwise seem necessary. While this course has added to the size of the book, the writer hopes it has also added proportionately to its value. If he has erred in this regard, it is the error of a too abundant caution. To further increase the practical usefulness of the book he has, at the expense of no little additional labor, given parallel references to those excellent series of reports, the American Decisions, American Reports, American State Reports and Moak's English Reports, as well as to the various Reporters and Law Journals. In several of the States the law of agency

has been, to a greater or less extent, reduced to the form of a code. The more important of these statutory provisions will be found collected in the Appendix.

The work is divided into five parts or books. Of these, the first four are devoted to a general exposition of the law of Agency, while the fifth contains a consideration of the law applicable to Attorneys, Auctioneers, Brokers, and Factors. That this method of treatment involves something of repetition is true, but in the writer's opinion the advantages of consecutive and separate treatment more than compensate for it. The subjects of ship and bank officers, and others sometimes treated in works upon agency, have not been separately dealt with, not only because they belong more appropriately to other topics, but because the size of the work would not permit of it. Each of the four separate forms treated might well be, as each has been, made the subject of an independent treatise, and to compress them into single chapters prevents exhaustive discussion. It is believed, however, that no important principle has been omitted, and that what these chapters lack will be matter which is cumulative or of detail only. Trusting that his work will be of use to those for whom it was intended, the writer submits it to the profession.

FLOYD R. MECHEM.

16 and 17 Bank Chambers,
Detroit, October 1, 1888.

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THE DUTIES AND LIABILITIES OF THIRD PERSONS TO THE AGENT

[References are to sections: §§ 1–1705, Vol. I; §§ 1706–2588, Vol. II.]

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[References are to sections: §§ 1-1705, Vol. I; §§ 1706-2588, Vol. II.]

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(References are to sections: §§ 1–1705, Vol. I; §§ 1706–2388, Vol. II.)

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THE LAW OF AGENCY

BOOK I.

OF THE RELATION IN GENERAL; HOW CREATED AND TERMINATED

CHAPTER I

INTRODUCTION

§ 1. Meaning of agency.
2. Forms of acting.
3. Lines of distinction.
4, 5. Other forms.
6. Direct and indirect representation.
7. Degrees of authority.
8. Nomenclature adopted.
9. Is there a law of agency?
10. Agency belongs to a commercial age.
11–15. Agency a modern title in our law.
16–20. Agency in Roman law.
21. Other historical references.
22. Agency in modern Continental systems.
23. The early treatises on agency.
24. Legislation in English and American law.

§ 1. **Meaning of agency.**—Considered from the standpoint of etymology, the word "agency" or "agent" (*ago, agere, agens, agentis*) denotes an actor, a doer, a force which accomplishes things. Such an actor or force may be personal or impersonal, corporeal or incorporeal. Thus, we speak of a mechanical or chemical "agent," or say that this or that institution or influence is a great moral "agent," or is an "agency" for good or evil. In such cases we use the words "agent" and "agency" as practically synonymous.[1]

The force or actor which we call an agent or an agency may be one which operates independently, or one which accomplishes results for the account or benefit of something or some one else. It may be used

[1] Thus for example in State v. Liffring, 61 Ohio St. 39, 76 Am. St. R. 358, 46 L. R. A. 334, the court had occasion to consider whether osteopathy was an "agency" within the meaning of a statute which forbade prescribing "any drug, or medicine or other agency for the treatment," etc., except under certain prescribed conditions. The same expression is found in other similar statutes. See Bennett v. Ware, 4 Ga. App. 293.

for a person without his knowledge or consent; it may also be used *against* him. It may be also used *by* a person for his own benefit, being set in motion and controlled by him for that purpose. It is in the latter case that it becomes significant here. Thus, we speak of an agency, or more frequently of an agent, which acts or operates for a person. It may be a mechanical agent or a personal one. In the latter case we have one person acting for another.

At this point we are likely to make a distinction between agency and agent. We apply the word agent to the actor, and the word agency to the relation or condition or fact of his being the actor.

§ 2. **Forms of acting.**—One person may act for another in a great variety of ways. Thus one may render to another a purely personal service, as where he acts as the valet or body servant of the latter or as a member of his domestic establishment. He may act for another in aiding to carry on the latter's industrial or mechanical enterprises, as where he tills his employer's fields, tends his flocks, works in his shop or factory or mine, or is employed upon his roads or ways. He may act for the other in aiding in the performance of the latter's legal or contractual obligations to third persons, as where he serves a public carrier, warehouseman or innkeeper in the performance of the latter's duties to the public. Or he may act as the representative of the other in business negotiations, that is to say in the creation, modification or termination of contractual obligations between that other and third persons.

§ 3. **Lines of distinction.**—Between the last of these forms and all of the others, there runs a line of cleavage which is of much importance. The person who represents another in business negotiations necessarily has to have contractual relations and dealings with third persons—that is the very essence of business. Of none of the others is this necessarily true. The serving man or the working man may never come into contact with third persons at all. He may work entirely alone, or, if he is associated with others at all, it may be with those only who stand in a situation similar to his own. Moreover, even when his functions bring him into contact with third persons, it is not for the purpose of business dealings with them, that is to say, it is not for the purpose of entering into contractual relations with them on account of his employer.

§ 4. **Other forms.**—One who undertakes to accomplish work for his employer, may do so under one of two radically different methods. (1) He may undertake to do so under the direction and subject to the commands of his employer. Or (2) he may undertake to bring about

the result which the employer desires and for which he is willing to pay, but be at liberty to do so wholly by his own methods, in his own way, and free from the directions of his employer, being responsible to the latter for the result only, and not for the means and agencies by which it is brought about.

Thus, in actual practice, if I wish a house built, I may employ a person to proceed to buy material and hire laborers for me and supervise the building of it as my representative, or I may undertake to pay him so much if he, buying material and hiring laborers on his own account, shall turn over to me the completed structure.

§ 5. ——— Again, if I wish property to be held or used on my account, I may proceed in two radically different methods. (1) I may convey the legal title to another with the understanding that he shall hold and deal with it to my use. Or (2) I may retain the title and deliver to the other the possession or perhaps merely the custody with the understanding that he shall hold and use the property as I shall direct.

§ 6. Direct and indirect representation.—The person who is to represent another in his contractual dealings with third persons may do so in a great variety of forms; but here also a clear line of demarcation may well be drawn. The representative may be authorized and expected (1) *to bind his principal directly to, and with the third persons* with whom he deals, or (2) he *may bind himself* only *to and with them,* and then be held to account for the results to his principal and be entitled to demand reimbursement from him. Although the latter form is, as will be seen, unusual, it is entirely possible, and there have been systems of law which, in the main, recognized no other.

§ 7. Degrees of authority.—This person who is to bring about contractual relations between his principal and third persons may be clothed with many degrees of authority. The whole matter may be entrusted to his discretion. He may be restrained by minute and specific instructions. He may be a mere messenger who carries propositions back and forth until the chief parties have arrived at an agreement. Thus, to borrow an illustration from another, if I bargain with a horse dealer and refuse his price, but afterwards, when he has gone away, I send a messenger after him to say that I agree to the price, it is obvious that I and not the messenger will be the real negotiating party.

§ 8. Nomenclature adopted.—A satisfactory nomenclature is exceedingly desirable, but difficult to attain. If we call the whole field Agency, as is now often done, we may call the non-contractual field service, but we have left no familiar term to apply to the contractual

field. It has been suggested that the generic term may be *representation,* and we are then left at liberty to designate the non-contractual species as *service* and the contractual one as *agency.*

It has been proposed that we call the whole field Agency, and subdivide it into Principal and Agent and Master and Servant, to which may be added the relation of Employer and Independent Contractor. Historically just the reverse of this was the practice,—that is to say, Agency was simply a branch of Master and Servant. There is also a considerable tendency in recent times—perhaps more popular than legal —to group everything under the general head of Employment, affixing a different name to the actor according to his undertaking. Thus an employer employs an agent to make a contract, a workman to do work, a contractor to erect a house, and the like. Nevertheless, the method which makes Agency the generic term and classifies these three relations under it, seems best to conform to actual legal practice in modern times, and is the one which will be adopted in this book.

§ 9. Is there a law of agency.—It is sometimes said that there is no distinct law of agency at all,—that is, that there is no body of rules peculiar to it, but that it is simply a case in which we apply the familiar rules of contract, tort, etc., to a new set of facts. If this latter statement be true, then, however desirable it might be to collect and classify the cases in which these familiar rules have been applied, the result would not be to develop a law of agency. If, on the other hand, there should be found to exist a respectable body of rules peculiar to this situation, without which its phenomena could not be satisfactorily explained, then it might fairly be said that there is a law of agency.[2] That there are some unique cases,—like the rules respecting the undisclosed principal, for example—cannot be denied; though some have preferred to treat these merely as anomalies rather than as the subject of a distinct system of rules.

[2] Thus it is said by Mr. Justice Holmes: "If agency is a proper title of our *corpus juris,* its peculiarities must be sought in doctrines that go farther than any yet mentioned [in this article]. Such doctrines are to be found in each of the great departments of the law. In tort, masters are held answerable for conduct on the part of their servants, which they not only have not authorized, but have forbidden. In contract, an undisclosed principal may bind or may be bound to another, who did not know of his very existence at the time he made the contract. By a few words of ratification a man may make a trespass or a contract his own in which he had no part in fact. The possession of a tangible object may be attributed to him although he never saw it, and may be denied to another who has it under his actual custody or control. The existence of these rules is what makes agency a proper title in the law." 4 Harv. L. Rev., p. 348 (an extract from an article on "Agency").

§ 10. **Agency belongs to a commercial age.**—If agency be deemed to belong to contractual representation properly, it will at once be seen that it belongs to a condition of society in which commercial transactions are highly developed. A non-commercial society, while it might have much use for servants, would have little need of agents. The historical condition seems to accord with this conclusion.

§ 11. **Agency a modern title in our law.**—The title agency, as the name of a distinct subject, belongs to a comparatively recent period in our law. Blackstone scarcely refers to it. "The law of principal and agent," says one of Blackstone's most learned editors, Professor Hammond,[3] "is derived from the canon law, and has only been introduced into the common law in recent times. If the older books of English law are examined, no such words as 'principal and agent' will be found in them. Wherever any question is discussed which would now be treated under that head, it is treated of as master and servant. Principal and agent does not occur in Viner's Abridgement, or those preceding it; and it is only at the end of the eighteenth century that we find it beginning to appear as a separate title, as yet of very limited application."

§ 12. ——— "As late as Blackstone," says Mr. Justice Holmes in his book on the Common Law[4] "agents appear only under the general head of servants, and the first precedents cited for the peculiar law of agents were cases of master and servant. Blackstone's language[5] is worth quoting: 'There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial capacity; such as *stewards, factors* and *bailiffs;* whom, however, the law considers as servants *pro tempore,* with regard to such of their acts as affect their master's or employer's property.'"

§ 13. ——— Writing in 1811, Mr. Paley thought it necessary to apologize for offering to the profession a treatise on agency, saying, "The law of principal and agent appears, at first view, to be founded upon principles so few and simple, and in general so easy of application, that a treatise upon such a subject may seem altogether superfluous. And indeed the decisions upon this branch of the law, which are to be met with in the older reports, are neither numerous nor important."[6]

§ 14. ——— Pollock and Maitland in their History of English Law before the time of Edward I, say:[7] "The whole law of agency is

[3] Hammond's Blackstone, Bk. I, p. 719.

[4] P. 228. See also his articles on Agency, 4 Harv. L. Rev. 354, 5 Id. 1.

[5] 1 Blackstone's Com. 427.

[6] Preface to Paley on Agency.

[7] 2d ed., p. 228.

yet in its infancy. The King indeed ever since John's day has been issuing letters of credit empowering his agents to borrow money and to promise repayment in his name. A great prelate will sometimes do the like. It is by this time admitted that a man by his deed can appoint another to do many acts in his name, though he can not appoint an attorney to appear for him in court until litigation has been begun. Attorneys were appointed to deliver and to receive seisin. Among the clergy the idea of procuration was striking root; it was beginning to bear fruit in the domain of public law; the elected knights and burgesses must bring with them to parliament 'full powers' for the representation of the shires and boroughs. But of any informal agency, of any implied agency, we read very little. We seem to see the beginning of it when an abbott is sued for the price of goods which were purchased by a monk and came to the use of the convent.

"The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use, trust or confidence.' In tracing its embryonic history we must first notice the now established truth that the English word *use* when it is employed with a technical meaning in legal documents is derived, not from the Latin word *usus,* but from the Latin word *opus,* which in old French becomes *os* or *oes.* * * * In the thirteenth century we commonly find that where there is what to our eyes is an informal agency, this term *ad opus* is used to describe it. Outside the ecclesiastical sphere there is but little talk of 'procuration;' there is no current word that is equivalent to our *agent;* John does not receive money or chattels 'as agent for' Roger; he receives it to the use of Roger (*ad opus Rogeri*)."

§ 15. ——— Sir Henry Maine has no references to agency in his "Ancient Law." The index to Reeves' History of English Law contains no reference either to agency or to principal and agent. Mr. Holdsworth gives a few pages to it, but his instances are chiefly of the sort which would now be classed under the head of Master and Servant.

It is unnecessary to multiply quotations. Enough have been given to show, what was stated at the outset, that agency as a separate subject is a matter of late development in our law.

§ 16. **Agency in Roman law.**—Nor does this appear to be a peculiarity of English law. "The early Roman law of Contracts," says Mr. Hunter, "was absolutely destitute of the notion of agency. Two reasons may be assigned for this poverty. In the first place, the rule that everything acquired by a slave or son under *potestas* belonged to

the *pater familias*, removed to a certain extent any urgent necessity for an elastic law of agency. But, in the second place, it must be remarked that the absence of agency characterizes every department of the ancient law." [8]

§ 17. ——— Proceeding to explain his statement concerning the Roman law of agency, Mr. Hunter says: "A perfect type of agency implies three things—(1) that the authority of the agent is derived from the consent of the principal; (2) that the agent can neither sue nor be sued in respect of the contracts he makes for his principal; and (3) that the principal alone can sue or be sued. If A acts for B without B's knowledge or consent, he may make himself responsible to B, but he is not an agent. If the agent alone can sue or be sued, there is no real agency. Thus in an ordinary mandate, if A asks B to buy the farm of C, and B does buy it, A cannot sue C on the contract; he can only compel B to sue C, or rather compel B to allow him to sue C in B's name. In like manner C cannot sue A the principal, but must sue B, who has in turn an action against A for indemnity. Again if either the agent or the principal may be sued, then the agent is personally responsible for the performance of the contract, and is in effect a surety. In order, therefore, to have true agency, it is necessary that the agent should act by the authority of the principal, that the agent should be entirely irresponsible, and the principal exclusively responsible." [9]

Without necessarily committing ourselves to the soundness of all of these conclusions, we may accept Mr. Hunter's statement of the condition of the Roman law as trustworthy.

§ 18. ——— In a number of cases, however, the Roman law presented situations which had some of the characteristics or results of agency, and which may be briefly and generally enumerated. Thus all *rights acquired* (whether *in rem* or *in personam*) by a person under the power of another (no distinction being made between slaves, persons under the *potestas*, wives *in manu*, and free persons *in mancipio*) belonged to the person in whose power they were.[10]

With respect of liability upon contracts made, if the contract were made by one in the power of another but having property (*peculium*) of his own, an action (*actio de peculio*) would in general lie against the person having him in power to the extent of the property.[11]

If a contract were made by one in power, *e. g.* by a slave, for the

[8] Hunter's Roman Law (4th ed.) p. 609. See also Roby's Roman Private Law, vol. II, p. 248.

[9] Hunter's Roman Law, p. 609.

[10] Hunter's Roman Law, p. 610.

[11] Hunter's Roman Law, p. 614; Roby's Roman Private Law, vol. II, p. 238.

benefit of his master, an action (*actio de in rem verso*) would lie against the master to the extent of the benefit conferred or intended to be conferred.[12]

If a contract were made by the command of the one in power, an action (*actio quod jussu*) would lie based upon the command.[13]

§ 19. ——— In addition to these, were cases having more of the aspects of agency. Thus if a master provided a ship and put a captain or skipper in charge, he was liable (in an action *exercitoria*) upon contracts made relating to the ship, its seaworthiness and freight.[14] So if the master established a shop or business and put another in charge, he was liable (in an action *institoria*) upon contracts made by the one so put in charge in the proper conduct of the business.[15]

"The same actions," says Professor Sohm,[16] "by which a *pater familias* or *dominus* can be rendered liable for acts performed by the son or slave on the strength of a general authority bestowed upon them, are equally available where the person upon whom the authority is conferred is not subject to the power of another. Thus the *actio exercitoria* and *institoria* are equally applicable where a free person is appointed captain of a ship or manager of a business. Wherever an authority—whether general or special—is conferred for any other purposes, wherever, that is to say, in the case of an unfree representative the *actio quod jussu* would lie, in all such cases, where the representative is a free person, the *actio quasi institoria* is available. If the contract, though concluded without authority, was nevertheless entered upon in the interest of another party (*e. g.*, a contract made by a *negotiorum gestor*), the creditor with whom the contract was concluded may sue the other party by the *actio utilis de in rem verso*. The defendant, in such cases, is liable to the extent to which he was enriched by the transaction, in other words, to the extent to which he himself would be compellable to compensate the *negotiorum gestor*."

§ 20. ——— Aside from these cases in which, to some extent, a direct liability was enforced against or rights were acquired by the one on whose behalf the act was done, the general rule of the Roman law was that the rights or obligations arising existed only between the immediate parties, and the actor and the person acted for then settled their respective rights between themselves. *Mandatum* (gratuitous

[12] Roby's Roman Private Law, vol. II, p. 245: Hunter's Roman Law, p. 616.

[13] Hunter, p. 615.

[14] Roby, vol. II, p. 248 *et seq.*; Hunter, p. 617.

[15] Roby, *supra*; Hunter, *supra*.

[16] Institutes of Roman Law (4th ed.) trans. by J. C. Ledlie. (The later editions of the original present some verbal changes which do not alter the meaning.)

agency) and *negotiorum gestio* (unauthorized agency) furnish many illustrations.

§ 21. **Other historical references.**—The late Professor Brissaud, in his History of French Private Law, has some interesting comments which it is worth while to reproduce here.[17] "In the very old law juridical acts should be carried out by the interested party himself; this is a consequence of their formalistic character; ceremonies or words which they assume imply his own presence; they would have no meaning if they came from a third party. Under the system of non-formal transactions (for example, contracts by mutual consent) representation became possible; each one could make known his will, not only by means of a letter or a *'nuncius'* (*'epistola loquens'*) but by an agent furnished with powers and instructions which were sufficiently broad for one not to be able to term him merely a mouthpiece. Owing to a rather natural fiction, however, he is likened to a mere messenger; the act of the agent is looked upon as the act of the principal. Cases in which it is necessary to act through a representative have occurred at all times—for example, one is absent or ill. How did one proceed in the formalistic period to do a legal act in such a case as this? Inaction is not always possible; for example, if one is summoned to appear in court, one is compelled to appear so as to avoid the penalties which fall upon the defaulter. The head of the family sometimes escaped this necessity by using the people dependent upon him, the people of his household; but their sphere of action was rather limited, for it is evident that they could not bind the master *'in infinitum.'* To be sure, representation was less called for than one might believe, for every act which involved a person under disability was performed by his custodian, who acted in his own name by reason of his status as head of the family; such would also be the case when an individual *'sui juris'* had an interest in giving up his independence and placing himself under the custody of some other person, with the result of placing that other person over his affairs. As far as obligations were concerned, bills to bearer furnished a means of dispensing with representation. Besides the preceding cases, it was possible to secure the performance of the majority of acts by a third person in his own name, assuming that one obtained afterwards from him the transfer of the advantage or the burden which resulted therefrom. Thus one person bought a piece of land and paid for it, after which he resold it to the one on whose

[17] The quotation is reproduced from the English translation in volume III of The Continental Legal History Series, § 898. (Little Brown & Co., Boston, 1912.)

account the purchase had been made; but this complicated proceeding is not without its risks; one of the parties may suffer by reason of the insolvency of the other; if the transaction is an advantageous one, the third party may possibly want to keep it for himself; he may die before having carried out the transfer, and his heirs may refuse to carry it out; if the transaction is a bad one, it is the third party who is liable to lose, as a consequence of a change of will or the death of the one who is chiefly interested. Nothing can take the place of representation, properly so called. It entered the customary law in proportion as formalism disappeared. But, in order to show how slow was it progress, it is sufficient to establish that it was not allowed, upon principle, in Germany before the thirteenth century. * * * And, when representation is accepted, it is not a rare thing to find that there are doubts cast upon the validity of the act of the representative, and that this act must be confirmed by the man who is represented as soon as that becomes possible. Scruple and hesitation have disappeared towards the end of the fourteenth century in a general way, and before that period in many instances. The status of agents for business transactions (by contrast with agents or attorneys at law) was worked out by borrowing from the rules of the Roman law and the Canon law."

§ 22. Agency in modern Continental systems.—Modern Continental legal systems exhibit agency in its full and true form. The German civil and commercial codes provide many express regulations;[18] and the French civil code does the same, though with less fulness and carefulness of statement.[19]

§ 23. The early treatises upon agency.—The first systematic and separate English treatise upon the law of agency seems to have been that of William Paley on Principal and Agent, which appeared in 1812, and has passed through several English and American editions.

The first similar treatise produced by an American writer was that of Samuel Livermore, in one volume, published at Boston in 1811. There was a second edition in two volumes published at Baltimore in 1818.

Judge Story's Commentaries on Agency appeared in 1839, and at once became the leading American authority. The book has also frequently been cited in English cases. The latest edition, the ninth, by Mr. Charles P. Greenough, appeared in 1882. Judge Story made many

[18] There are two recent English translations of the German Civil Code—one by Wang, 1907, and one by Loewy, 1909. Of the Commercial Code, one by Schuster, 1911.

[19] There is an English translation of the French Civil Code by Wright, 1908.

references to the Civil law, but the direct and acknowledged influence of that system has been less obvious in the American courts than in the English tribunals. Since then the literature upon all aspects of the subject has come to be extensive.

§ 24. Legislation in English and American law.—No legislative statement of the law of agency has as yet been attempted in England, though Mr. Bowstead, in his Digest of the Law of Agency, has done much to pave the way for such an undertaking.

In the United States, several states have statutory statements of the law of agency as part of a general code. In California, and the states which have followed it, the code is that of David Dudley Field. The Louisiana code is based upon the Code Napoleon. The Georgia code is of local origin. The most important of these codes will be found in the appendix to this work. Nothing like uniform state legislation upon the subject has been thus far undertaken.

CHAPTER II

DEFINITIONS AND DISTINCTIONS

§ 25. Agency defined.
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63. —— Person used merely as mechanical aid or instrument.
64. —— How many of each one principal may have.
65. —— Same person may be a general and a special agent.
66. —— Not special because limited to a particular business.
67. Uses of these distinctions.
68. —— Difficulty of determination.
69. —— How determined.
70. 3. Special forms of agency—Professional and non-professional agents.
71. —— Attorneys at law.
72. —— Auctioneers.
73. —— Brokers.
74. —— Factors or commission merchants.
75. —— Traveling salesmen or "drummers."
76. Officers of ships.
77. Partners.
78. Bank officers.

§ 25. Agency defined.—The word agency, when used in its broad meaning as pointed out in the preceding chapter, indicates the relation which exists when one person is employed to act for another. In this aspect, it has, in our modern law, three chief forms: 1. The relation of principal and agent; 2. The relation of master and servant, or, in the

more modern phrase, the relation of employer and employee; and 3. The relation of employer or proprietor and independent contractor. All of these have some points of similarity but, at the same time, many aspects of real distinction.

Of the three forms here suggested, the one with which this work has chiefly to do, is the first, or the relation of principal and agent. At the same time the three relations, and particularly the first two, are so closely related, and the actor in these first two forms so frequently acts in both capacities or so largely combines them both in his own person, that it is convenient and often desirable to consider them side by side. Moreover, even though they be distinct, the rules which govern one relation are so frequently identical with those which apply to the other, that one statement will suffice for both, and illustrations may be freely drawn from either field. A full discussion, however, of all of the aspects of all of these relations is far beyond the scope of the present endeavor, and, where time or space requires, the other two forms are herein constantly subordinated to the first.

This much being determined, it will be next appropriate to make the definitions and point out the distinctions which the method of treatment here decided upon will make necessary.

§ 26. Principal and agent.—The relation of principal and agent, or the relation of agency in the narrower sense in which it is chiefly employed in this work, is the legal relation which exists where one person, called the agent, is authorized—usually by the act of the parties, but occasionally perhaps by operation of law [1] to represent and act for another, called the principal, in the contractual dealings of the latter with third persons.[2] The distinguishing features of the agent may

[1] See *post* § 29.

[2] See Chapter I. Many definitions of Agency have been proposed, some of which may prove of interest: "Agency is founded upon contract, either express or implied, by which one of the parties confides to the other, the management of some business to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it." Kent, Com., II, p. 784.

"An agent is a person duly authorized to act on the behalf of another, or one whose unauthorized act has been duly ratified." Ewell's Evans' Agency, 1.

"An agent is one who acts for and in the stead of another, termed the principal, either generally or in some particular business or thing, and either after his own discretion in full or in part, or under a specific command." Bishop on Contracts, § 1027.

"In the common language of life, he, who being competent and *sui juris*, to do any act for his own benefit or on his own account, employs another person to do it, is called the principal, constituent or employer, and he who is thus employed is called the agent, attorney, proxy or delegate of the principal, constituent or employer. The relation thus created be-

briefly be said to be his representative character and his derivative authority.[8]

The names *principal* and *agent,* though the usual ones, are not the only ones used to designate the parties to this relation. The agent is frequently called an attorney, or an attorney in fact, and occasionally is spoken of as a proxy, delegate or representative. The person represented, though usually called the principal, is sometimes called the employer, constituent or chief.

§ 27. Parties involved.—Agency, in the sense in which it is here used, contemplates three parties—the principal, the agent, and the third party with whom the agent is to deal. Each of these parties may incur obligations to each of the others and there are therefore presented six possible aspects, namely—the principal against the agent, the agent against the principal, the principal against the third party, the third

tween the parties is termed an agency. Story, Agency, § 3.

"Agency is a contract by which one person, with greater or less discretionary powers, undertakes to represent another in certain business relations." Wharton, Agency, § 1.

"An agent is one who represents another, called the principal, in dealing with third persons. Such representation is called agency." Code, Cal., § 2295; Dakota, Code, § 1337.

"An 'agency' is a contract of employment for the purpose of bringing another in legal relations with a third party." An agent is "a person either actually or by law held to be authorized and employed by one person to bring him into contractual or other legal relations with a third party." Wright, Principal and Agent, p. 3.

"An agent is a representative vested with authority, real or ostensible, to create voluntary primary obligations for his principal, by making contracts with third persons, or by making promises or representations to third persons calculated to induce them to change their legal relations." Huffcut on Agency, 2d ed. p. 17.

"An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal." Bowstead on Agency, 3d ed. p. 3.

When used in statutes, the word agent may have a more or less flexible meaning according to the context.

When used in statutes against embezzlement, see Pullam v. State, 78 Ala. 31, 56 Am. Rep. 21; Brewer v. State, 83 Ala. 113, 3 Am. St. R. 693; Echols v State, 158 Ala. 43; People v. Treadwell, 69 Cal. 226; Wynegar v. State, 157 Ind. 577; State v. Hubbard, 58 Kan. 797, 39 L. R. A. 860; State v. Phillips, 105 Minn. 375; State v. Barter, 58 N. H. 604; Territory v. Maxwell, 2 N. Mex. 250.

Statutes requiring notice to an owner or his agent are usually held to contemplate an agent having authority or power of control and not mere laborers or servants. Regina v. Watson, 19 Ont. 646; Lofink v. Schuette, 14 Pa. Dist. 558; City of St. Paul v. Clark, 84 Minn. 138.

A statute requiring a license where a business is carried on by a party or his agent means the managing or superintending agent. Stewart v. Kehrer, 115 Ga. 184, 197 U. S. 60.

Under a statute requiring an affidavit to be made by the plaintiff or his agent, one who is merely described as a "bookkeeper" can not be presumed to be an agent. Merriman Co. v. Thomas, 103 Va. 24.

[8] See Ewell's Evans on Agency, 1; Walton v. Dore, 113 Iowa, 1.

party against the principal, the agent against the third party, and the third party against the agent.

§ 28. Relation usually a voluntary one.—The position of the parties to this relation is usually a voluntary one, that is to say, in general no one is bound to enter into it against his will. Speaking first of the agent,—a master may command his slave to act for him; to some extent the parent may do so with reference to his child; at common law the husband had some power of control over his wife; a hired servant may to some degree in fact have subordinated his will to that of his master; adventitious circumstances in other situations may in fact have given one a temporary though actual power to dominate another; but these cases in modern times are practically all exceptional, and in general no one is bound to be the agent of another against his will. Even if he has agreed to be, his power to renounce, as will be seen, is usually absolute and the law will not as a rule attempt to coerce specific performance.

Speaking next of the principal, his independence is usually still more complete. As a rule no one can be bound by the act of another unless he has in fact, expressly or by implication, consented that that other shall represent him.

§ 29. ——— Authority created by law—Authority by necessity.—To this rule, however, there are several more or less real exceptions,—cases in which it is said that the principal's assent is unnecessary and in which his dissent would be unavailing.

Thus with reference to the power of a married woman to buy necessaries on her husband's credit when he has failed to supply her, it has been said: "In those cases where the law authorizes a wife to pledge her husband's credit, even against his will, it creates a compulsory agency, and her request is his request."[4] The same thing has been said where a child is allowed to buy necessaries on his parent's credit. Both of these cases may doubtless be put on different grounds.

It has been said that an unpaid seller of goods, who makes a sale of the goods for the purpose of foreclosing his lien, acts as the agent of the buyer in making the sale; but, as has been pointed out in several

[4] *Per* HOLMES, J. in Benjamin v. Dockham, 134 Mass. 418. See also *per* POLLOCK, C. B., in Johnston v. Sumner, 3 H. & N. 261; Cantine v. Phillips, 5 Harr. (Del.) 428; Bostwick v. Brower, 22 Misc. 709; Hendricks v. American Express Co., 138 Ky. 704, 32 L. R. A. (N. S.) 867; Evans v. Crawford Co. Ins. Co., 130 Wis. 189, 118 Am. St. R. 1009, 9 L. R. A. (N. S.) 485; and many other cases cited in Chapter V on Appointment of Agents.

cases, this is an inaccurate statement of the situation.[5] Somewhat like this is the power of a pledgee to sell.

It is sometimes said that the master of a ship in buying supplies or in making a sale of the ship, and the like, is an agent by necessity; but this authority is doubtless not a legally created one at all, but merely the outgrowth of custom and the presumed intention of the owner in view of the special facts of exigency. Other instances of what are called agencies by necessity are occasionally to be found, but they are usually only agencies implied in fact; and, as will be seen hereafter, the whole matter is confined within much narrower limits than is often supposed.

There are, however, cases in which authority seems to be created by mere rule of law. In a great variety of cases statutes provide for the service of process, the giving of notice, and the like, upon particular persons as agents of those sought to be reached. This is particularly true in the case of corporations. Many of these cases can actually be based upon assent; but in some of them the element of assent seems to be largely lacking.

All of these various cases will be more fully considered in a later chapter.[6]

§ 30. Contractual—Consensual.—Authority or power in one person to bind another as his agent may be conferred without any contract between the principal and the agent, and even, in some cases as will be seen, without any actual or effective consent upon the part of the agent. In many of these cases the alleged agent would more properly be deemed an instrument or an agency than a true agent. The command or direction of the principal given to one who is subject to his command will, if acted upon, suffice to bind him, or his mere assent, express or implied, may be adequate to the purpose. Mere assent upon the part of the agent may be sufficient to make him an agent, upon his side, so far as he actually enters upon the performance. Any agreement, however, on the one side, that one *will* act as agent or any agreement on the other side that one *may* act as agent, in order to be binding as such, must take the form of a contract, and be based upon a sufficient consideration. This consideration may be of various kinds. It is perhaps ordinarily found in the express or implied agreement that one will act if the other will pay compensation, or *vice versa;* but this is not the only form. It may be found in other mutual promises of the parties. A promise that one will act as agent in a particular case or for a partic-

[5] See Moore v. Potter, 155 N. Y. 481, 63 Am. St. R. 692; Ackerman v. Rubens, 167 N. Y. 405, 82 Am. St. R. 728, 53 L. R. A. 867.

[6] See *post*, Book I, Chapter V.

ular period may find a sufficient consideration in the assent of the other party that the first may so act, and *vice versa*. It is often said that there can be no contract for a gratuitous agency,—by which is meant a contract to serve without pay; but this is not sound; there is no doubt that there may be such a contract, though it is probably true that in the ordinary case of this sort the parties do not intend to create a binding obligation.

§ 31. ——— In many cases a unilateral obligation only will be intended. There may be the offer of a promise for an act, the actor being at liberty to act or not as he pleases. The common case of the employment of a real-estate broker is often of this sort. The principal promises to pay a commission if the broker finds a purchaser, but the broker does not promise to find one or even to make any effort to find one. The case may also be the reverse of this; the offer of an act for a promise. If I turn over to you this purchaser will you promise to pay me a commission?

The obligation may also be bilateral. I will promise to find you a purchaser if you will promise to pay me a commission, and the like.

§ 32. **Agency as status.**—It is sometimes disputed whether agency is a matter of *status*. It really seems, however, to be of very little consequence whether it is so or not. It is, in the end, largely a question of definition. What is meant by *status*? The persons who use the term do not agree, and many conflicting definitions are proposed. Professor Holland in his book upon Jurisprudence collects a number of them, most of which he rejects, and concludes—and the present writer entirely agrees with him,—that the true test of *status* is to be found in some peculiarity of the person unconnected with the act which he undertakes to perform.[7] According to this view, the law of *status* is the law of abnormal personality. Applying such a test, the infant, the idiot, the insane person, the slave, the alien, the felon, the outlaw, the married woman at common law, and the like, present instances of *status*. Agency, on the other hand, does not necessarily involve or result in abnormal personality, and agency is no more a relation of *status* than landlord and tenant, bailor and bailee, and the like.

§ 33. **Agency as a contract relation.**—Is agency then a contract relation? That will, of course, also depend upon the definition. The writer ventures to define a contract relation as one which, under normal conditions, results from the contract or agreement of the parties

[7] Holland's Jurisprudence (10th ed.) pp. 136, 137. See also Appendix, Note L in Sir Frederick Pollock's edition of Maine's Ancient Law; Markby's Elements of Law, 4th ed. § 178; Salmond's Jurisprudence, 3d ed. p. 213; Hunter's Roman Law, 4th ed. p. 138.

to it, which may ordinarily be terminated at their pleasure, and whose rights and obligations, as between the parties to it, are in general capable of being enlarged, diminished or modified by the contract or agreement of the parties.

The relations of parent and child, of guardian and ward, of master and slave, of sovereign and subject, and the like do not fall within this definition. Neither does that of husband and wife. For while this relation may freely be entered into, it may not yet, whatever the future may have in store for it, be terminated at will, nor may its duties and obligations be substantially altered by the agreement of the parties.

On the other hand, the relations of landlord and tenant, of bailor and bailee, of carrier and passenger, of vendor and purchaser, of partner and partner, and the like, do fall within the definition. Within this class also falls agency, whether in the form of master and servant in modern times or of principal and agent.

It is realized, of course, that all attempts at definition are dangerous; that definitions are easily made to fit the facts in the desired way; and that human relations do not develop along defined lines, and may at any time take on new aspects. What is finally to be dealt with is the facts as they from time to time present themselves.

§ 34. ——— Although, as has been pointed out, agency may exist so far as third persons are concerned without any formal contract, between the principal and the agent, or even where the agent has no capacity to contract, yet in the great majority of the cases with which the law, in modern times, has to deal, there is an actual contract between the parties to the relation. In those cases in which one of the parties, usually the agent, has no contractual capacity, the relation is at best an imperfect one, and does not furnish the mutual rights and liabilities which ordinarily exist.

As to the obligations resting upon the parties to the relation in any given case, certain of them will be imposed by the express contract of the parties; most if not all of the remainder may be based upon contract implied in fact from the acts and situation of the parties; as to a few, other than those which may be regarded as equitable in their nature, there may be dispute as to whether they are implied in fact or are purely legally created obligations imposed by law upon the parties and enforceable at option by actions either of tort or of *quasi*-contract. Either view can find authority for its support. For himself, the present writer has no hesitation in expressing his preference for the conclusion which bases them wherever it is possible upon contract implied in fact. Practically all of these obligations, moreover, may, subject

to the ordinary rules of public policy which govern similar contracts in general, and subject also to the rules governing the legal capacity of the particular parties, be limited, extended or superseded by the actual agreement of the parties.

In practically all of the cases in which the obligations of the principal and agent to one another become material, the matter will have gone so far that a real contract will have arisen between them—if they be competent to contract—whatever the initial absence of contractual elements may have been. If, for example, I request another to do some act for me as my agent, while he may be under no obligation to do it, yet if he does do it, a contractual obligation on my part to compensate, or reimburse or indemnify him will arise; and, on his part, a like obligation to follow my instructions or act with appropriate care or fidelity.

So far as the obligations of the principal or agent to third persons are concerned, they will, from the nature of the case, be, in principal and agent, generally contractual, or, if in tort, generally in those kinds of tort like deceit and fraud which ordinarily accompany contractual dealings; in master and servant, on the other hand, the obligations will usually be in tort.

§ 35. "Contract of agency"—"Power of attorney."—The contract, when one exists, by which the relation of principal and agent is created is called a "contract of agency;" the right of the agent to represent the principal is called his "authority" or "power;" when the authority is conferred by formal instrument in writing, it is said to be conferred by "letter of attorney," or, more commonly by "power of attorney."[8] When the authority is conferred by power of attorney, the agent is frequently called an "attorney," or more commonly, an "attorney in fact," in order to distinguish him from the attorney at law.

§ 36. How agent compares with servant.—The distinction between the relation of principal and agent and that of master and serv-

[8] "This power of attorney," said Parke, B., in Hibberd v. Knight, 2 Exch. 11 (a case involving the question of admitting secondary evidence of its contents rather than subpoenaing the agent to produce it), "is the deed of the attorney to whom it was given, and he is to keep it and, under it, to show that he has authority for what he has done. The witness should have been duly served with a *subpoena duces tecum*."

One who makes payment to an agent having a power of attorney to receive it, is not entitled to demand and receive the power of attorney. As between these parties, it belongs to the attorney. Pridmore v. Harrison, 1 Car. & Kir. 613.

But upon the termination of the agency, the principal must have the right to have the power of attorney returned or cancelled in any case at least in which its continued possession by the agent might be a menace to the principal's interests.

ant is not always easy to define. As has been seen,[9] the relation of principal and agent is of comparatively late development in our law; it was preceded by the relation of master and servant, and from the law respecting that relation the earliest precedents concerning agents were drawn. The two relations are therefore very closely allied, and it is sometimes said that they are not distinguishable. Nevertheless, notwithstanding this common origin, it is entirely possible to distinguish them; the line of distinction seems in the main to be a logical and natural rather than a purely artificial one; and there can be no doubt that now for many years there has been developing a body of law known as the law of agency or of principal and agent and that a distinction between this relation and that of master and servant has come to be generally recognized.[10] It is upon the basis of this fact, that the present discussion proceeds, and an attempt is made to show what the line of demarcation is thought to be.

[9] See *ante*, Chapter I.

[10] "The distinction between a servant and an agent," it is said by Mr. Justice Holmes in his edition of Kent's Commentaries (12th ed. vol. II, p. 260, note), "is the distinction between *serving* and *acting for*."

"The great and fundamental distinction between a servant and an agent," said Professor Dwight (Persons and Personal Property, p. 323), "is, that the former is principally employed to do an act for the employer, not resulting in a contract between the master and a third person, while the main office of an agent is to make such a contract. Servants may make contracts incidentally, while agents may in the same way render acts of service. The principal distinction between them, however, is as above stated."

Professor Huffcut (Agency, 2d ed. § 4) says: "The primary distinction between representation through an agent, and representation through a servant, lies in the nature of the act which the representative is authorized to perform. An agent represents his principal in an act intended, or calculated, to result in the creation of a voluntary primary obligation or undertaking. A servant represents his master in the performance of an operative or mechanical act of service not resulting in the creation of a voluntary primary obligation but which may result, intentionally or inadvertently, in the breach of an existing one. An agent makes offers, representations, or promises for his principal, addressed to third persons, upon the strength of which such third persons change their legal relation or position. A servant performs operative acts not intended to induce third persons to change their legal relations. An agent has to take account of the mind and will of two persons, namely, of his principal whose mind he represents, and of the third person whose mind he seeks to influence. A servant has to take account of the mind and will of one person, namely, of his master whose existing obligations and duties he is to perform. An agent may cause damage by inducing a third person to act. A servant may cause damage by acting upon a third person in his property or rights. In representation through an agent there are always three persons involved, the principal, the agent, and the third person. In representation through a servant, there are only two persons primarily involved, the master and the servant, and the third person is introduced only when the

The characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons. To the proper performance of his functions therefore, it is absolutely essential that there shall be third persons in contemplation between whom and the principal legal obligations are to be thus created, modified or otherwise affected by the acts of the agent.[11]

servant commits, in the course of his master's business, a breach of the obligations owing by the master to a third person. In the first case, there are three persons and the third is induced to act. In the second case, there are three persons and the third is acted upon." See also the discussion in Merriman v. Thomas, 108 Va. 24 (holding a bookkeeper to be a servant but not an agent within a statute requiring an affidavit by a party or his agent).

On the other hand, Mr. Charles Claflin Allen contributes an article in 28 American Law Review, 9, on "Agent and Servant essentially Identical." This view is approved in Brown v. Germ. Am. Title & Tr. Co., 174 Pa. 443.

The codes distinguish between the two relations thus: "An agent is one who represents another called the principal in dealings with third persons." Cal., § 2295; Dakota, § 1337.

"A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." Cal., § 2009; Dakota, § 1157.

"A preliminary remark," says Judge Cooley, "is essential regarding the employment, in the law, of the words master and servant. The common understanding of the words and the legal understanding is not the same; the latter is broader and comprehends some cases in which the parties are master and servant only in a peculiar sense, and for certain purposes; perhaps only for a single purpose. In strictness, a servant is one who, for a valuable consideration, engages in the service of another, and undertakes to observe his directions in some lawful business. The relation is purely one of contract, and the contract may contemplate or stipulate for any services, and any conditions of service not absolutely unlawful." Cooley on Torts, 531.

"The word servant," says Mr. Parsons, "seems to have in law two meanings. One is that which it has in common use, when it indicates a person hired by another for wages, to work for him as he may direct. We may call such a person a servant in fact; but the word is also used in many cases to indicate a servant by construction of law; it is sometimes applied to any person employed by another, and is scarcely to be discriminated in these instances from the word agent. This looseness in the use of the word is the more to be regretted, because it seems to have given rise to some legal difficulties and questions which might have been avoided." 1 Parsons on Contracts, 101.

"The word servant," says Mr. Wood, "in our legal nomenclature, has a broad significance, and embraces all persons of whatever rank or position who are in the employ and subject to the direction or control of another in any department of labor or business." Wood, Mast. & Serv., § 1.

[11] A person may be employed to render service either to his employer directly, as in the case of the cook, the butler, the gardener, the coachman, or to some other person whom the employer has undertaken to serve. In the first case the person so employed comes in contact with his em-

The function of the servant, on the other hand, as his name suggests, is the rendition of service,—not the creation of contractual obligations. He executes the commands of his master, chiefly in reference to things, but occasionally with reference to persons when no contractual obligation is to result.[12]

§ 37. ——— The agent usually is vested with more or less of discretion as to the time and manner of acting, while the servant is commonly required to act according to the directions of his master; and this has sometimes been suggested as the basis for distinguishing between the two relations.[13] It is not, however, a satisfactory basis. I may limit my broker (who would everywhere be regarded as an agent) to sales or purchases at a particular place, time or amount, while I may give to my gardener (who would everywhere be regarded as a servant) the utmost discretion as to how or when or where or what he shall plant or cultivate or gather.

ployer only; in the latter case he in some measure represents his employer in rendering the service to third persons. Although he thus comes in contact with third persons, he is none the less a servant. The case of a porter on a sleeping car may be used as illustration. He comes in contact with third persons; a large portion of his duties is to assist passengers and look out for their comfort and convenience; but he is still a servant. The essence of his duty is to render service for his employer to the passengers, and he has neither power nor occasion to make contracts with them.

The case of the conductor, on the other hand, is not so simple. If he has no other duties than to manage the train; if he has no power to make contracts for carriage; if his sole duty with respect to the passengers is to perform the ministerial act of collecting the tickets, and there is no occasion in which he has the right to bind his employer by contracts, then he also is purely a servant. But if he is authorized not only to manage his train but to make contracts for carriage—to make the ordinary bargains which are made between carrier and passenger, then he is also an agent. As to the situation of the conductor, see the remarks of Field, J., in Chicago, etc., Ry. Co. v. Ross, 112 U. S. 377, 390, since overruled upon the main question involved.

[12] "As an agent is a person employed to bring the principal in legal relations with a third party, it is absolutely necessary, in order to carry out the contract of employment between the agent and his principal, that there should be a third party with whom the principal is to be brought into relation. (See Robinson v. Mollett, 7 Eng. & Ir. App. 802, and see Brett, J., at p. 820.) The contract between the principal and agent is primarily a contract of employment to bring him into legal relations with a third party, or to conduct such business as may be going on between him and the third party." Wright, Principal and Agent, p. 4.

[13] In McCroskey v. Hamilton, 108 Ga. 640, 75 Am. St. R. 79, this distinction is made use of in order to hold that the act of a given person was not the act of an agent or subagent, but of a servant, a mere instrument, a messenger. In Flesh v. Lindsay, 115 Mo. 1, 37 Am. St. R. 374, it is used to show that while a married woman might not have an agent she might have a servant. In Kingan v. Silvers, 13 Ind. App. 80, the

The true distinction is that already indicated, namely, the distinction between representing another in business dealings with third persons, and working for or serving another when no contractual obligation or relation is to result.

A person who is ordinarily a servant may at times act as agent, and *vice versa*. And a person may be an agent as to one branch of a transaction and a servant as to another.[14]

§ 38. ——— Distinction often immaterial—Tendency to ignore it.—While the distinction between agency and service is thus quite radical in theory, there is a marked tendency in many cases to ignore it. There is in the first place, a strong popular inclination to use the word agent to indicate any one who acts for another without distinguishing between those acts which are designed to create contractual relations and others.[15] This popular use is more and more reflected from the courts and text books.

There is, moreover, in many quarters, a strong repugnance to the use of the word "servant," because it is supposed to emphasize social distinctions which, it is thought, ought not to exist among us.[16] This leads in popular language to the substitution of the word "agent," and this popular use is often exhibited by legislatures and courts, with the result that even in legal language the word "agent" is coming to be

distinction is used to hold that while one might be an agent in negotiating for a note, he became a servant in receiving it to carry to his principal, and that therefore his act of altering it was not the act of his principal.

In Baltimore & Ohio Employees' Relief Ass'n v. Post, 122 Pa. 579, 9 Am. St. Rep. 147, 2 L. R. A. 44, the court adopts the distinction made by Mr. Wharton in his book on Evidence (sec. 1182) that "An agent is authorized to exercise discretion; when a servant is authorized to exercise discretion then he ceases to be a servant and becomes an agent." In Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. Ed. 440, a sewing machine salesman was held to be a servant, so far as to make his employer liable for his negligence, largely because the contract under which he was employed gave the company a large measure of control as to the manner in which he should conduct the business.

[14] If, for example, I request a person to buy a horse for me, and he does so, he will in the purchase act as my agent. If I then request him to drive or care for the horse for me, and he does so, he will as to those acts be ordinarily my servant. See also Kingan v. Silvers, *supra*.

[15] Thus, in Kennedy v. DeTrafford [1897] App. Cas. 180, Lord Herschell says: "No word is more commonly and constantly abused than the word 'agent.' A person may be spoken of as an 'agent,' and no doubt in the popular sense of the word may properly be said to be an 'agent,' although when it is attempted to suggest that he is an 'agent' under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading."

[16] See § 11 of article on "Agent and Servant essentially Identical," in 28 American Law Review, 23.

more and more used where the word "servant" would be more appropriate.[17]

Fortunately, the rules regulating the two relations are in the main so much alike, that nice distinction is usually not material and the tendency referred to leads to no serious difficulty.

§ 39. ——— **Occasionally distinction important.**—There is, however, occasionally a case in which the distinction becomes important. A statute, for example, may use one word or the other under circumstances which call for strict construction, and it then becomes material to distinguish. Thus a statute aimed at embezzlement by "servants" will not necessarily extend to embezzlement by agents;[18] and statutes extending special privileges to "servants" or "laborers" will not ordinarily apply where the person claiming their protection is an agent or other employee of superior rank.[19]

[17] Statutes often use the word agent as synonymous with servant. Thus a prohibition against the doing of an act by one or his agents would usually have the same effect as though it were prohibited to himself, his servants or agents. See St. Johnsbury, etc., R. Co. v. Hunt, 59 Vt. 294.

A privilege extended to one and his agents would also usually include servants and *vice versa*.

[18] Thus in Regina v. Walker, Dearsly & B. Cr. Cas. 600, the defendant was prosecuted for embezzlement under a statute as a "servant." The defendant had been employd to solicit orders for goods, with which he was supplied by his employers; he was also to collect payment and remit the proceeds to his employers. Having appropriated money so received, he was prosecuted under the statute. There was much discussion of the distinction between an agent and a servant, though no definite rule was laid down or principle evolved. The defence contended that the prisoner was an agent, *i. e.* a factor, and not a servant, and this view was finally adopted by the court, though without an extended discussion.

[19] Thus in Wakefield v. Fargo, 90 N. Y. 213, an act was construed making stockholders in a corporation liable for all debts owing to "their laborers, servants and apprentices." A person who was "bookkeeper and general manager" of the corporation sought the benefit of the statute as a "servant," but it was held that he was not within that class. So also of a "secretary." Gordon v. Jennings, L. R. 9 Q. B. Div. 45; Coffin v. Reynolds, 37 N. Y. 640. An attorney at law is not within a statute securing "wages or salaries to clerks, servants or employees." Lewis v. Fisher, 80 Md. 139, 26 L. R. A. 278, 45 Am. St. Rep. 327. Nor is a "mine agent." Dean v. De Wolf, 16 Hun, 186, affirmed 82 N. Y. 626; Krauser v. Ruckel, 17 Hun, 463. The salary due a travelling salesman is not a "labor debt." Jones v. Avery, 50 Mich. 326; Epps v. Epps, 17 Ill. App. 196; Eppstein v. Webb, 44 Ill. App. 341. He is not "a clerk employed in a store or elsewhere." Mulholland v. Wood, 166 Pa. 486. But he is within a statute protecting "laborers, servants, clerks, and operatives." Hand v. Cole, 88 Tenn. 400, 7 L. R. A. 96. So also Wildner v. Ferguson, 42 Minn. 112, 6 L. R. A. 338. An assistant chief engineer of a railroad company is not a "laborer." Brockway v. Innes, 39 Mich. 47, 33 Am. Rep. 348. Same effect: Pennsyl-

§ 40. How agent compares with independent contractor.—Although all three are, in a large sense, agents, yet in ordinary legal usage the agent—and the servant also—is further to be distinguished from the "independent contractor," [20] who is one who exercises some independent employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the end to be achieved rather than for the means by which he accomplishes it.

Such a person is not an agent, in the sense in which that term is here used, and has no authority to bind his employer in any form of contractual dealings.[21] The employer, moreover, in the ordinary

vania, etc., R. Co. v. Leuffer, 84 Pa. 168, 24 Am. Rep. 189; Ericsson v. Brown, 38 Barb. (N. Y.) 390; Missouri, etc., R. Co. v. Baker, 14 Kan. 563. Nor is a bookkeeper. Signor v. Webb, 44 Ill. App. 338. The commissions of a broker or factor are not the "wages of a laborer." Hamberger v. Marcus, 157 Pa. 133, 37 Am. St. Rep. 719.

In Tete v. Lanaux (1893), 45 La. Ann. 1343, there was a necessity, in view of a peculiar statute, to determine whether a certain person was a *clerk*, or a *broker*. Said the court: "A clerk is one who hires his services to an employer at a fixed price under a stipulation to do and perform some specific duty or labor which requires the exercise of skill. 'The broker is he who is employed *to negotiate a matter between parties*, and who for that reason is the mandatory of both.' R. C. C. 3016. The leading and essential difference between a clerk and a broker is that the former hires his services exclusively to one person, while the latter is employed to make bargains and contracts between other persons in matters of trade, commerce and navigation. For the services of the former there is a fixed stated salary, while for the latter a compensation, commonly styled brokerage, is allowed."

[20] See *post*, Book IV, Chap. V, under head of Independent Contractor, where the subject is more fully considered.

[21] Thus in a case wherein a loaded vessel just leaving port was found to be on fire, and the master employed S. & Co., who were doing business as shipping-merchants, to take charge of her and rescue her cargo, the court said: "The employment of S. & Co., under these facts, was something more than the appointment of an agent. It was more in the nature of an employment or hiring than an appointment to an agency. It was in the nature of a contract between the captain of the vessel, as the owner's agent, and S. & Co., whereby the latter agreed to extinguish the fire, and if necessary unload the vessel of its cargo, and do everything else for the protection of the vessel and cargo. They were employed to do a particular thing, and were contractors, instead of agents, in the general understanding of agency." Horan v. Strachan (1890), 86 Ga. 408, 22 Am. St. Rep. 471.

So where a state made a contract with a publisher to stereotype and print certain state reports, the court said: "In the case at bar the defendant was not employed as an agent to carry on a printing and publishing business for the state. Its contract was to manufacture certain plates

case, not having the legal power of control, is not responsible to third persons for the neglects or defaults of the independent contractor occurring in the performance of his undertaking, while he would ordinarily be responsible for like neglects or defaults if the person employed were his servant. There are, however, as will be seen, a number of well defined exceptions to this rule.[22] Under statutory obligations even the word "agent" is sometimes construed to include independent contractors.[23]

Of the two, the agent more nearly corresponds to the independent contractor than does the servant, but they are both distinguishable.

§ 41. Public instrumentalities like mail, telegraph, etc., not usually agents.—Usually to be regarded rather as a sort of independent contractor, than as agents or servants whom the principal may direct and control, and for whose acts or defaults he is responsible, are such public instrumentalities as the mail, the telegraph, the public carrier, and the like, when employed in their ordinary capacity. Certain of them may, undoubtedly, undertake to act as agent, and some of them

and certain books for the state. When they were manufactured they were to be delivered to the state, and the defendant was to be paid a certain price therefor. This was the special employment of the defendant by the plaintiff [the state]. It was not acting as the agent of the state in making these plates and books. It did the work in its own name. The state could not be held responsible for any acts or omissions of the defendant, or any contracts entered into, or liabilities incurred by it in carrying out this contract with the state." State v. State Journal Co., 75 Neb. 275; 9 L. R. A. (N. S.) 174.

Though a transfer company employed to receive goods from a carrier may be an independent contractor as to the transportation of them, it may also be so far an agent as to charge the employer with its notice as to the condition of the goods. Rothchild v. Great Northern Ry. Co., 68 Wash. 527.

Where a lumber company induced a physician to locate at its plant and undertook to collect for him certain sums from its employees monthly, it was held to be an absolute contract on the part of the company to pay him those sums, and not merely an undertaking as agent to collect and pay over to him. Texarkana Lumber Co. v. Lennard, 47 Tex. Civ. App. 116.

Independent contractor and not agent. McKenna v. Stayman Mfg. Co., 112 N. Y. Supp. 1099.

[22] See *post*, Book IV, Chap. V, Independent Contractors.

[23] Thus, under statutes requiring the fencing of railways and imposing liability for not doing it upon railway companies and their "agents," the word agent is often construed in a wide sense to include independent contractors and others acting for and by the authority of the railway company. See Gardner v. Smith, 7 Mich. 410, 71 Am. Dec. 722; Chicago, etc., R. Co. v. McCarthy, 20 Ill. 385, 71 Am. Dec. 285.

So a lessee may be included. Clement v. Canfield, 28 Vt. 303.

Same within statute giving right of action for death by wrongful act. Peters v. St. Louis, etc., R. Co., 150 Mo. App. 721.

frequently do. Express companies, for example, often undertake to purchase or sell goods, as well as to carry them, or to collect money as well as to transmit it. Banks often act as agents, though whether they are agents or independent contractors in the ordinary case of receiving checks, notes, drafts, etc., for collection,—is a disputed question, as will be seen hereafter.

The distinction in the case of a governmentally conducted institution, like the post office, is not difficult. And in the case of the telegraph, though the authorities are not uniform, the tendency of the more recent cases is to regard it not as the agent of one who undertakes to deal through its instrumentality but as a public institution undertaking to serve all who employ it and liable for its own negligence or default.[24]

So it is held that members of a public fire department, who undertake to extinguish fires, are not the agents or servants of those upon whose property they attempt to extinguish a fire.[25]

§ 42. Agency differs from trust.—Agency differs in material respects from the ordinary trust.[26] It is true that agency is often said to be a relation of trust and confidence, and that property in the hands of an agent is often held to be impressed with a trust for the benefit of the principal,[27] yet the two relations are not identical. A trust involves control of property; agency may be totally disconnected with any particular property. The trustee holds a legal title; the agent has usually no title at all. The trustee may act in his own name; the agent acts regularly in the name of his principal. Trust is not necessarily a

[24] See the discussion in Pepper v. Western Union Tel. Co., 87 Tenn. 554, 10 Am. St. R. 699, 4 L. R. A. 660; Shingleur v. West. Un. Tel. Co., 72 Miss. 1030, 48 Am. St. R. 604, 30 L. R. A. 444; Pegram v. West. Un. Tel. Co., 100 N. C. 28, 6 Am. St. R. 557; Postal Tel. Co. v. Schaefer, 110 Ky. 907; Strong v. West. Un. Tel. Co., 18 Idaho, 389, 30 L. R. A. (N. S.) 409, where the cases will be found more fully cited. But compare the rule in Georgia as found in West. Un. Tel. Co. v. Shotter, 71 Ga. 760; West. Un. Tel. Co. v. Flint Riv. Lumber Co., 114 Ga. 576, 88 Am. St. R. 36; Brooke v. West. Un. Tel. Co., 119 Ga. 694.

[25] Ericksen v. Great North. Ry. Co., 117 Minn. 348, 39 L. R. A. (N. S.) 237.

[26] See Taylor v. Davis, 110 U. S. 330, 28 L. Ed. 163; Hartley v. Phillips, 198 Pa. 9; Knowles v. Scott, [1891] 1 Ch. 717; James v. Smith, [1891] 1 Ch. 384; Cleghorn v. Castle, 13 Hawaiian, 186; Owen v. Cronk, [1895] 1 Q. B. 265; Shepard v. Abbott, 179 Mass. 300; Chaffee v. Rutland R. Co., 53 Vt. 345; Simon v. Burgess, 71 Misc. 300; Weer v. Gand, 88 Ill. 490.

See also *per* Bramwell, L. J., in New Zealand Land Co. v. Watson, 7 Q. B. D. 374.

[27] See *post*, under the head of *Loyalty;* Central Stock Exchange v. Bendinger, 109 Fed. Rep. 926, 56 L. R. A. 875; Roller v. Spilmore, 13 Wis. 26; Long v. King, 117 Ala. 428; Conan v. Riseborough, 139 Ill. 883.

contractual relation; agency is properly to be so regarded. A trust does not necessarily or even usually involve any authority to enter into contracts which shall bind another; the authority to make such contracts is the distinguishing characteristic of agency. Trusts are usually not revocable; agency usually is revocable.[28]

§ 43. ——— Occasion to distinguish between the two relations may arise in many ways. A general statute may use one term under circumstances which make discrimination necessary,[29] and the statute of frauds or the statute of limitations may operate differently upon them.[30] But the question most commonly arising is, whether the person who may be either *cestui que trust* or principal is liable upon contracts made by the person claimed to be agent or trustee. If the person acting be agent the other, whether disclosed or not, may be liable as principal; if the person acting be a trustee merely he may bind himself by his contracts, but he can not make the *cestui que trust* personally responsible.[31] This question difficult enough at best, is often rendered doubly so by contracts apparently drawn purposely in such ambiguous terms as to leave room for the one construction or the other as shall best serve the purpose of the parties when the controversy arises.

For the solution of this difficulty, no inflexible rule can be laid down. Names used are not conclusive, and the case must be determined by the preponderance of the conflicting characteristics contending for recognition.

§ 44. **Agency to be distinguished from sale.**—Agency is, further, to be distinguished from sale. In the ordinary case the two contracts

[28] See this distinction in Flaherty v. O'Connor, 24 R. I. 587; Lyle v. Burke, 40 Mich. 499; Kraft v. Neuffer, 202 Pa. 558.

[29] Thus a trustee may acquire a copyright, while an agent may not. Petty v. Taylor, [1897] 1 Ch. 465.

[30] Thus the statute of frauds has distinguished in the way in which agency, on the one hand, and trust or confidence, on the other may be proved. James v. Smith, [1891] 1 Ch. 384.

[31] If the person who made the contract is a trustee he binds himself and not the *cestui que trust*. Chaffee v Rutland Railroad Co., 53 Vt. 345; Everett v. Drew, 129 Mass. 150; Shepard v. Abbott, 179 Mass. 300; Hartley v. Phillips, 198 Pa. 9; McGovern v. Bennett, 146 Mich. 558.

"If, on the other hand, the so-called trustee is a mere nominee or 'dummy,' put forward for no other purpose but to screen the so-called *cestui que trust* from responsibility, the relation between them is that of principal and agent, and the principal is liable." 8 Law Quar. Rev. article, "Trusteeship and Agency," p. 220, citing *inter alia* Cox's Case, 4 De Gex, J. & S. 53; Pugh and Sharman's Case, L. R. 13 Eq. 566. See also Coventry's Case, [1891] 1 Ch. 202.

Where the person is trustee it is held that the rule exempting an agent who has, before notice, paid over to his principal money voluntarily paid to him by mistake, does not apply. Cleghorn v. Castle, 13 Hawaiian 186.

are, of course, readily enough distinguished; but there also arise cases wherein, because of the mixed motives of the parties or the artless or artful framing of the contract, it is not easy to distinguish. The question, in these doubtful cases, usually takes one of two forms: 1. Is the party in question an agent to buy goods for the other or is he buying the goods on his own account and then himself selling them to that other? 2. Is the party in question an agent to sell goods for the other, or is he really buying the goods from that other to sell upon his own account?

§ 45. ——— **Agency to buy or sale.**—A typical case of the first sort is presented where, under an ambiguous contract, one party is accumulating goods to be delivered to another. After the goods have been accumulated in whole or in part but before delivery, they are accidentally destroyed. Upon whom does the loss fall? If the person who was accumulating them was a vendor, the loss ordinarily will fall upon him. If he was an agent to buy, the loss ordinarily will fall upon the other party. Hence arises the controversy—a controversy which can be determined only by an investigation of all of the facts and a balancing of the opposing features of agency and sale. In the leading case upon the question,[82] the contract was thus found to be one of sale rather than agency to buy; while in another presenting some of the same features the opposite conclusion was reached.[83]

§ 46. ——— The form of the contract, while not at all conclusive, may go far in determining the question. The weight of this evidence is increased by the extent to which the contract appears to disclose the real intention of the parties rather than to be an artful and wordy cover of the real purpose. Who is to be affected by fluctuations in price, is often significant. If the one who is to supply the goods is to do so at a fixed price regardless of market fluctuations, there is strong evidence of sale rather than of agency. Upon whose responsibility are the goods to be procured, is also a significant question. If they are to be obtained upon the credit of the person, who is to supply them without possibility of recourse to the person to whom they are to

[82] Black v. Webb, 20 Ohio, 304, 55 Am. Dec. 456, discussed more fully in Mechem on Sales, § 41. So in a prosecution for embezzlement, the transaction was held to be a sale rather than an agency to buy. State v. Brown, 171 Mo. 477. See also St. Louis, etc., R. Co. v. Blocker (Tex. Civ. App.), 138 S. W. 156.

[83] Hatch v. McBrien, 83 Mich. 159; Mechem on Sales, § 42. In Keswick v. Rafter, 35 App. Div. 508, affirmed on opinion below, 165 N. Y. 653, the correspondence between the parties was held to show an order to the plaintiff to buy for the defendant and not a sale by the plaintiff to the defendant.

be supplied, this also is strong evidence of sale. Who is to determine of whom, where, to what extent, upon what terms, the goods to be supplied are to be procured? If the person who is to supply them is to determine these matters, then, as stated in one case,[34] "there is nothing characteristic of agency in this."

The writer has, however, so fully discussed this question in another place,[35] as to make further examination here unnecessary.

§ 47. ——— Agency to sell or sale of goods.—Agencies to sell are very numerous, the most familiar types being those of the auctioneer, the broker, the factor or commission merchant, and the general dealer who receives goods for sale under what is commonly termed a "consignment." These present no peculiar difficulties and will be more fully dealt with in their appropriate place. Anomalous cases, however, do arise which are difficult of determination. The most common are those wherein goods have been delivered to another for sale, but it is not certain whether he is to sell them as agent of the person from whom he received them, or whether he has purchased them from that person and is to sell them on his own account.[36] This uncertainty is to be attributed sometimes to the ignorance or inattention of the parties in making their contracts, sometimes to the desire of the parties to evade the operation of a particular statute, like a recording act,[37] but more frequently to the conscious desire of one of the parties at least—usually the one from whom the goods are received—to have the transaction afterward take the form either of agency or sale as shall best suit his purposes.[38]

§ 48. ——— These doubtful cases are to be determined, not by the name which the parties have seen fit to apply to their contract but by its true nature and effect.[39] The essence of sale is the transfer of the title to the goods for a price paid or to be paid. Such a transfer puts the transferee, who has obtained the goods to sell again, in the attitude of one who is selling his own goods, and makes him liable to the person from whom he received them as a debtor for the *price* to be paid and not liable as an agent for the *proceeds* of the resale. The essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal,

[34] Black v. Webb, *supra*.
[35] Mechem on Sales, §§ 41 *et seq.*
[36] See Mechem on Sales, § 43 *et seq.*
[37] Norwegian Plow Co. v. Clark, 102 Iowa, 31; Braunn v. Keally, 146 Pa. 519, 28 Am. St. Rep. 811.
[38] Arbuckle v. Kirkpatrick, 98 Tenn. 221, 36 L. R. A. 285, 60 Am. St. Rep. 854.
[39] Heryford v. Davis, 102 U. S. 235; Sturm v. Boker, 150 U. S. 312, 37 L. Ed. 1093; Hervey v. Locomotive Works, 93 U. S. 664; Mennis v. Manning, 136 Ill. App. 406.

who remains the owner of the goods and who therefore has the right to control the sale, to fix the price and terms, to recall the goods, and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a *price* for them before sale or unless sold by the agent. .

In doubtful cases, the courts in endeavoring to extract the meaning will incline against the party whose mixed motives or ambiguous language has caused the uncertainty, where such a course is demanded for the protection of innocent persons against whom the contract is sought to be enforced.[40]

In the application of these principles, the courts have been called upon to examine a great variety of contracts, holding some to create agency[41] and others to create sale.[42] The most important cases thus

[40] Arbuckle v. Kirkpatrick, 98 Tenn. 221, 36 L. R. A. 285, 60 Am. St. Rep. 854.

[41] *Ex parte* White, L. R. 6 Ch. App. 397; Eldridge v. Benson, 7 Cush. (Mass.) 483; Walker v. Butterick, 105 Mass. 237; Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co., 38 W. Va. 158, 22 L. R. A. 850, 45 Am. St. Rep. 846; National Cordage Co. v. Sims, 44 Neb. 148; Lenz v. Harrison, 148 Ill. 598; Burton v. Goodspeed, 69 Ill. 237; Barr v. Am. Copying Co., 142 Ill. App. 92; Holleman v. Bradley Fertilizer Co., 106 Ga. 156; National Bank v. Goodyear, 90 Ga. 711; Balderston v. Rubber Co., 18 R. I. 338, 49 Am. St. Rep. 772; Norton v. Melick, 97 Iowa, 564; Milburn Mfg. Co. v. Peak, 89 Tex. 209; Moline Plow Co. v. Rodgers, 53 Kan. 743, 42 Am. St. Rep. 317; McKinney v. Grant, 76 Kan. 779; Metropolitan Nat. Bank v. Benedict Co., 36 U. S. App. 604, 74 Fed. 182; Joslyn v. Cadillac Auto Co., 101 C. C. A. 77, 177 Fed. 863; Sturm v. Boker, 150 U. S. 312, 37 L. Ed. 1093; Sturtevant Co. v. Dugan & Co., 106 Md. 587; Sligh & Co. v. Kuehne Commission Co., 135 Mo. App. 206; Barteldes Seed Co. v. Border, etc., Co., 23 Okla. 675, 101 Pac. 1130; Sioux Remedy Co. v. Lindgren, 27 S. Dak. 123, 130 N. W. 49; Lindsey Lumber Co. v. Mason, 165 Ala. 194; Collyer v. Krakauer, 122 App. Div. (N. Y.) 797; Arkansas Fertilizer Co. v. Banks, 95 Ark. 86; Lance v. Butler, 135 N. Car. 419.

[42] Dr. Miles Medical Co. v. Park, 164 Fed. 803, 220 U. S. 373; Arbuckle Bros. v. Kirkpatrick, 98 Tenn. 221, 36 L. R. A. 285, 60 Am. St. Rep. 854; Snelling v. Arbuckle, 104 Ga. 362; Arbuckle Bros. v. Gates, 95 Va. 802; *In re* Linforth, 4 Sawy. 370, Fed. Cas. No. 8,369; *Ex parte* Flannagans, 2 Hughes, 264, Fed. Cas. No. 4,855; Nutter v. Wheeler, 2 Low. 346, Fed. Cas. No. 10,384; Mack v. Tobacco Co., 48 Neb. 397, 58 Am. St. Rep. 691; Norwegian Plow Co. v. Clark, 102 Iowa, 31; Alpha Checkrower Co. v. Bradley, 105 Iowa, 537; Armstrong v. St. Paul, etc., Co., 48 Minn. 113; Granite Roofing Co. v. Casler, 82 Mich. 466; Peoria Mfg. Co. v. Lyons, 153 Ill. 427; Yoder v. Haworth, 57 Neb. 150, 73 Am. St. Rep. 496; Chickering v. Bastress, 130 Ill. 206, 17 Am. St. Rep. 309; Mennis v. Manning & Co., 136 Ill. App. 406; Ætna Powder Co. v. Hildebrand, 137 Ind. 462, 45 Am. St. Rep. 194; Aspinwall Mfg. Co. v. Johnson, 97 Mich. 531; Kellam v. Brown, 112 N. C. 451; Heywood v. Doernbecher Mfg. Co., 48 Oreg. 359; Hessig-Ellis Drug Co. v. Sly, 83 Kan. 60; Jackson v. State, 2 Ala. App. 226, 57 So. 110; Conn v. Chambers, 123 App. Div. (N. Y.) 298, affirmed in 195 N. Y. 538; Baldwin v. Feder, 135 App.

arising are cited in the notes, but as the writer has dealt with them at large in another place,[43] it seems neither necessary nor excusable to repeat the discussion here.

§ 49. ——— Land.—The same questions may arise with reference to land. An authority to sell land is not an offer to sell it to the agent, and he will not be permitted to buy it and hold it on his own account without his principal's consent.[44] The instrument creating the authority may, however, be so broad or be couched in such language as to amount to an option to the agent to purchase or to authorize him to sell upon the basis that he is or may become the owner.[45]

On the other hand, while an option or a contract for the sale of land does not *per se* create an agency to sell it,[46] its language may be broad enough to compass that result, with the effect that the giver may be responsible for the acts of this agent like any other.[47]

§ 50. ——— How question determined—Law or fact.—Where the contract is in writing, or the facts are not disputed and only one in-

Div. (N. Y.) 97; Poirier Mfg. Co. v. Kitts, 18 N. Dak. 556.

[43] See Mechem on Sales, §§ 41 *et seq.*

[44] Thus in Chezum v. Kreighbaum, 4 Wash. 680, an instrument giving the agent "the exclusive sale" of certain lands for a certain price, and providing that he must get his commission in addition to the price named, was held not to authorize the agent to take the land himself and demand a conveyance from the principal. See also Meek v. Hurst, 223 Mo. 688, 135 Am. St. R. 531; Raddle v. Lindemann, 151 Ill. App. 441.

[45] In Robinson v. Easton, 93 Cal. 30, 27 Am. St. R. 167, an instrument authorizing certain persons to sell land for a certain price "net" to the owner and providing that for that sum "they may sell said property with our consent," was held to authorize them to make themselves the buyers.

Instrument in form of power of attorney construed as deed. Sims v. Sealy, 53 Tex. Civ. App. 518.

[46] Thus in Reeves v. McCracken, 103 Tex. 416, the owners contracted to sell land to a certain party "or order." The latter made a contract, induced by fraud, to resell the land to a third person. When the sales were consummated, it was agreed, as a short cut, that the owners should convey directly to the subpurchaser and receive directly from him the price agreed to be paid by the original vendee. This arrangement was carried out in entire ignorance of the fraud. *Held*, that the original owners did not thereby become responsible for the fraud of the intermediate party. To same effect. Alger v. Keith, 44 C. C. A. 311, 105 Fed. 165.

[47] Shepard v. Pabst, 149 Wis. 35, where it is said: "There is nothing inconsistent in a contract which creates an agency to sell and also gives the agent an option to himself purchase, which he is at liberty to avail himself of at any time during his agency, but is not bound to do so. Russell v. Andrae, 79 Wis. 108; Puffer v. Welch, 144 Wis. 506; Arnold v. Nat. Bank, 126 Wis. 362, 3 L. R. A. (N. S.) 580."

One holding an option on land, and who undertakes to sell "subject to the approval of the owner," is not *ipso facto* made the agent of either buyer or owner. Cartwright v. Ruffin, 43 Colo. 377.

ference can fairly be drawn from them, the determination of the legal effect of the writing or the facts in creating agency or sale, is a matter for the court; but where there is no writing and the facts are in dispute, or where there is no dispute as to the facts but more than one inference may fairly be drawn from them, the jury must determine, under proper instructions from the court, not only what the facts are but also what is their effect under the court's instructions upon the law.[48]

§ 51. **Agency differs from partnership.**—Agency also differs from partnership. For while partnership results in a certain type of agency, and while the existence of agency has often been said to be the modern test of partnership,[49] not every agent is a partner with his principal even when he obtains his compensation by sharing in the profits of the business which his principal carries on with his aid.[50] Where there has been no holding out of the agent as a partner, the matter must be determined by the agreement of the parties themselves,[51] and while parties may create partnership, without actually intending that specific result where they voluntarily enter into an arrangement whose necessary legal effect is the creation of partnership, courts are reluctant to surprise parties into that relation when they clearly did not intend it. "Every doubtful case," it has been well said,[52] "must be solved in favor of their intent; otherwise we should 'carry the doctrine of constructive partnership so far as to render it a trap to the unwary.'"

§ 52. **Agency differs from lease.**—So agency may be distinguished from lease. As in the preceding case of sale, the two contracts are usually very much unlike; but, here as there, cases are met with wherein one relation has apparently been disguised under the name of the other. Here, as there, also, names are of no consequence, and the true nature of the contract determines the case. If, therefore, though the contract be called a lease, the alleged tenant is so far under the direction and control of the alleged landlord as to make the latter the real party in

[48] See Mechem on Sales, § 50; Rauber v. Sundback, 1 S. D. 268.

[49] See Cox v. Hickman, 8 H. L. Cas. 268.

[50] See for example Sodiker v. Applegate, 24 W. Va. 411, 49 Am. Rep. 252; Zuber v. Roberts, 147 Ala. 512; Buzard v. Bank of Greenville, 67 Tex. 83, 60 Am. Rep. 7.

[51] See Grinton v. Strong, 147 Ill. 587, where the relation was held to be agency and not partnership. So also in National Lumber Co. v. Gray's Harbor Com'l Co., — Wash. —, 127 Pac. 577; Duensing v. Paine, 150 Iowa, 417; Lance v. Butler, 135 N. Car. 419; Heidenheimer v. Walthew, 2 Tex. Civ. App. 501.

[52] *Per* Cooley, J., in Beecher v. Bush, 45 Mich. 188, 40 Am. Rep. 465, quoting Kent, C. J., in Post v. Kimberly, 9 Johns. (N. Y.) 470, 504.

interest and the former merely his representative, the contract will be held to be one of agency.[53]

Where, however, the relation is that of landlord and tenant merely, the tenant is not an agent for whose contracts the landlord is responsible,[54] nor a servant for whose torts the landlord can be held liable.[55]

§ 53. Agency differs from license.—Also to be distinguished from an agent is a mere licensee. The fact that one who has the power to give or withhold permission, grants to another, gratuitously or for a consideration, the right, for the grantee's benefit, to use the grantor's property, operate under his patent, publish under his copyright, sell under his trade marks, and the like, does not of itself make the grantee an agent to bind the grantor by contracts respecting the property involved or otherwise, or make the grantor responsible for the acts or omissions of the licensee.[56] On the other hand, where the act is being done for the grantor and to accomplish his ends and purposes, agency may more readily be found.[57]

§ 54. Agency differs from bailment.—Equally clear is it that the mere bailment of property does not make the bailee an agent to make contracts respecting the property or otherwise, or a servant for whose acts or defaults the bailor will be responsible. Mere possession gives

[53] Petteway v. McIntyre, 131 N. Car. 432. See also Ragsdale v. Meridian Land Co., 71 Miss. 284.

[54] Hawley v. Curry, 74 Ill. App. 309. A lessee, allowed a certain amount out of the rent with which to make certain agreed repairs and supply furnishings, is not the agent of the lessor. Pray v. Appledore Land & Bldg. Co., 76 N. H. 167.

Very similar to the last case is Rothe v. Bellingrath, 71 Ala. 55, where it was held that an agreement that the tenant might make certain improvements, which the lessor was to take and pay for at the end of the term, did not make the tenant the lessor's agent to bind the lessor for the cost. In Oriental Investment Co. v. Barclary, 25 Tex. Civ. App. 543, a so-called lease was held to be a mere cover for an agency, and that the lessor was liable for an injury.

[55] Marsh v. Hand, 120 N. Y. 315; Miller v. New York, etc., R. Co., 125 N. Y. 118; Harrison v. McClellan, 137 App. Div. 508. See also Moorshead v. United Railways Co., 119 Mo. App. 541, 203 Mo. 121.

[56] See American Press Association v. Daily Story Pub. Co., 120 Fed. 766, 66 L. R. A. 444, 193 U. S. 675. Or charge the licensee as a fiduciary. Thomson v. Batcheller, 201 N. Y. 551; State v. State Journal Co., 75 Neb. 275, 9 L. R. A. (N S.) 174.

[57] See Bingamen v. Hickman, 115 Pa. 420, where the creditors of an insolvent debtor who had made an assignment for creditors, entered into an arrangement with the assignee by which a committee of three were to be allowed to take the assigned property—a manufacturing establishment—and operate it with a view to paying the creditors. *Held*, that the committee were agents of the creditors in such wise that they were entitled to compensation and reimbursement, and were not compelled to look merely to the proceeds of the factory. Compare with Cox v. Hickman, 8 H. L. Cas. 268.

no authority to sell or otherwise dispose of, unless aided by such a statute as the Factor's Act. Possession, however, may be delivered to such a person or under such circumstances or accompanied with such *indicia* of authority or ownership, as to estop the true owner if the bailee has thereby been enabled to deceive an innocent taker for value, as will be seen in a later chapter wherein the subject is fully discussed.[58]

§ 55. Agency differs from borrowing.—There would seem to be no difficulty in the ordinary case in distinguishing the relation of principal and agent from that of lender and borrower, yet cases are by no means infrequent in which one who claims to have been merely a lender has so stipulated for a share of profits in lieu of interest or for such an interest in the venture as to raise a serious question whether he is not a principal or more commonly a partner. Where there has been no holding out as principal, courts in modern times endeavor to give effect to the real intention of the parties, and not to charge one as a principal or a partner who did not intend to become such, unless that is the necessary legal effect of the arrangement into which the parties have entered.[59] Agency rather than loan has, however, been found in some cases,[60] and where it exists it may be undisclosed, with the same consequences as in other cases.

Some other cases of relations which may be distinguished from agency are given in the notes.[61]

[58] See Book IV, Chap. VII, Right to Recover Property.

[59] See the discussion in Meehan v. Valentine, 145 U. S. 611, 36 L. Ed. 835 (where partnership was charged but not sustained); Harvey v. Childs, 28 Ohio St. 319, 22 Am. Rep. 387 (same). There are many others.

In Davis, etc., Com. Co. v. Mt. Vernon Bank, — Tex. Civ. App. —, 133 S. W. 448, one who had advanced money to enable another to buy cattle was held to be merely a lender and not a principal. So, in the purchase of a mine. Krohn v. Lambeth, 114 Cal. 302.

[60] In Dows v. Morse, 62 Iowa, 231, followed in Van Sandt v. Dows, 63 Iowa, 594, 50 Am. Rep. 759, where money was advanced to another for the purchase of corn, under a contract providing that it should be used for no other purpose, that the title to the corn should be deemed to be in the one who advanced the money; that the latter should sell it and receive the money and retain the amount advanced and interest at 10 per cent and expenses and a compensation of one cent a bushel, there was held to be agency between the parties, even though the person to whom the money was advanced was to guarantee the other against all loss and to make good the investment with interest, compensation and expenses. See also Hartshorne v. Thomas, 43 N. J. Eq. 419, where the question was likewise between the immediate parties only.

Compare Cassiday Fork Boom Co. v. Terry, 69 W. Va. 572.

[61] *Relation of officials in church organization.*—In Evangelista v. Ver, 8 Philip. 653, the supreme court of the Philippine Islands held that the relation of officials of a religious denomination to one another is that

§ 56. Classification of agents.—Agencies and agents may be classified according to several lines of distinction. A statutory distinction based upon a deeply rooted and natural line of demarcation is that drawn between *actual* and *ostensible* agencies.[62] The nature and extent of the authority conferred have led to the classification of agents as *universal, general,* and *special* or *particular.*[63]

Other classifications, based (*a*) upon the nature of the agency into *mercantile* and *non-mercantile* agents; or (*b*) with regard to their obligations in selling, into *del credere* agents, and agents *not del credere;* or (*c*) in regard to the degree of skill required of them, into *gratuitous* and *paid* agents and *professional* and *non-professional* agents, are sometimes made for convenience of treatment.[64]

Each of these general groups will be given some attention.

of ecclesiastical subordination to a common superior, rather than of master and servant, principal and agent, or landlord and tenant. The court said, "In the United States it has been held that the relation between a Roman Catholic bishop and a pastor of a church in his diocese is not that of master and servant (Baxter v. McDonnell, 155 N. Y. 83, p. 99), not that of hirer and hired, nor of principal and agent (Tuigg v. Sheehan, 101 Pa. 363). They are fellow-servants of their church, for which the bishop acts merely as a superior agent and not as a principal (Rose v. Vertin, 46 Mich. 457). Nor are they landlord and tenant (Chatard v. O'Donovan, 80 Ind. 20). A like rule in respect of master and servant has been laid down as to bishops and clergy of the Methodist Episcopal Church (Bristor v. Burr, 120 N. Y. 427)."

Agency or Cotenancy.—For cases holding a given situation to be the former rather than the latter, see Davis v. Peterson, 59 Minn. 165; Elwell v. Coon (N. J.), 46 Atl. 580.

Agency or Joint Venture.—In Manker v. Tough, 79 Kan. 46, 19 L. R. A. (N. S.) 675, 17 Ann. Cas. 208, a contract between a real estate owner and a broker by which the broker was to undertake the sale of the land for an interest in the proceeds above a certain sum, was said to be "a contract of agency and not a joint venture."

Vendor delivering goods to carrier not agent of buyer.—A seller of goods delivering them to a carrier in pursuance of the contract of sale is not thereby the agent of the buyer to make the shipment so as to charge the latter with the former's negligence. Norfolk, etc., R. Co. v. Harman, 91 Va. 601.

Vendor obtaining deed to perfect his own title not agent of buyer.—A vendor of land who, in order to perfect his own title to the satisfaction of the buyer, obtains a quit-claim deed from a third person, does not do so as the agent of his vendee in such wise that the latter is charged with the notice which the vendor acquires, while obtaining the quit-claim deed, of the outstanding title of another person. Riley v. Robinson, 128 App. Div. 178, aff'd, no opinion, 202 N. Y. 531.

Receiver not an agent.—Wildberger v. Hartford F. Ins. Co. 72 Miss. 338, 48 Am. St. R. 558.

[62] Cal. Code, § 2300; N. Dak. Code, § 4308; S. Dak. § 5151; Montana Code, § 3075.

[63] See Ewell's Evans' Agency, 2; Story on Agency, § 17; Wharton on Agency, § 116.

[64] Ewell's Evans' Agency, 2.

§ 57. 1. **Actual and ostensible agencies.**—The distinction which leads to the division of agencies into *actual* and *ostensible* is one which is deeply rooted in the law of agency. In the nature of the case, as will be more fully seen hereafter, the law must often, for the protection of third persons, proceed upon the appearance of authority created by the alleged principal without stopping to determine critically whether the appearance corresponded in all respects with the fact. The formal distinction was made in the proposed code for New York and has been adopted in California and other of the western states.[65] As there stated, the agency is actual when the agent has really been employed and authorized by the principal; the agency is ostensible when the principal intentionally, or by want of ordinary care, leads a third person to believe another to be his agent who has not really been employed and authorized by him.

§ 58. 2. **Universal, general and special agents.**—The classification of agents usually deemed to be the most important, is that based upon the nature and extent of the authority conferred upon them, into *universal, general,* and *special* agents. Those who recognize the classification, however, are by no means entirely agreed upon the basis of it, and it is undoubtedly difficult to frame a definition which will prove satisfactory in every case.[66] To some extent, the words explain themselves, but so far as further statements will be of aid, the following are, perhaps, the ones most generally agreed upon:

A *universal agent* is one authorized to do all acts for his principal which can lawfully be delegated to an agent. So far as such a condition is possible, such an agent may be said to have universal authority.

[65] See California Code (Pomeroy 1901) §§ 2298–2300, 2834; North Dakota, Rev. Codes (1899) §§ 4320–4322; South Dakota Ann. Stats. (1901) §§ 5149–5151; Montana Codes (Sanders' Ed. 1895) §§ 3078–3075.

[66] Judge Story has said: "A special agency properly exists, when there is a delegation of authority to do a single act; a general agency properly exists where there is a delegation to do all acts connected with a particular trade, business or employment." Story on Agency, § 17. Professor Parsons has said: "A general agent is one authorized to transact all his principal's business, or all his business of some particular kind. A particular [special] agent is one authorized to do one or two special things." 1 Parsons on Contracts, *41. Mr. Evans says: "General agents are such as are authorized to transact all business of a particular kind; whilst a special agent is authorized to act only in a single transaction." Evans on Agency (Ewell's Ed.) p. 2.

Mr. Wright says that the general agent "is usually a person to whom the principal has entrusted the management of a particular business, such as an estate agent, or the manager of a business;" while the special agent is "an agent given authority to deliver a particular message or buy a particular thing on one occasion, or do some special thing, and has no implied authority *aliunde*

§ 59. Basis of distinction.—With respect of the general and the special agents two bases of classification are possible, one the extent of the authority and the other the extent of the act, that is to say, we may distinguish between a general or unlimited authority on the one hand and a particular or limited one on the other; or we may distinguish between authority to do all the acts of a particular kind or class and authority to do a single and particular act only. Logically it might seem that the classification based upon the extent of the authority was the one to be preferred, but actually the one based upon the extent of the act has been the one commonly relied upon. Treating this as the principal line of division and the other as subordinate, it is possible to have a general agent with general powers, a general agent with special and limited powers, a special agent with general powers and a special agent with special or limited powers. It happens, however, in the majority of cases that an agent who under the familiar classification is a general agent is clothed with powers which under the other would be deemed general, and that the special agent has usually special powers—a fact which doubtless accounts for the failure to press the logic of the classification with more vigor.

§ 60. ——— Definitions resulting—General agent.—Adopting for the present the current basis of classification—a *general agent* is one to do all the acts pertaining to a business of a certain kind or at a particular place, or all the acts of a particular class or series. He has usually authority either expressly conferred in general terms or in effect made general by the usages, customs or nature of the business which he is authorized to transact. A general authority may arise from the creation or the recognition of authority in many particular cases concerning the same subject matter.[67] It is usually general from

from his position or the nature of his business." Wright on Principal and Agent, 2d ed. 87, 88.

In Butler v. Maples, 76 U. S. (9 Wall.) 766, 19 L. Ed. 822, it is said: "The distinction between a general and a special agency is in most cases a plain one. The purpose of the latter is a single transaction, or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency, but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. * * * The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only."

[67] See Whitehead v. Tuckett, 15 East, 400, where Lord Ellenborough

the difficulty or impossibility of enumerating specifically what shall be deemed to be the authority in each particular contingency which may arise in accomplishing the general purpose.[68] An agent, therefore, who is empowered to transact all the business of his principal of a particular kind or in a particular place, would, for this reason, be ordinarily deemed a general agent.[69]

§ 61. ——— Special agent.—A *special agent* is one authorized to do some particular act or to act upon some particular occasion. He acts

speaks of a general authority as "that which is derived from a multitude of instances."

[68] Something of the distinction may be made clear by an illustration. If I have a business which I cannot conduct in person, I may employ an agent to manage it for me. In the very nature of the case, however, in conferring his authority, I must do so in general terms. I cannot easily do more than to empower him to manage it according to his best judgment for my best interest. I cannot well go into details and prescribe how he shall conduct himself and what he shall do in all the multitudinous contingencies which may arise. I must give him authority in general terms and leave the details to his discretion. On the other hand, if I need a horse, I may send a person into the market to buy one only on condition that it shall be of the age, size, color, weight, disposition, speed and price which I prescribe. This case admits of special and particular instruction; the other did not. The former, the business manager, would be a general agent. The latter, who is to buy the horse, would be a special agent. But suppose I say to an agent, "Go into the market and buy me a horse," and limit him neither as to age, size, color, price or otherwise. What kind of an agent is he? He has general powers, but is to act only on a particular occasion.

[69] South Bend Toy Co. v. Dakota F. & M. Ins. Co., 8 S. Dak. 205; Cruzan v. Smith, 41 Ind. 288; Toledo, etc., R. Co. v. Owen, 43 Ind. 405. An agent authorized to manage a business is a general agent. Fisk v. Greeley Elec. L. Co., 3 Colo. App. 319.

"Power to act generally in a particular business or a particular course of trade in a business, however limited, would constitute a general agency, if the agent is so held out to the world, however restricted his private instructions may be." Crain v. First Nat. Bank, 114 Ill. 516; St. Louis, etc., Ry. Co. v. Elgin Milk Co, 74 Ill. App. 619, 175 Ill. 557.

On the distinction between general and special agency, see a few of the great number of cases: Gilman v. Robinson, Ry. & Moo. 226; Kaye v. Brett, 5 Ex. 269; Brady v. Todd, 9 C. B. (N. S.) 592; Whitehead v. Tuckett, 15 East, 400; Loudon Savings Fund Society v. Savings Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612; Manning v. Gasharie, 27 Ind. 399; Anderson v. Coonley, 21 Wend. (N. Y.) 279; Farmers', etc., Bank v. Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; Tomlinson v. Collett, 3 Blackf. (Ind.) 436; Walker v. Skipwith, Meigs (Tenn.) 502, 33 Am. Dec. 161; Savage v. Rix, 9 N. H. 263; Union Stock Yards Co. v. Mallory, 157 Ill. 554, 48 Am. St. R. 341; Great West. Min. Co. v. Woodmas Min. Co., 12 Colo. 46, 13 Am. St. R. 204; McIntosh v. Rice, 13 Colo. App. 393; Dowden v. Cryder, 55 N. J. L. 329; Davis v. Talbot, 137 Ind. 235; First Nat. Bank v. Robinson, 105 Iowa, 463.

usually in accordance with specific instructions or under limitations necessarily implied from the nature of the act to be done.

§ 62. ——— Mere messenger.—Lower in rank even than the special agent is the mere *messenger,* whose character and functions, however, have been very little considered in English law.[70] He was well known to the Roman law (*nuntius*) [71] and his case (*bote*) has been carefully differentiated by the German lawyers.[72] If I have negotiated the terms of a contract which shall be operative or not according to the message which I am to send to the other party, the person whom I employ to deliver the message may be the instrument or agency through which I make the contract, but he does not make it for me. He is no more an agent in the true sense than is the mail or the telegraph which is the instrumentality through which a contract may be negotiated.

§ 63. ——— Person used merely as mechanical aid or instrument.—Lower still in the scale of true agency is the person employed as a mere mechanical aid or instrument. Thus, where one person, in the presence and by the express direction of another, serves as an aid in performing some purely ministerial or mechanical part,—such as signing the other's name, attaching his seal, and the like,—of an act which that other is engaged in performing and to which he brings his own volition, judgment and determination in all matters which concern the essence of the transaction, the act is regarded in law as the direct and personal act of the latter, and the person who aided ministerially or mechanically is deemed to be a mere tool or instrument. In a large sense he is an agency, but in the legal sense he is not an agent within the rules governing the method of authorization, at least; for, as will be seen, it is settled that, even though the person so employed

[70] In Johannson v. Gumundson, 19 Manitoba L. Rep. 83, 11 West. L. Rep. 176, a distinction is made by Perdue, J., between a messenger or intermediary and an agent.

[71] Mr. Hunter (Roman Law, 4th ed. p. 622) has some interesting comments. Among other things he says, answering an argument of Savigny, "Although upon particular states of fact a doubt may arise whether a person is an agent, yet there is a broad distinction between a messenger (*nuntius*) and an agent. A messenger, like a letter, is simply a medium of communication; he exercises no judgment of his own, but merely repeats what is told him. An agent, on the other hand, acts on his own judgment, of course within the limits of his instructions. These instructions may be minute and precise, leaving little to the exercise of the agent's judgment, but unless they do away with the necessity of his exercising his judgment altogether, the agent is distinguishable from a mere messenger."

[72] See, for example, Planck, Bürgerliches Gesetzbuch, 4th ed. Vol. I, p. 283.

is to sign a written instrument or an instrument under seal, he requires only the oral direction or consent of the principal.[73]

§ 64. ——— How many of each one principal can have.—It has been said that a principal can have but one universal agent, by which is probably meant simply that the nature of such a universal power excludes the possibility of its being shared with others—a proposition by no means free from doubt.

Universal agencies are very rare, and it has been doubted whether such an agency could practically exist,[74] although the books furnish illustrations of agencies called universal.[75] Such an agency, however, can only be created, if at all, by clear and unambiguous language, and will not be inferred from any general expressions however broad.[76]

A principal may have several general agents, and as many special agents, messengers, and the like, as occasion may require.

§ 65. ——— Same person may be a special and a general agent.—The same person may at one time or in regard to one transaction be a special agent of his principal and at another time or in reference to other transactions he may be a general agent. So, though he may be authorized to act only in a particular case he may, with respect of that transaction, have general power.[77]

§ 66. ——— Not special because limited to a particular business.—The fact that the authority of the agent is limited to a particular business does not make it special; it may be as general in regard to that business as though its range were unlimited.[78]

§ 67. Uses of these distinctions.—Distinctions of this sort may be of use in securing a logical statement of the law, and they are also of some importance because of the more or less arbitrary rules which have been based upon them; but unless it be held clearly in mind that they are aids only, and are not conclusive, in controversies between the principal and third persons, they will often prove to be misleading rather than useful.[79]

[73] See Gardner v. Gardner, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; Lewis v. Watson, 98 Ala. 479, 39 Am. St. R. 82, 22 L. R. A. 297; Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84; Reinhart v. Miller, 22 Ga. 402, 68 Am. Dec. 506; People v. Organ, 27 Ill. 27, 79 Am. Dec. 391; Lord v. Lord, 58 N. H. 7, 42 Am. Rep. 565 (will); Hart v. Withers, 1 P. & W. (Pa.) 235, 21 Am. Dec. 382; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121, and many others cited *post*, Chapter V.

[74] See Story on Agency, § 21.

[75] See Barr v. Schroeder, 32 Cal. 609.

[76] Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612.

[77] Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476.

[78] Anderson v. Coonley, 21 Wend. (N. Y.) 279; Cruzan v. Smith, 41 Ind. 288.

[79] See *post*, Book II, Chap. I.

§ 68. ——— **Difficulty of determination.**—It is often difficult to determine whether a given agency shall be deemed general or special, and cases frequently occur, as will be seen hereafter,[80] where the agency, though it may be special as between the principal and the agent, must be regarded as general as between the principal and third persons. The distinction is of chief importance in determining the liability of the agent to his principal, because, as will be seen,[81] the agent by exceeding the limits set to his authority or by violating express instructions may make himself liable to his principal for the loss or damage occasioned thereby.

§ 69. ——— **How determined.**—No abstract presumption of law is made in reference either to the existence or to the nature or extent of an agency. These are facts to be proved. If the agency is created by writing, or, though there was no writing, if the facts are not disputed, and but one inference can be drawn from them the question addresses itself to the court; but if the facts are in dispute or if different inferences may be drawn from the undisputed facts it is for the jury to determine, under proper instructions from the court, both the existence of the agency and its character and extent.[82] Where, however, an agency is shown to exist, it is said that the presumption would be that the agent's authority was general rather than limited.[83]

It is however always true that anybody who relies upon the existence of agency has imposed upon him the burden of proving it. He must not only prove that it exists, but he must also show what kind of an agency it is. The law never simply presumes that agency exists, and it never simply presumes that an agent is general or special. When it appears that an agency does exist, the court, since it cannot presume any *particular* limitation without proof, must, if it makes any presumption at all, except such as grows out of the very nature of the agency, presume it to be general rather than limited; but, speaking generally, not only must the fact of the agency be shown but also the nature and extent of it.

[80] See *post*, Book II, Chap. I.

[81] See *post*, Book II, Chap. I.

[82] Dickinson County v. Mississippi Valley Ins. Co., 41 Iowa, 286; Morrison v. Whiteside, 17 Md. 452, 79 Am. Dec. 661; Loudon Savings Fund Society v. Savings Bank, 36 Pa. 498, 78 Am. Dec. 390; Beringer v. Meanor, 85 Pa. 223; Bean v. Howe, 85 Pa. 260; Dale v. Pierce, 85 Pa. 474. "The existence of an agent's authority, is purely a question of fact. What he may do by virtue of it is a question of law." Glenn v. Savage, 14 Ore. 567; Long Creek Bldg. Ass'n v. State Ins. Co., 29 Ore. 569.

[83] Trainer v. Morison, 78 Me. 160, 57 Am. Rep. 790; Methuen Co. v. Hayes, 33 Me. 169; Sharp v. Knox, 48 Mo. App. 169; Missouri Pac. R. Co. v. Simons, 6 Tex. Civ. App. 621; Oak Leaf Mill Co. v. Cooper, — Ark. —, 146 S. W. 130; Austrian v. Springer, 94 Mich. 343, 34 Am. St. R. 350.

§ 70. 3. Special forms of agency—Professional and non-professional agents.—Certain forms of agency are of such great importance and of such universal use that many of them have come to be regarded as distinct professions or occupations, and around each of them has grown up a special body of the law that requires distinctive consideration. Of this class are attorneys, auctioneers, bank officers, brokers, factors, ship masters, and the like, some of which will be specially considered hereafter.

§ 71. ——— Attorneys at law.—As has been seen, the term attorney is often used in the law of agency as synonymous with the word agent, particularly when the authority is conferred by a written instrument. An agent of this sort is often further distinguished as an *attorney in fact.*

The term has also its well understood significance of *attorney at law,* by which is meant, in modern times, one whose profession it is to give advice and assistance in legal matters, and to prosecute and defend in courts, the causes of those who may employ him for that purpose.[84]

§ 72. ——— Auctioneers.—An auctioneer is one whose business it is to sell or dispose of property, rights or privileges at public competitive sale, to the person or persons offering or accepting the terms most favorable to the owner.[85] He differs from a broker in several

[84] Weeks on Attorneys at Law, § 31. See the subject treated at length in the chapter on Attorneys at Law.

[85] Mr. Bishop defines an auctioneer as "one who dealing with assembled persons competing, sells property to those who make or accept the offers most favorable to the owner." As will be observed, the definition in the text is based largely upon this. Of this definition Mr. Bishop says: "I have not observed in the books any satisfactory definition of an auctioneer. Even Story puts what seems to have been meant for a definition, very loosely, thus: 'An auctioneer is a person who is authorized to sell goods or merchandise at public auction or sale for a recompense or (as it is commonly called) a commission.' Story, Agency, § 27. My definition is silent as to his remuneration, or the manner of it; in which respect Story's is to be preferred if this is really an element in the question. But though ordinarily, an auctioneer, like any other agent, is paid, he is not the less such if he does the work gratuitously. State v. Rucker, 24 Mo. 557. Nor does he cease to be an auctioneer though he sells his own property. Bent v. Cobb, 9 Gray (Mass.), 397, 69 Am. Dec. 295. Therefore the definition may well be silent as to the matter of agency. Nor is he less an auctioneer though, selling his own property, he conducts the competition by some method other than outcry. Rex v. Taylor, McClel. 362, 13 Price, 636. Story's definition is defective in not comprehending the auctioneer of real estate. Emmerson v. Heelis, 2 Taunt. 38, 47; Dobell v. Hutchinson, 3 A. & E. 355. It may be a question whether mine is not defective in not extending to such a case as the letting out of the board of paupers to the lowest bidder, and various other cases of procuring a contract other than a purchase of property." Bishop on Contracts, New Ed. § 1131, and note.

particulars, chief among which are that he is employed to sell or dispose of, only, and that his sales are always public. He is primarily deemed to be the agent of the seller, but in the performance of his functions he becomes the agent of the buyer also, as when he accepts the buyer's bid and enters his name upon the memorandum of the sale.[86]

§ 73. ——— **Brokers.**—A broker is one whose occupation it is to bring parties together to bargain, or to bargain for them, in matters of trade, commerce or navigation.[87] He is essentially a middle-man or go-between. He differs from an auctioneer in that he has no special property in the goods which he may be authorized to sell; that he must sell them in the name of the principal, and that his sales are private and not at auction. He ordinarily receives a compensation or commission, usually called brokerage, but he may also serve gratuitously. He differs from a factor, also, in that he does not ordinarly have the possession of the property which he may be employed to sell and that his contracts are always made in the name of his employer. He is primarily the agent of the person who first employs him, and he cannot, without the full and free consent of both, be, throughout the transaction, the agent of both parties. Without such consent, he can only act as the agent of the other party when the terms of the contract are fully agreed upon between the principals and he is instructed to close it up or where he acts as a mere middle-man who brings the parties together to then deal in person.

Brokers are of many kinds, according to the particular class of transactions in which they engage. Thus there are money-brokers, stock-brokers, ship-brokers, bill-brokers, insurance-brokers, real estate-brokers, pawnbrokers, and general merchandise-brokers.[88]

§ 74. ——— **Factors or commission merchants.**—These terms, as is said by a learned writer,[89] are nearly or quite synonymous. The

"An auctioneer," says Mr. Wharton, "is a person employed to sell at public sale, after public notice, property to the highest bidder." Agency, § 638.

[86] See chapter on Auctioneers, where the subject is separately treated.

[87] "A broker is one, who, as middleman, brings persons together to bargain or bargains for them, in the private purchase or sale of property of any sort, not ordinarily in his possession." Bishop, Contracts, § 1135.

"A broker is a specialist employed as a middleman to negotiate between the parties, a sale or other business contract." Wharton on Agency, § 695. Hamberger v. Marcus, 157 Pa. 133, 37 Am. St. R. 719.

Judge Story says that a broker "is an agent employed to make bargains and contracts between other persons, in matters of trade, commerce or navigation, for a compensation, commonly called brokerage." Agency, § 28. This definition is the one given by Evans' Agency, 4.

[88] See this subject fully discussed in the chapter on Brokers.

[89] Bishop, Contracts, § 1138. See

former is the more common in the language of the law, the latter in the language of commerce. A factor is one whose business it is to receive and sell goods for a commission. He differs from a broker in that he is entrusted with the possession of the goods to be sold and usually sells in his own name.[90] He is invested by law with a special property in the goods to be sold and a general lien upon them, for his advances; and unless there be an agreement or usage to the contrary, he may sell upon a reasonable credit.[91]

Del credere commission. Not unfrequently, in consideration of an increased commission, the factor guarantees the payment of debts arising through his agency, in which case he is said to sell upon a *del credere* commission.[92]

Supercargo. A factor is called a supercargo when authorized to sell a cargo which he accompanies on the voyage.[93]

also, Hamberger v. Marcus, 157 Pa. 133, 37 Am. St. R. 719; Perkins v. State, 50 Ala. 154.

[90] "The distinction between a broker and a factor," said Chief Justice Abbott, "is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name without disclosing that of his principal. The latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation,—he is not trusted with the possession of the goods and he ought not to sell in his own name." And in the same case it is said by Holroyd, J., that a factor "is a person to whom goods are sent or consigned, and he has not only possession, but in consequence of its being usual to advance money upon them, he has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name it is within the scope of his authority, and it may be right therefore that the principal should be bound by the consequences of such sale—amongst which the right of setting off a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority and his principal is not bound." Baring v. Corrie, 2 B. & Ald. 143.

[91] See the subject discussed in the chapter on Factors.

[92] See the question of his duties and liabilities discussed in the chapter on Factors, *post*.

BANIANS—A peculiar sort of agent, known only in India, is the Banian, who is a *del credere* agent with respect of his employer but a principal with reference to third persons. He has been described as follows: "He often, if not generally, advances money to the firm in which he is employed; he gives security; if he sells the goods of the firm he is a sort of *del credere* agent, guaranteeing the payment of the price by the bazaar dealers or other purchasers to his principal, and as to purchases he is the direct purchaser in the bazaar." *Per* Norman, C. J., in Grant v. Shaw, 2 Hyde, 302, 309.

[93] Ewell's Evans on Agency, 3.

"Supercargoes are persons em-

Mercantile agent. The English Factors Act of 1889, defines a "mercantile agent," within the meaning of that act, as "a mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods." Other similar statutory definitions are to be found.

§ 75. ——— **Traveling salesmen.**—In many respects unlike either the broker or the factor is the traveling salesman commonly called a "drummer." "A traveling salesman," said the court in Pennsylvania, "who exhibits samples of, and takes orders from purchasers for, his employer's goods is not, in a technical or popular sense, a broker, or factor, although he may be compensated for services by commissions on the sales so effected by him." [94] He differs from the broker in that he is a traveling agent rather than one having a fixed place of business; he does not undertake to serve anyone who may desire his services but is usually in the regular employment of a particular principal; and he has not usually, as the broker often has, the power to make a binding contract, but merely to solicit orders for his principal's approval or disapproval. He differs from the factor in the same particulars, and also in the fact that he is not usually entrusted with the possession of the goods but is merely provided with samples of them which he is to exhibit for the purpose of securing orders.

§ 76. **Officers of ships.**—Certain officers of ships, as the master and the ship's husband, present well recognized forms of agency, but the consideration of their rights, authority and duties belongs rather to a treatise upon shipping or maritime law than to one upon the subject of agency generally.[95]

§ 77. **Partners.**—The transaction of the business of an ordinary partnership furnishes frequent opportunity for the application of the law of agency, but this subject is also deemed to be beyond the scope of the present treatise.

§ 78. **Bank officers.**—Certain officers of banks, and particularly the cashier, also present familiar forms of agency, which will receive some attention herein, though no attempt is made to deal with them extensively or separately.

ployed by commercial companies or private merchants, to take charge of the cargoes they export to foreign countries, to sell them there to the best advantage, and to purchase proper commodities to relade the ships on their return home. For this reason supercargoes generally go out and return home with the ships on board of which they were embarked, and therein differ from factors, who reside abroad at the settlements of the public companies for whom they act." 1 Beawes Lex Mer., 47 (nth ed.)

[94] Hamberger v. Marcus, 157 Pa. 133, 37 Am. St. R. 719.

[95] See Parsons on Maritime Law; Abbott on Shipping.

CHAPTER III

FOR WHAT PURPOSES AGENCY MAY BE CREATED

§ 79. Object of this chapter.
80. General Rule—For any lawful purpose.
81. Exceptions—Illegal and personal acts.

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82. Preliminary considerations.
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84. How these cases regarded in law.
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II. ACTS OF A PERSONAL NATURE

124. Personal duty, trust or confidence cannot be delegated to agent.

125. Illustrations — Voting — Affivits — Statutory requirements.

126. —— Assignments — Wills — Marriage.

§ 79. Object of this chapter.—Having now seen something respecting the nature of the relation of agency, it is desirable next to consider what are the purposes for which it may be created. As to this—

§ 80. General rule—For any lawful purpose.—It is the general rule that an agency may be created for the performance of any lawful act, and that whatever a person may lawfully do, if acting in his own right and in his own behalf, he may lawfully delegate to an agent.[1]

This general rule applies, ordinarily,[2] as much to acts done under a statute, or by the authority of a statute, as to any other class of acts.[3]

§ 81. Exceptions—Illegal and personal acts cannot be delegated.—In dealing with this general rule, two principles are important to be considered. One of them results as the direct and natural effect of the rule itself; the other is an exception to it. These are, 1. That authority cannot lawfully be delegated to do an act which is illegal, immoral or opposed to public policy; and 2. That the performance of an act which is personal in its nature cannot be delegated. Separate consideration will be given to each of these exceptions.

I.

UNDERTAKINGS CONTRARY TO LAW, OR OPPOSED TO PUBLIC POLICY.

§ 82. Preliminary considerations.—The first corollary to the general rule is based upon the nature of the service to be rendered. Three classes of cases are suggested under it. While these cases have some aspects in common, they differ radically in others. The objections urged

[1] Story on Agency, § 6; Com. Dig. "Attorney," C. I. "An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention." Cal. Code, § 2304; Dak. Code, § 1343.

[2] For exceptions, common to statutory as well as to other acts, see *post* §§ 125, 126.

[3] Jackson v. Napper, 35 Ch. Div. 162; Reg. v. Kent, L. R. 8 Q. B. 305; *In re* Whitley Partners, 32 Ch. Div. 337; Dennison v. Jeffs, [1896] 1 Ch. 611; McClanahan v. Breeding, 172 Ind. 457; Cain v. Allen, 168 Ind. 8; Ludwig v. Cory, 158 Ind. 582; Fried v. Nelson, 30 Ind. App. 1; Finnegan v. Lucy, 157 Mass. 439; *In re* Hannan's Express, etc., Co., [1896] 2 Ch. 643.

Thus subscriptions to stock in a corporation may be made by agent. *In re* Hannan's Empress, etc., Co., *supra; In re* Whitley Partners, *supra*. So may an affidavit for the registration of a trade mark (Jackson v. Napper, *supra)*; or a statutory consent to the dissolution of a partnership (Dennison v. Jeffs, *supra)*; or a

against them are founded upon different reasons. Certain of the employments are said to be opposed to positive law; others are contrary to good morals; and still others are deemed to be opposed to that important but somewhat vague principle which is denominated public policy. It is not within the present purpose to attempt to distinguish these various grounds with any nicety; but, recognizing them as more or less familiar principles of our law, to attempt to discover how they apply to the present subject. Starting from this point and attempting to state a general principle, it may be said that —

§ 83. In general, contracts for agency in such cases are void.—The law will not sanction the creation, or enforce the performance, of an agency which has for its object, or which naturally and directly tends to promote, the commission of an act which is either illegal or immoral in itself, or which is opposed to the public policy. It may be thought at first view that the case here considered is not an exception to the rule at all—that the principal himself could not do any of the acts which are so condemned. It is true that there may be no difference in the moral quality of the acts, but there may be great difference in the practical ability of the law to deal with them. There are many cases in which the principal might, with impunity, do the act in person, because there is no statute which would enable the court to reach it. But there are abundant common law principles which would enable the court to deal with a contract of agency for the doing of the same act, in any case in which the contract was before the court for enforcement.[4] Thus, for example, one may very frequently resort to personal persuasion to procure legislation, or obtain a contract or a pardon by personal influence, and the like, and incur thereby no legal penalty, because no

remonstrance against the granting of liquor licenses where no discretion is involved (Ludwig v. Cory; McClanahan v. Breeding; Cain v. Allen; Fried v. Nelson, *supra*); or a notice not to sell liquor to one's husband, (Finnegan v. Lucy, *supra*); or a memorandum under the statute of frauds where the statute, unlike most of the sort, makes no provision for signing by agent (Fordyce v. Seaver, 74 Ark. 395).

STATUTES sometimes declare the same rule. Thus the Indiana statute (§ 240, Rev. Stat. 1881) provides "when a statute requires an act to be done which, by law, an agent or deputy as well may do as the principal, such requisition shall be satisfied by the performance of such act by an authorized agent or deputy."

For cases holding statutory powers non delegable for various reasons, see *post*, §§ 125, 126.

[4] Thus in State v. Brandenburg, 232 Mo. 531, 32 L. R. A. (N. S.) 845; it was held that even though a mother might not be liable, under a statute against enticing children away from their parent, for "kidnapping" her child from its father, she could not lawfully appoint an agent to do it, and the agent would be liable if he did do it.

express statute has made it an offense. Such practices, however, are undesirable, because they tend to substitute personal influences for considerations of the public good. They are opposed to public policy, and though the courts may not be able to reach them directly, they will at least refuse to lend their aid to enforce them.

§ 84. How these cases regarded in law.—Pursuing this general principle more fully into details, it may be further said that the law scrutinizes undertakings of this nature with great strictness, and judges of their validity by their general character and their natural and probable results. It makes no difference in many instances, that in the particular case nothing improper was done or intended to be done. The law seeks to prevent, not only the evil itself, but the very temptation to evil. It concerns itself rather with the public weal than with individual interest. The law therefore ordinarily determines the case by the tendency of undertakings of that kind, and holds the particular contract unlawful if its general nature brings it within the prohibited class.[5] It refuses, ordinarily, to assist either party, but leaves them both in the situation in which their own cupidity has placed them.

These principles which apply here are the well established and familiar ones which regulate the formation and performance of contracts generally. They are not in any sense distinctively a part of the law of agency, and no attempt will be made here to discuss them fully. Their application to the law of agency, however, is frequent, and some illustrations of that aspect will be given in the following sections.

§ 85. What elements the rule involves.—So far as the rule stated condemns contracts of employment in direct violation of the dictates

[5] Institutes Justinian, Liber 3, Title 19, Par. 24; Gray v. Hook, 4 N. Y. 449; Marshall v. Baltimore & Ohio R. R. Co., 16 How. (U. S.) 314, 14 L. Ed. 953; and see generally the cases cited in the following sections.

"Contracts," says Devens, J., "which are opposed to open, upright and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. No one can be permitted to found rights upon his own wrong, even against another also in the wrong. A promise made to one in consideration of doing an unlawful act, as to commit an assault or to practice a fraud upon a third person, is void in law, and the law will not only avoid contracts the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place, a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons. Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases where it had occurred it would be impossible to be proved. The contract is avoided on account of its necessarily injurious tendency." Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459.

of positive law, there is not much difficulty in its application. The same thing may ordinarily be said of employments to violate the familiar principles of good morals, though with reference to other alleged principles of morals there might be hopeless conflict. With reference to the employments which are alleged to be opposed to public policy, there is much room for controversy. As to some questions of public policy, popular and judicial opinion seem pretty well agreed; but as to other questions courts differ widely in their views, and as to some there is irreconcilable conflict.

The vice in any given employment may be found either in the *end* to be attained, or in the *means* employed to accomplish it. (1) The end objected to may be either the direct and immediate one, or a consequential one. In an employment to commit bribery, the wrongful end is direct. In an employment to endeavor to procure a repeal of the laws against bribery, the end objected to may be the more remote one that thereby bribery will be encouraged. (2) With reference to the means employed, it may be that while the end might be proper in itself, the contract prescribed methods for attaining it which must be condemned; or, though no methods are prescribed, none but bad ones are possible; or, though good ones are possible, bad ones are so likely to be resorted to as to invalidate the employment; or, still further, though good methods are possible and perhaps not unlikely, bad ones are also possible and perhaps likely, and therefore the employment should be condemned. So far as the first two of these cases are concerned, there is not much room for doubt; but with the third and more so with the fourth, the solution is not so easy. Where a contract unobjectionable as to end is silent as to methods, but is perfectly capable of execution without resorting to undesirable methods, shall the mere fact that objectionable methods *may be* resorted to, be sufficient to condemn it without any evidence that such methods were contemplated or intended?

§ 86. ——— The element of contingent compensation.—It will be noticed in many of the illustrations hereafter given that particular stress is laid upon the fact that the undertaking was for a compensation contingent upon success. In some of the cases, the employment was *per se* objectionable, and the element of contingent compensation was not needed to make it invalid. In some cases courts seem to have been doubtful about the nature of the employment and to have seized upon the contingent compensation as an element sufficient to turn the scale. In other cases, though they are relatively few, an otherwise apparently unobjectionable employment has been held bad simply because of this feature.

Making compensation contingent upon success is undoubtedly to put a spur to effort, but in many cases this is not deemed objectionable. In many kinds of familiar employment, this is the regular and usual method of making compensation. All cases wherein the employee is paid by commissions, present this aspect. The real estate broker, the stock and merchandise broker, the auctioneer, the factor or commission merchant, the agent who solicits life or fire insurance, the book agent, and many others are regularly and usually paid only upon and in proportion to their success. In most states now, attorneys may lawfully take cases upon contingent fees.

In addition to being an incentive to effort, a contingent fee may also undoubtedly be an inducement to the use of unfair means.[6] In the cases just referred to, that evil is met as it arises, but its possibility does not invalidate all such employments. In the cases now being dealt with in this chapter, if contingent fees are held to make the employment bad, it must be because of the peculiar nature of the employment, or because the courts taking that view have over estimated their significance. Some courts have declined to adopt this view; and it would seem that they are right. Contracts of this nature are not robbed of their viciousness because the agent is certain of his compensation; nor is his undertaking any more righteous because it is surely to be paid for. On the other hand,—questions of *champerty* and *maintenance* aside—legitimate services ought not to be rendered unlawful because the agent is to be rewarded only in case of his success. The nature of the undertaking and its natural and proximate results should be the criterion.[7]

§ 87. Distinction between validity of contract and lawfulness of services.—It must also be kept in mind that the primary question here in issue is as to the validity of the employment and not as to the lawfulness of what may be done under it. Unlawful acts may be done

[6] Thus in Tool Co. v. Norris, 2 Wall. (U. S.) 45, 17 L. Ed. 868, Justice Field said: "Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil and strikes down the contract from its inception;" and similar language has been used in many other cases, *e. g.*, Spalding v. Ewing, 149 Pa. 375, 34 Am. St. R. 608, 15 L. R. A. 727. But that this is not always the case is recognized by the same learned justice in Oscanyan v. Arms Co., 103 U. S. 261, 276, 26 L. Ed. 539, where he says that the commissions allowed by established custom to commission merchants and brokers, though dependent upon sales made, are not regarded as contingent compensation in the obnoxious sense of that term so often the subject of animadversion by that court.

[7] Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Bergen v. Frisbie, 125 Cal. 168; Barber Asphalt Paving Co. v. Botsford, 56 Kan. 532; Kansas City

under a lawful contract, and the question whether compensation may be recovered for them may present a very different aspect from that which is presented when the question is as to the validity of the employment itself.

§ 88. What cases here considered.—As has already been pointed out, the general question of the legality of contracts is too great and too remote to the present purpose to be here considered.[8] All that can be here attempted is to give some illustrations of the application of the rules involved to contracts of employment, and in doing this attention will be confined to the cases most frequently arising and most fully discussed by the courts.

The cases dealt with may be somewhat roughly divided into two classes: 1. Acts prohibited by positive law; and 2. Acts opposed to public policy.

1. Employments to do Acts Prohibited by Positive Law.

§ 89. Employments to commit crimes, misdemeanors, trespasses and the like, are so clearly within the prohibited class, as to require no extended discussion. An employment to abduct, assault, bribe, conspire, forge, imprison, ravish, rob, seduce, and so on through the category of crimes, needs no comment to show its illegality. Fortunately such employments are not common.

Employments to convert the property of another, to libel or slander him, to knowingly trespass upon his property or person, to infringe his patent or copyright, and many others of the same sort, though they may not involve acts specifically made crimes or misdemeanors, are nevertheless clearly illegal, and fall within the class here being considered. Fortunately these also are not very common.

§ 90. Employments to carry on forbidden occupations.—Employments of this sort also, by reason of their very obviousness, are not particularly common. But wherever they do occur, there is usually no difficulty in dealing with them. If the doing of the very thing contemplated is prohibited by the express terms of a statute, the employment to do it or to aid in doing it, must be illegal. Thus an employ-

Paper House v. Foley Ry. Printing Co., 85 Kan. 678, 39 L. R. A. (N. S.) 747; Disbrow v. Cass Co., 119 Iowa, 538; Shinn v. Cunningham, 120 Iowa, 383.

What might be regarded as objectionable between private persons is not necessarily so when the state (which may determine public policy) is a party. Opinion of Justices, 72 N. H. 601. As to champerty and maintenance, see Peck v. Heurich, 167 U. S. 624, 42 L. Ed. 302; *post, Attorneys at Law*, Book V, Ch. I.

[8] See the elaborate treatise of Mr. Greenhood on "The Doctrine of Public Policy in the Law of Contracts."

ment to aid in carrying on a forbidden lottery,[9] or saloon[10] or billiard table;[11] to serve at a time when work is forbidden, as upon Sunday;[12] to procure and ship goods in violation of legislation in time of war;[13] to secure business for a foreign corporation not authorized to do business within the state and forbidden to do business by officers or agents;[14] to obtain forbidden rebates on the shipment of goods;[15] to acquire lands in a forbidden territory, *e. g.* in the Cherokee Nation;[16] to sell goods in a prohibited territory;[17] and the like, is illegal, and will not be enforced.

§ 91. Employment of unlicensed person to serve in occupation for which a license is required.—The same principles apply to cases in which a person without a license is employed to serve in an occupation for which a license is required. If the statute or ordinance which requires the license expressly or by clear implication forbids acting in a given capacity or occupation without a license, or expressly or by clear implication makes such acting illegal, a contract to so act must be itself illegal and unenforceable.[18] This question has arisen many times with

[9] Mexican International Banking Co. v. Lichtenstein, 10 Utah, 338; Rolfe v. Delmar, 7 Robt. (N. Y.) 80; Davis v. Caldwell, 2 Rob. (La.) 271; Roby v. West, 4 N. H. 285, 17 Am. Dec. 423; Roselle v. McAuliffe, 141 Mo. 36, 64 Am. St. Rep. 501, 172 U. S. 641.

[10] Bixby v. Moor, 51 N. H. 402. To same effect: Sullivan v. Horgan, 17 R. I. 109, 9 L. R. A. 110.

Where a sale of liquor within the state is forbidden, an employment of an agent to order from or buy in another state where the sale is legal, is not unlawful. Whitmore v. State, 72 Ark. 14.

[11] Badgley v. Beale, 3 Watts (Pa.), 263.

[12] Watts v. Van Ness, 1 Hill (N. Y.), 76. Compare Boland v. Kistle, 92 Iowa, 369.

[13] Irwin v. Levy, 24 La. Ann. 302. See also Williams v. Gay, 21 La. Ann. 110; Haney v. Manning, 21 La. Ann. 166; Rhodes v. Summerhill, 4 Heisk. (Tenn.) 204.

[14] Dudley v. Collier, 87 Ala. 431, 13 Am. St. R. 55; Lowey v. Granite State, etc., Ass'n, 8 Misc. 319, 59 N. Y. St. Rep. 246.

[15] Parks v. Dold Packing Co., 6 Misc. 570, 57 N. Y. St. Rep. 788.

[16] Alexander v. Barker, 64 Kan. 396.

[17] Crigler v. Shepler, 79 Kan. 834, 23 L. R. A. (N. S.) 500; Rocco v. Frapoli, 50 Neb. 665.

[18] ATTORNEYS: Ames v. Gilman 10 Metc. (Mass.) 239; Hittson v. Browne, 3 Colo. 304. But see Yates v. Robertson, 80 Va. 475. In Harland v. Lilienthal, 53 N. Y. 438, an attorney not admitted to practice in that particular court, was allowed to recover.

PHYSICIANS: Gardner v. Tatum, 81 Cal. 370; Puckett v. Alexander, 102 N. C. 95, 3 L. R. A. 43; Deaton v. Lawson, 40 Wash. 486, 2 L. R. A. (N. S.) 392. (Compare Zeigler v. Illinois T. & S. Bank, 245 Ill. 180, 28 L. R. A. [N. S.] 1112.)

MERCHANDISE BROKERS: Hustis v. Pickands, 27 Ill. App. 270; Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737.

REAL ESTATE BROKERS: Denning v. Yount, 62 Kan. 217, 50 L. R. A. 103; Buckley v. Humason, 50 Minn. 195, 16 L. R. A. 423, 36 Am. St. R. 637; Johnson v. Hulings, 103 Pa. 498, 49 Am. Rep. 131; Stevenson v. Ewing, 87 Tenn. 46.

reference to attorneys, physicians, real estate and merchandise brokers, and the like. As in many other cases of statutory prohibition, it is often difficult to determine whether a statute or ordinance, not specific in its terms, was designed to render the business unlawful when carried on without a license, or merely to impose a personal penalty upon the individual, often as a mere revenue measure, leaving the legality of the business unaffected.[19]

2. Employment to do Acts Opposed to Public Policy.

§ 92. Employment to secure legislation—Lobbying agents.—It is of the utmost importance to the preservation and protection of the state that the sources of its legislative enactments be kept uncontaminated by any improper or debasing influence. Considerations of the public good, motives of high policy, arguments based solely upon the true interests of the people, are the only elements which can properly enter into the question of the right discharge of the important functions of the legislator. Personal solicitation, private intrigue, secret persuasion, arguments based upon the legislator's duty or obligations to individuals or societies or parties, to say nothing of offers of personal or pecuniary profit or advancement, are utterly hostile to the public good. Courts of law and equity have not been slow to recognize this evil, or to declare that all attempts to influence the course of legislation by secret or sinister means, or even by using personal influence, solicitation or persuasion with the members of the legislative body, are inconsistent with sound public policy.

Any contract, therefore, for services to be performed in procuring or attempting to procure the passage or defeat of any public or private act by the use of any improper means or the exercise of undue influence, or by using personal solicitation, influence or persuasion with the members is void;[20] and any agreement for the payment of a fee for

[19] This was held to be the situation in Fairly v. Wappoo Mills, 44 S. Car. 227, 29 L. R. A. 215; Hughes v. Snell, 28 Okla. 828, 34 L. R. A. (N. S.) 1133, 25 Am. & Eng. Ann. Cas. 374.

[20] Marshall v. Baltimore & Ohio R. R. Co., 16 How. (U. S.) 314, 14 L. Ed. 953 (here the real attitude of the agent was to be concealed); Tool Co. v. Norris, 2 Wall. (U. S.) 45, 17 L. Ed. 868; Trist v. Child, 21 Wall. (U. S.) 441, 22 L. Ed. 623; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Nutt v. Knutt, 200 U. S. 12, 50 L. Ed. 348; Hazelton v. Scheckells, 202 U. S. 71, 50 L. Ed. 939; Burke v. Wood, 162 Fed. 533; Globe Works v. U. S., 45 Ct. Cl. 497; County of Colusa v. Welch, 122 Cal. 428; Weed v. Black, 2 McArthur (D. C.), 268, 29 Am. Rep. 618; Owens v. Wilkinson, 20 D. C. App. 51; Cook v. Shipman, 24 Ill. 614; Crichfield v. Bermudez Asphalt Paving Co., 174 Ill. 466, 42 L. R. A. 347; Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746; Kansas Pacific Ry. Co. v. McCoy, 8 Kan. 538; McBratney v. Chandler, 22 Kan. 692; Burney v.

such services is likewise void.[21] Moreover, where the fee is made contingent upon success many courts seem to hold contracts otherwise unobjectionable to be invalid because in such a case there would be such a strong incentive to the exercise of personal and sinister means to effect the object that it probably would not be resisted.[22]

§ 93. ——— So jealously do the courts scrutinize such contracts that they condemn the very appearance of evil, and often declare that it matters not that in the particular case nothing improper was done or was expected to be done. It is enough that such employments tend *necessarily and directly* to such results, even though in the particular case the end desired was or might have been attained by wholly unexceptionable means.[23] Neither is it material in such a case that the

Ludeling, 47 La. Ann. 73, 96; Frost v. Belmont, 6 Allen (Mass.), 152; Houlton v. Dunn, 60 Minn. 26, 51 Am. St. R. 493, 30 L. R. A. 737; McDonald v. Buckstaff, 56 Neb. 88; Richardson v. Scott's Bluff Co., 59 Neb. 400, 80 Am. St. R. 682, 48 L. R. A. 294; Harris v. Roof, 10 Barb. (N. Y.) 489; Rose v. Truax, 21 Barb. (N. Y.) 361; Harris v. Simonson, 28 Hun (N. Y.), 318; Carey v. Western U. Tel. Co., 47 Hun (N. Y.), 610, 20 Abb. N. C. 333, 15 N. Y. St. Rep. 204; Mills v. Mills, 40 N. Y. 543; Veazey v. Allen, 61 App. Div. (N. Y.) 119, aff'd, 173 N. Y. 359; Sweeney v. McLeod, 15 Oreg. 330; Clippinger v. Hepbaugh, 5 Watts & Serg. (Pa.) 315, 40 Am. Dec. 519; Spalding v. Ewing, 149 Pa. St. 375, 34 Am. St. R. 608, 15 L. R. A. 727; Powers v. Skinner, 34 Vt. 274, 80 Am. Dec. 677; Bryan v. Reynolds, 5 Wis. 200, 68 Am. Dec. 55; Chippewa Valley, etc., Ry. Co. v. Chicago, etc., Ry. Co., 75 Wis. 224, 6 L. R. A. 601; undertaking to get legislation for the mere purpose of affecting the market value of certain stock is unlawful. Veazey v. Allen, 173 N. Y. 359, 62 L. R. A. 362.

[21] Clippinger v. Hepbaugh, 5 Watts & Serg. (Penn.) 315, 40 Am. Dec. 519; Wood v. McCann, 6 Dana (Ky.), 366; Gil v. Williams, 12 La. Ann. 219, 68 Am. Dec. 767; and cases *supra*.

[22] See *ante*, § 86; and especially Chippewa Valley, etc., Ry. Co. v. Chicago, etc., Ry. Co., 75 Wis. 224, 6 L. R. A. 601; Richardson v. Scott's Bluff Co., 59 Neb. 400, 80 Am. St. R. 682, 48 L. R. A. 294 [but compare Stroemer v. Van Orsdel, 74 Neb. 132, 121 Am. St. R. 713, 4 L. R. A. (N. S.) 212]; Coquillard v. Bearss, 21 Ind. 479, 83 Am. Dec. 362; Crichfield v. Bermudez Paving Co., 174 Ill. 466, 42 L. R. A. 347; Gil v. Williams, 12 La. Ann. 219, 68 Am. Dec. 767; Spalding v. Ewing, 149 Pa. 375, 34 Am. St. R. 608, 15 L. R. A. 727; Owens v. Wilkinson, 20 D. C. App. 51. But see cases *contra*, in next section.

[23] Clippinger v. Hepbaugh, *supra;* Chippewa Valley, etc., Ry. Co. v. Chicago, etc., Ry. Co., *supra;* Mills v. Mills, *supra;* McKee v. Cheney, 52 Howard Pr. (N. Y.) 144; Gil v. Williams, *supra;* Powers v. Skinner, *supra;* Atcheson v. Mallon, 43 N. Y. 147, 3 Am. Rep. 678; Spence v. Harvey, 22 Cal. 337; Thomas v. Caulkett, 57 Mich. 392, 58 Am. Rep. 369.

"It matters not," says Rogers, J., in Clippinger v. Hepbaugh, *supra*, "that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts, or tends to cor-

contract expressly stipulates that no improper influence is to be used.[24]

The rule respecting contingent fees applies equally whether a fixed sum was agreed upon or whether the amount was left to be subsequently determined, as for example, where the promise is to pay a large or a liberal fee. Such a transaction furnishes no foundation for a recovery *quantum meruit*.[25]

§ 94. ——— Legitimate services.—It is not to be understood, however, that every contract for services to be rendered in endeavoring to procure or defeat legislation is unlawful. Services may be rendered, public in their nature and intended to reach the understandings of the legislators rather than to exercise any personal influence over them, which are perfectly legitimate.

Thus a person may lawfully be employed to draft a bill and request its introduction, prepare a petition, attend the taking of testimony, collect facts, prepare arguments and to submit them publicly, either before a committee of the legislature or the legislature itself, if permitted to do so, "because," as it is said by a learned judge, "a public discussion could not tend to deceive or corrupt the legislature, while personal solicitation and influence might produce that result." [26]

rupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal."

[There is, however, no doubt that courts, in their zeal to overthrow questionable contracts, often state too strongly the effect of a possible use of unlawful means and impute unlawful purposes to a degree that they would not do in other cases. See § 95, *post*.]

[24] Chippewa Valley, etc., Ry. Co. v. Chicago, etc., Ry. Co., *supra;* Marshall v. Balt. & O. R. Co., *supra;* Elkhart County Lodge v. Crary, *supra;* Sweeney v. McLeod, *supra*.

[25] Richardson v. Scott's Bluff Co., 59 Neb. 400, 80 Am. St. R. 682, 48 L. R. A. 294.

[26] Bryan v. Reynolds, 5 Wis. 200, 68 Am. Dec. 55; Trist v. Child, 21 Wall. (U. S.) 441, 22 L. Ed. 623; Salinas v. Stillman, 66 Fed. 677; Sedgwick v. Stanton, 14 N. Y. 289; Chesebrough v. Conover, 140 N. Y. 382; Wildey v. Collier, 7 Md. 273; Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384; Foltz v. Cogswell, 86 Cal. 542; Barber Asphalt Paving Co. v. Botsford, 56 Kan. 532; Kansas Pac. Ry. Co. v. McCoy, 8 Kan. 538; Denison v. Crawford Co., 48 Iowa, 211; Cole v. Hardware Co., 139 Iowa, 487, 18 L. R. A. (N. S.) 1161; Cavanagh v. Beer Co., 136 Iowa, 236; Stroemer v. Van Orsdel, 74 Neb. 132, 121 Am. St. R. 713, 4 L. R. A. (N. S.) 212. "It must be the right of every citizen who is interested in any proposed legislation to employ an agent for compensation payable to him, to draft his bill and explain it to any committee or to any member of a committee or of the legislature fairly and openly, and ask to have it introduced; and contracts which do not provide for more, and services which do not go farther, in our judgment violate no principle of law or rule of public policy." Earl, J., in Chesebrough v. Conover, *supra*.

In Eisenstein v. Maiden Lane Safe Deposit Co., 113 N. Y. Supp. 967, the

It has sometimes been thought that this rule could apply only to lawyers or similar professional advocates, but it is clear that it is properly subject to no such limitation. It is the nature of the methods used, rather than the profession of the advocate, which is material.

In several cases of this sort, the fact that compensation was contingent upon success was held not of itself to invalidate the contract.[27]

§ 95. ——— Ambiguous cases.—But conceding that all contracts for the use of unlawful means or even for personal solicitation and influence, are void, and granting, as we must, that contracts for open presentation and legitimate argument or for professional services as an advocate openly avowed, are valid, what shall be done with a contract for services which does not on its face disclose whether it belongs to the one class or the other? It may be that, in such a case, the end to be accomplished is such, or the character, position or relation of the parties is such, that the court can see clearly, although it is nowhere so stated, that personal solicitation or other improper influence was contemplated or could alone be resorted to.[28] In such a case, the contract is properly to be condemned. But suppose that the contract neither by its terms nor by any necessary implication involves the use of such improper means. Suppose that while improper means *might* be resorted to, the end *could equally* be attained by proper means, and the parties offer to show or can show that in fact no improper means

defendant needed from the city council a permit for the construction of railing near defendant's building, and a lawyer was employed "to examine the law with respect to such matter, and to present the resolution to the board of aldermen, and to see various aldermen and explain to them the reasons and necessity for favorable action on said resolution and to explain its purport to the mayor, so that it would meet his approval." For successful accomplishment of his employment the lawyer was to have a $300 fee. The contract was held not improper and the defendant was held liable for the lawyer's fee to one who had employed the lawyer at the defendant's request.

[27] Chesebrough v. Conover, 140 N. Y. 382; Sedgwick v. Stanton, 14 N. Y. 289; Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384; Barber Asphalt Paving Co. v. Botsford, 56 Kan. 532; Stroemer v. Van Orsdel, 74 Neb. 132, 121 Am. St. R. 713, 4 L. R. A. (N. S.) 212.

[28] Such was the case which the court had in mind in Bryan v. Reynolds, 5 Wis. 200, 68 Am. Dec. 55 [although opinions might differ as to whether the principle was correctly applied to the case then in hand], when it said "We know of no way by which a person who is not a member of the legislature can prosecute or superintend a claim before that body, except by means of the members themselves, or some of them. He could not, therefore, comply with the contract on his part without resorting to personal solicitation with the members of the legislative body. We therefore think that the contract was *by its terms* an agreement to pay money for a consideration which is inconsistent with public policy, and that the agreement is for that reason void."

were contemplated or employed. Shall the court, in such a case, *presume* that improper means were used or intended to be used, and that the contract is therefore invalid? To this question there should, it would seem, be but one answer, though in fact another answer seems sometimes to be given. In their zeal to defeat questionable contracts, courts appear at times to have over looked presumptions of innocence which are ordinarily given effect even in much more serious matters.[29] As stated in a recent case, "It is sometimes lost sight of that the presumptions in human affairs are in favor of innocence rather than of guilt, and that such rule applies in testing such a contract as the one we have here by the principles of sound morals." [30]

The principle which should control in dealings of this nature was stated in the same case as follows: "If, properly construed, the contract does not, by its terms or by necessary implication, contain anything illegal, or tend to any violation of sound morals, the fatal element should not—through any over zealous desire to fortify against the deplorable effects of lobbying contracts, strictly so called, which all recognize and should unhesitatingly condemn—be injected into it by mere suspicion and conjecture that the parties intended to do some illegal act, or a legal act by illegal means, or that the agreement might probably have led to improper influences upon, or tampering with, official conduct, and thereby defeat the contract."

§ 96. ——— How fair contract affected by illegal acts done under it.—Moreover, where the contract itself is unobjectionable upon its face, the mere fact that the party employed did objectionable acts in the execution of it, will not necessarily render the contract invalid, although that fact may be of importance in determining the tendency of such contracts.[31] As said in one case,[32] "The plaintiff may have rendered illegal services and yet the defendant's promise may have

[29] See, for example, what is said in Houlton v. Dunn, 60 Minn. 26, 30 L. R. A. 737, 51 Am. St. Rep. 493, disapproved in Houlton v. Nichol, 93 Wis. 393, 33 L. R. A. 166, 57 Am. St. R. 928. The case of Chippewa Valley Ry. Co. v. Chicago, etc. Ry. Co. 75 Wis. 224, 6 L. R. A. 601, cited *supra*, although not disapproved in Houlton v. Nichol, is certainly questionable for the same reason.

That the presumption of innocence should be indulged, see Salinas v. Stillman, 66 Fed. 677; Barber Asphalt Paving Co. v. Botsford, 56 Kan. 532; Knut v. Nutt, 83 Miss. 365, 102 Am. St. R. 452, 200 U. S. 12; Drake v. Lauer, 93 App. Div. 86, 15 N. Y. Ann. Cas. 58, 182 N. Y. 533; Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487, 18 L. R. A. (N. S.) 1161.

[30] Houlton v. Nichol, *supra*.

[31] Barry v. Capen, 151 Mass. 99, 6 L. R. A. 808; Dunham v. Hastings Pavement Co., 56 N. Y. App. Div. 244; Chesebrough v. Conover, 140 N. Y. 382; Kerr v. American Pneumatic Service Co., 188 Mass. 27; Fox v. Rogers, 171 Mass. 546; Church v. Proctor, 66 Fed. 240; Hardy v. Stonebraker, 31 Wis. 640.

[32] Barry v. Capen, *supra*.

been in consideration of the plaintiff's promising to perform or performing legal ones only. If the contract was legal, it would not be made illegal by misconduct on the part of the plaintiff in carrying it out.[33] The judge having found that the contract was legal, the fact that the plaintiff did things against public policy, if it be a fact, can be considered only as bearing by way of illustration upon the question whether the tendency of the contract necessarily was to induce the doing of such things. If that was its necessary tendency to an appreciable degree, it was void, whether it induced the acts or not."

§ 97. Obtaining consent of property owners to proposed public improvements or to proposed business, etc.—Analogous to the questions considered in the preceding sections is that which arises upon employments to obtain the consent of property owners to proposed public improvements, such as the paving of streets, and the like, or to the licensing of saloons and similar places in particular localities, where the consent of a prescribed proportion is made by law a condition precedent to the action. Such a condition is prescribed in order to guard against ill advised or extravagant proposals, and contemplates the actual consideration of the question by those whose interests it most directly affects. That such consents should be procured by bribery or personal solicitation is prejudicial to the public welfare, and an employment to so procure them could not be upheld.[34] But it is ordinarily necessary that some one shall undertake to interview the persons interested and obtain their consent if they are in favor of the project. This may be done gratuitously by some one of the parties concerned, but as it may often require more time than any one interested can

[33] Citing Howden v. Simpson, 10 Ad. & El. 793, 818, 819, s. c. 2 Per. & Dav. 714, 740, 9 Cl. & Fin. 61, 68; Barrett, J., in Powers v. Skinner, 34 Vt. 274, 284, 285, 80 Am. Dec. 677. In Mulligan v. Smith, 32 Colo. 404, it is held that the fact that the employer thought the agent *would* use unfair means, would not defeat the contract if the contract did not contemplate that he would, if he did not agree to do so, and did not in fact do so.

[34] In Riggs v. Ryan, 121 N. Y. App. Div. 301, the defendant had promised to reimburse the plaintiff if the plaintiff would pay $50 to a specified owner of neighboring property and thereby obtain such owner's consent to the presence of a saloon upon the defendant's property. Such consent was necessary under the state statute before a license could be obtained. After the plaintiff had spent the money and successfully obtained the consent, he was denied recovery against the defendant on the ground that his contract was contrary to public policy.

See also Howard v. First Independent Church of Baltimore, 18 Md. 451; Farson v. Fogg, 205 Ill. 326; Doane v. Chicago Cy. Ry. Co., 160 Ill. 22, 35 L. R. A. 588; Maguire v. Smock, 42 Ind. 1, 13 Am. Rep. 353, which are not agency cases but involve this kind of contract; but compare Makemson v. Kaufman, 35 Ohio St. 444.

devote to it, there seems to be no good reason why an agent may not be employed to do the work or why his employment should *per se* be deemed illegal. That he is to be paid only in case he secures the requisite number ought not, of itself alone, to invalidate the employment, even though it may be admitted that it should subject the contract to close scrutiny.[88]

§ 98. Procuring contracts from government or heads of departments.—Employments to procure contracts from federal, state or municipal governments, boards or bodies for the purchase of supplies, the leasing of buildings, or the employment of labor, and the like, rest upon the same principles as those considered in the preceding sections. It is legitimate and proper to lay before the officer having the matter in charge, facts, information and arguments intended for the public good and calculated to enlighten the understanding and secure wise and intelligent action. Parties desiring to furnish to the government—whether national, state or municipal,—its necessary supplies, or to undertake the performance of its public works, may lawfully employ an agent to present their bids or offers; to call attention to their facilities for the proper performance of their undertakings, and to make, in their

[88] In Union Elevated R. Co. v. Nixon, 199 Ill. 235, the defendant wished to construct an elevated loop in the city of Chicago, an ordinance authorizing such construction was necessary and no such ordinance could be passed by the city council except upon petition signed by the owners of land representing one half of the frontage. The plaintiff was hired for $500 a month "to use best efforts" to obtain the signatures of property owners to their consent. In case of success the plaintiff was within thirty days to have an additional $5,000. The contract was held valid and not opposed to public policy. The court said: "The obtaining of consents was legitimate and the employment of the plaintiff legal, and we fail to see how the actions of the plaintiff in obtaining consents can be said to be contrary to public policy by reason of the fact, alone, that he was to be paid extra compensation for such services after the ordinance permitting the improvement had been passed. While a contract to obtain the passage of an ordinance, would be void, as against public policy, because under our system of law and morals, influence to be exercised over a legislative body to secure the passage of a law or an ordinance, cannot legally be made the subject matter of contract, a contract to obtain consents from the property owners abutting upon streets upon which improvements are to be made, payment for such services to be made after the ordinance permitting such improvement shall be passed, would not, when, as here, the person obtaining such consents had nothing to do with the legislative body or the passage of the ordinance, make the obtaining of such consents contrary to public policy, so that the person obtaining such consents could not recover the compensation agreed to be paid him therefor."

See also Sussman v. Porter, 137 Fed. 161.

behalf, such public and open arguments in favor of their propositions as they may be afforded opportunity.[36]

But where the employment contemplates the bringing to bear of improper, sinister or personal influence, or where its natural and direct tendency is in that direction, it is opposed to public policy and void.[37]

The fact that the compensation was to be contingent upon success

[36] Trist v. Child, 21 Wall. (U. S.) 441, 22 L. Ed. 623; Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Pease v. Walsh, 49 How. Pr. (N. Y.) 269; Swift v. Aspel, 40 Misc. 453; Bergen v. Frisbie, 125 Cal. 168; Kerr v. American Pneumatic Service Co., 188 Mass. 27; Kansas City Paper House v. Foley Ry. Printing Co., 85 Kan. 678, 39 L. R. A. (N. S.) 747.

Thus in Beal v. Polhemus, 67 Mich. 130, Polhemus gave Beal a note to be paid "as soon as the postoffice is moved into" a building which Beal was then erecting on property near that belonging to Polhemus, the latter believing that its location there would enhance the value of his own property. Beal was an active and prominent politician, but while there was some evidence that he had said in relation to similar contracts with other parties that he could control the senators from his state, there was no evidence that he made any such representations to Polhemus or that the using of any such influence constituted any part of the consideration of the contract. The postoffice was duly moved into the building, but Polhemus refused to pay the note, alleging it to be invalid as against public policy. In an action to recover upon it the trial court found as a fact that in securing the postoffice to be placed and located in his building, Beal used no undue influence upon any department or officers of the government, and was not guilty of any corruption or corrupt practice in making the contract, and did no more than any honorable man might do in renting his building to the government for the use of a postoffice, and he was allowed to recover.

See also Green Co. v. Blodgett, 159 Ill. 169, 50 Am. St. R. 146; Fearnley v. De Mainville, 5 Colo. App. 441. But compare Benson v. Bawden, 149 Mich. 584, 13 L. R. A. (N. S.) 721.

[37] Thus in a case very similar to Beal v. Polhemus, *supra*, the party had given his notes in consideration that the owners of the building "would use all proper persuasion to secure the location of the postoffice in their room." One of the owners was a personal friend of the postmaster-general and represented to him that the location was a suitable one and urged upon him the propriety of placing the postoffice in their building and this was done. The court, however, held that the agreement was against public policy and that the notes were void: Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746. See also, Woodman v. Innes, 47 Kan. 26, 27 Am. St. R. 274; Spence v. Harvey, 22 Cal. 336, 83 Am. Dec. 69; Hutchen v. Gibson, 1 Bush (Ky.), 270; Hayward v. Nordberg Mfg. Co., 85 Fed. 4; Garman v. United States, 34 Ct. Cl. 237; Russell v. Courier Co., 43 Colo. 321; Flynn v. Bank of Mineral Wells, 53 Tex. Civ. App. 481; Hovey v. Storer, 63 Maine, 486; Benson v. Bawden, 149 Mich. 584, 13 L. R. A. (N. S.) 721; Edwards v. Goldsboro, 141 N. Car. 60, 4 L. R. A. (N. S.) 589, 8 A. & E. Ann. Cas. 479.

An employment to procure contracts through "favoritism" is within the forbidden class. Drake v. Lauer, 93 N. Y. App. Div. 86, 15 N. Y. Ann Cas. 58, aff'd 182 N. Y. 533.

has been given substantially the same effect here as in the cases dealt with in the preceding sections.[88]

§ 99. ——— **Illustrations.**—Thus in a leading case decided by the supreme court of the United States, one Norris had been employed by the Providence Tool Company to endeavor to obtain from the war department an order for a large number of muskets, and, for his compensation, he was to receive whatever the government should agree to pay for each musket above a certain sum. Norris thereupon set himself to work, to use his own language, "concentrating influence at the war department," and finally succeeded in obtaining a favorable contract. Afterwards a dispute arose between him and the tool company, as to the amount of his commission, and he brought an action to recover it.

The supreme court, by Mr. Justice Field, said: "The question then is this: Can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other element can lawfully enter into the transaction so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other element into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds. * * * Agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception."[89]

§ 100. ——— **Contrary views.**—The broad doctrine thus laid down by the supreme court has not, however, passed unchallenged. Thus in a case soon after decided by the New York court of appeals,

[88] Held not to make an otherwise good contract bad. Kansas City Paper House v. Foley Ry. Printing Co., 85 Kan. 678, 39 L. R. A. (N. S.) 747.

[89] Tool Co. v. Norris, 2 Wall. (U. S.) 45, 17 L. Ed. 868, and the same rule was laid down and applied in Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539.

See also Russell v. Courier Co., 43 Colo. 321; Coquillard's Adm'r v. Bearss, 21 Ind. 479, 83 Am. Dec. 362.

that court, one judge dissenting, held that a contract, fair upon its face, to obtain contracts from the government for a commission, which might be carried out by perfectly legitimate methods, could not be deemed to be opposed to public policy where it did not appear that unobjectionable methods were contemplated.[40] Other courts have also reached the same conclusion.[41]

§ 101. Services in prosecuting claims.—Contracts for services to be rendered in the prosecution of claims against governments and municipal bodies stand upon the same footing. As is said by a learned judge in a case involving the right of an attorney to recover upon such a contract: "Professional services, to prepare and advocate just claims for compensation, are as legitimate as services rendered in court in arguing a cause to convince a court or jury that the claim presented, or the defence set up against a claim presented by the other party, ought to be allowed or rejected. Parties in such cases require advocates, and the legal profession must have a right to accept such employment, and to receive compensation for their services; nor can courts of justice adjudge such contracts illegal, if they are free from any taint of fraud, misrepresentation or unfairness." [42]

But where the contract contemplates that the allowance of the claim is to be sought by using improper means or by bringing personal solicitation, influence or persuasion to bear upon the officer vested with the duty of decision, the undertaking is unlawful and the courts will not enforce it.[43]

[40] Lyon v. Mitchell, 36 N. Y. 235, 682, 93 Am. Dec. 502. (It was said in this case that the fact that the agent was of the same political party as the government executives, did not change the rule.)

In Swift v. Aspell, 40 Misc. 453, the court expresses the opinion that this is still the law in New York notwithstanding that in Veazey v. Allen, 173 N. Y. 359, 62 L. R. A. 362, the federal cases were cited with apparent approval.

[41] In Kerr v. American Pneumatic Service Co., 188 Mass. 27, a contract of employment, for a compensation in part contingent upon success, to procure franchises from governmental bodies, was held valid since it was not invalid upon its face, and could be executed without resorting to objectionable methods.

[42] Clifford, J. in Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Burbridge v. Fackler, 2 McArthur (D. C.), 407; Foltz v. Cogswell, 86 Cal. 542; Denison v. Crawford Co., 48 Iowa, 211; Knut v. Nutt, 83 Miss. 365, 102 Am. St. R. 452, aff'd 200 U. S. 12. The prosecution of a claim cannot be deemed to be opposed to public policy where the legislature authorizes it. Davis v. Com., 164 Mass. 241, 30 L. R. A. 743; Pennebaker v. Williams, 136 Ky. 120.

[43] Devlin v. Brady, 32 Barb. (N. Y.) 518; McCallum v. Corn Products Co., 131 App. Div. 617. *A fortiori*, is the undertaking void where the claim is a fictitious one and is to be presented as the claim of the agent rather than as that of the principal. Spotswood v. Bentley, 130 Ala. 310.

Where the claim requires legisla-

§ 102. Compromise of crime.—It is a high requirement of the public policy that crimes should be investigated and punished, and the law frowns upon all attempts to suppress investigation or to defeat the administration of justice. Any contract, therefore, for services to be rendered for the purpose of stifling prosecutions, or of obstructing, delaying or preventing the due course of public justice in its efforts to punish crime, is opposed to public policy and void.

Thus an agreement with an attorney, for a contingent fee, to settle a criminal case so as to avoid a prosecution;[44] an agreement to pay one for endeavoring to induce the complainant in a prosecution for felony to discontinue the proceedings;[45] an undertaking for compensation to endeavor to prevent the finding of an indictment,[46] and, if found, to endeavor to have the public authorities dismiss it;[47] an agreement for a contingent fee to use one's influence with a prosecuting attorney to induce him to bring about a lighter punishment than otherwise, and to permit the accused to turn state's evidence with the hope of receiving a pardon therefor;[48] and an agreement with an attorney to attempt to induce the sheriff to refrain from arresting A, who is charged with murder, the object being to give A an opportunity to escape,[49] are void.

tion to make it payable, and the attorney is to procure this, and the fee is contingent upon success, the contract, upon analogy to those involving the procurement of legislation, is held invalid. Spalding v. Ewing, 149 Pa. 375, 15 L. R. A. 727, 34 Am. St. Rep. 608.

[44] Ormerod v. Dearman, 100 Penn. St. 561, 45 Am. Rep. 391.

[45] Rhodes v. Neal, 64 Ga. 704, 37 Am. Rep. 93; Ricketts v. Harvey, 78 Ind. 152; Averbeck v. Hall, 14 Bush. 505 (Ky.); Crisup v. Grosslight, 79 Mich. 380.

See also, Henderson v. Palmer, 71 Ill. 579, 22 Am. Rep. 117; Smith v. Blachley, 188 Pa. 550, 68 Am. St. R. 887; Smith v. Richmond, 114 Ky. 303, 24 Ky. L. 1117, 102 Am. St. Rep. 283; McNeese v. Carver, 40 Tex. Civ. App. 129.

[46] Weber v. Shay, 56 Ohio St. 116, 60 Am. St. Rep. 743, 37 L. R. A. 230. See also Kirkland v. Benjamin, 67 Ark. 480; Shaw v. Reed, 30 Me. 105; Sumner v. Summers, 54 Mo. 340; Riddle v. Hall, 99 Pa. 116.

[47] Barron v. Tucker, 53 Vt. 338, 38 Am. Rep. 684.

[48] Wight v. Rindskopf, 43 Wis. 344.

[49] Arrington v. Sneed, 18 Tex. 135. See also Buck v. First National Bank, 27 Mich. 293, 15 Am. Rep. 189; Haines v. Lewis, 54 Iowa, 301, 37 Am. Rep. 202; McMahon v. Smith, 47 Conn. 221, 36 Am. Rep. 67; Dodson v. Swan, 2 W. Va. 511, 98 Am. Dec. 787; Way v. Greer, 196 Mass. 237.

In Arlington Hotel Co. v. Ewing, 124 Tenn. 536, 38 L. R. A. (N. S.) 842, an attorney undertook to suspend the enforcement of a prohibition statute by obstructive tactics calculated to discourage prosecution. In a suit for compensation the court held that such a contract was necessarily void as are all contracts made with a view to the violation of a statute.

In Small v. Lowrey, — Mo. App. —, 148 S. W. 132, a contract for services in endeavoring to get the complaining witness to leave the state, was held bad.

§ 103. Encouragement of crime—Agreement by attorney to defend future prosecutions.—It needs no citation of authorities to show that contracts for the commission of crimes are void, and so are contracts for participation in or aid to be rendered in furthering criminal acts and practices.[50] And even though the contract may not take on these grosser forms, yet if its natural and necessary tendency is to encourage the commission of crimes it will fall within the prohibited class. Thus a contract by an attorney to defend future prosecutions for violations of the law,—for example, a contract by an attorney to defend all members of a liquor dealers' association for a fixed salary for a definite period,—is held to be opposed to public policy as directly tending to encourage violations of the law which but for the existence of the contract the parties might never have committed.[51]

§ 104. Services in procuring appointment to office.—Contracts to procure the appointment of a person to public office fall within the same principles.[52] These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power must necessarily lower the character of the appointments to the great detriment of the public. While, therefore, a candidate for such an office may undoubtedly lawfully employ an agent to openly urge his fitness for the place, agreements for compensation to procure these appointments by personal persuasion or influence tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy.[53]

[50] See *ante* § 89; Cook v. Shipman, 24 Ill. 614.

[51] Bowman v. Phillips, 41 Kan. 364, 3 L. R. A. 631, 13 Am. St. R. 292.

[52] See Mechem on Public Officers, § 350 *et seq.*, where the subject is more fully discussed.

[53] Tool Co. v. Norris, 2 Wall. (U. S.) 45, 17 L. Ed. 868; Gray v. Hook, 4 N. Y. 449; Gaston v. Drake, 14 Nev. 175, 33 Am. Rep. 548; Filson v. Himes, 5 Penn. St. 452, 47 Am. Dec. 422; Faurie v. Morin, 4 Martin (La.), 39, 6 Am. Dec. 701; Outon v. Rodes, 3 A. K. Marsh. (Ky.) 432, 13 Am. Dec. 193; Basket v. Moss, 115 N. C. 448, 44 Am. St. R. 463, 48 L. R. A. 842; Hager v. Catlin, 18 Hun (N. Y.), 448; Haas v. Fenlon, 8 Kans. 601; Liness v. Hesing, 44 Ill. 113, 92 Am. Dec. 153; Edwards v. Randle, 63 Ark. 318, 58 Am. St. Rep. 108, 36 L. R. A. 174; Harris v. Chamberlain, 126 Mich. 280; McCall v. Whaley, 52 Tex. Civ. App. 64. See also Caton v. Stewart, 76 N. C. 357, in which a contract by which a government employee hired the plaintiff to continue a business, that the need for the employee's place should not cease, was held void as against public policy.

Employment to get the present officer to resign and to get the plaintiff appointed in his place, is opposed to

§ 105. Same rule applies to private offices and employments.—The same principles apply to contracts to procure private offices and employments, as well as those which are public or political in their nature. Open and fair presentation of an applicant's qualifications for the position is legitimate, and such presentation may lawfully be undertaken for a compensation, where the agent's relations to the subject matter and the appointing power will permit, and the fact that he comes as a hired advocate is disclosed.

But where it is contemplated that the agent is to conceal his agency and assume the position of a disinterested friend or adviser;[54] or where the appointment is to be sought by bringing to bear personal influence or persuasion;[55] or where the undertaking of the commission at all is inconsistent with duties already assumed or imposed by law, the contract is repugnant to the public policy.[56]

Thus where A, an attorney, employed B, the agent of C, to endeavor to persuade C to discharge a certain other attorney he was then employing, and to employ A instead, and promised B, by way of compen-

public policy. Eversole v. Holliday, 131 Ky. 202. See also Hunter v. Nolf, 71 Pa. 282.

In Law v. Law, 3 P. Wms. 391, 24 Eng. Reprints, 1114, equitable relief including a surrender of the bond and injunction against suit upon it, was granted against a bond for the payment of an annual sum actually in consideration of personal influence used to secure appointment to office. The court acted upon the doctrine of public policy.

[54] See Bollman v. Loomis, 41 Conn. 581, where A. for a fee from C. undertook to pose as the confidential friend and adviser of B. and thus induce him to purchase property of C. Followed in Simon v. Garlitz, — Tex. Civ. App. —, 133 S. W. 461. See also Twentieth Century Co. v. Quilling, 130 Wis. 318.

"This," says Chief Justice Shaw, in Fuller v. Dame, 18 Pick. (Mass.) 472, in speaking of this rule, "is founded upon the general consideration of fitness and expediency. Such advice and solicitation, in whatever form the agency may be exerted, are understood to be disinterested and to flow from a single regard to the interests of the parties. They are lawful only so far as they are free and disinterested. If such advice and solicitation, thus understood to be pure and disinterested, may be justly offered from mercenary motives, they would produce all the consequences of absolute misrepresentation and falsehood. It is understood to be the offer of disinterested good offices, and the measure proposed, to be recommended by the unbiased judgment of the person offering it; whereas, it is in fact an offer flowing from unavowed motives of pecuniary interest, and the recommendation is the result of a judgment biased by a hope of a large reward. If rewards might be taken in consideration of the exertion of direct or indirect influence, either by the person acting under it, or by others who should be influenced and moved by him, it would destroy all confidence, it would lead to false and unfair representations and dealings, and be productive of infinite mischief."

[55] See note 57, *post*.

[56] See note 57, 58 and 59, *post*.

sation, to divide with him such fees as A might receive, it was held that the agreement was void.[57] So a contract that in consideration of B's purchasing of A certain stock in a corporation, A would procure B's appointment as treasurer [58] or manager [59] or cashier [60] thereof, is void. Such appointments should be made because of the personal fitness of the applicant, and not because the appointing power is open to personal influence or can be bought for a price. So A, who has been requested to recommend to C, a suitable person for employment whom he could endorse as in every way responsible and reliable, cannot lawfully undertake to secure the position for B in consideration of B's paying him a fee.[61]

§ 106. Services in improperly influencing elections.—Purity of elections, and the free, fair and intelligent exercise of the ballot, uninfluenced by other considerations than the candidate's fitness and the general good of the community, are of paramount public importance, and any agreement for the rendition of services which have for their object, or which immediately tend to, the introduction of other elements, as the bribery of voters or the bringing to bear upon them of personal influence, solicitation or persuasion, is, in accordance with the principles already referred to, clearly opposed to public policy and void.

Thus where one who was a candidate for the office of district attorney, employed another to "use all of his influence" with the voters of the county to secure the candidate's election, and who promised as compensation therefor, that if he should be elected, he would divide the fees of the office with the other, the court said: "Such a contract can-

[57] Byrd v. Hughes, 84 Ill. 174, 25 Am. Rep. 442; Meguire v. Corwine, 101 U. S. 108, 25 L. Ed. 539.

An employment to induce prospective litigants to employ the defendant as attorney, the agent to be compensated by a share of the fees which may be received, is opposed to public policy. Langdon v. Conlin, 67 Neb. 243, 108 Am. St. R. 643, 60 L. R. A. 429; Alpers v. Hunt, 86 Cal. 78, 21 Am. St. R. 17, 9 L. R. A. 483.

A contract with the large creditor of a firm to secure A's appointment as special receiver, the creditor to be compensated by $1,000 out of receiver's commissions to apply upon its claims against the firm is invalid. McGraw v. Trader's National Bank, 64 W. Va. 509. See also Hirshback v. Ketchum, 5 App. Div. 324 (under a code); *In re* Clark, 184 N. Y. 222 (a disbarment proceeding).

[58] Guernsey v. Cook, 120 Mass. 501; Noyes v. Marsh, 123 Mass. 286; Jones v. Scudder, 2 Cin. Sup. Ct. 178.

[59] Wilbur v. Stoepel, 82 Mich. 344, 21 Am. St. R. 568. To like effect: Dickson v. Kittson, 75 Minn. 168, 74 Am. St. Rep. 447; West v. Camden, 135 U. S. 507, 34 L. Ed. 264; Wood v. Manchester F. Ins. Co., 30 N. Y. Misc. 330, aff'd 54 App. Div. 522. Compare Almy v. Orne, 165 Mass. 126.

[60] As of a National Bank, Noel v. Drake, 28 Kan. 265, 42 Am. Rep. 162; see also Railroad Co. v. Ryan, 11 Kan. 602; Haas v. Fenlon, 8 Kan. 601; Tool Co. v. Norris, 2 Wall. (U. S.) 45, 17 L. Ed. 868.

[61] Holcomb v. Weaver, 136 Mass. 265.

not be upheld. Its tendency was to corrupt the people upon whose integrity and intelligence the safety of the state and nation depends,—to lead voters to work for individual interests rather than the public welfare." [62]

So where one agreed to render services in procuring the election of a certain candidate to the office of sheriff upon consideration that if successful he should be appointed deputy, the court held the agreement void.[63] And where one for money or other personal profit, agrees to use his influence in an election against what he believes to be for the public good, the contract is void, though as a matter of fact he uses no unlawful means.[64]

§ 107. ——— **What services legitimate.**—But it is not unlawful for a candidate for a public office, particularly where his candidacy extends over a considerable territory, to employ another to make public speeches in his behalf, or to prepare, print or distribute arguments upon the questions at issue, or to use other open and honorable means to promote the success of his candidacy, where the object is to convince the understandings of the voters by public means and not to bring personal or other improper influences to bear upon their weaknesses or prejudices.[65]

[62] Gaston v. Drake, 14 Nev. 175, 33 Am. Rep. 548; Martin v. Wade, 37 Cal. 168; see also Swayze v. Hull, 3 Halstead (N. J.), 54, 14 Am. Dec. 399. An agreement to pay another to "work and canvass" voters for the purpose of securing the promisor's nomination for an office is void. Keating v. Hyde, 23 Mo. App. 555. A contract to use the influence of plaintiff's newspaper to secure defendant's nomination to public office, is opposed to public policy. Livingston v. Page, 74 Vt. 356, 93 Am. St. R. 901, 59 L. R. A. 336; King v. Raleigh, etc., Railroad Co., 147 N. C. 263, 125 Am. St. R. 546.

[63] Stout v. Ennis, 28 Kan. 706. And a like ruling was made in Robertson v. Robinson, 65 Ala. 610, 39 Am. Rep. 17. See also Salling v. McKinney, 1 Leigh (Va.), 42, 19 Am. Dec. 722; Groton v. Waldoborough, 11 Me. 306, 26 Am. Dec. 530.

[64] Nichols v. Mudgett, 32 Vt. 546.

[65] "There is a clear distinction," says Lewis, P. J., in Keating v. Hyde, 23 Mo. App. 555, "between the purchase of services to be devoted only to an advertising of the fact that one is or desires to be a candidate, and the purchase of services to be employed in advocating his peculiar merit and eligibility so as to influence the choice of the voter. No public policy forbids the making of compensation, under agreement or otherwise, for printing or distributing announcements, or for the employment of any proper agency which may bring the fact of a person's candidacy more prominently before the public eye. The information thus disseminated is essential to the intelligent determination of the voter's choice. But it becomes a very different thing when money is paid or promised for efforts to control the voter's free agency in selecting the object of his suffrage." See also Murphy v. English, 64 How. Pr. (N. Y.) 362.

§ 108. Services in procuring pardons.—The same general principles which underlie the questions just discussed, govern here. An agent or attorney may lawfully be employed to attend an open or public hearing of the executive or board of pardons, and make such legitimate arguments and present such petitions, memorials, statements of fact and evidence as are appropriate to bring before the pardoning power all the considerations which may be properly taken into account in behalf of the convicted person;[66] but all employments having for their object or natural tendency the using of any improper or sinister means, or which contemplate the exercise of personal influence or solicitation, especially if for a contingent fee, are looked upon by the law as demoralizing in their tendency, opposed to public policy and void, even though in the particular case no improper means were used or contemplated.[67]

§ 109. ——— How when conviction illegal.—But where the conviction was unwarranted, as because the court had no jurisdiction, or where there was a grave doubt as to the constitutionality of the statute under which the conviction was had, it is held that no rule of public policy would be violated by legitimate endeavor to secure the pardon or release of the accused.[68]

§ 110. Services in procuring or suppressing evidence.—Like considerations apply to undertakings to procure evidence for use before legal tribunals. It is entirely lawful and proper for a party to an action or controversy to employ another to ascertain what documentary and other evidence, and what witnesses are available; to obtain the names of the witnesses and a memorandum of their testimony; to cause them to be duly supœnaed for attendance upon trial, and to take such other steps as may be necessary and proper to enable the party to present all the existing and lawful evidence that is pertinent to his case. This service is legitimate, and tends to promote and secure the due administration of justice.[69]

[66] Moyer v. Cantieny, 41 Minn. 242; Chadwick v. Knox, 31 N. H. 226, 64 Am. Dec. 329; Bremsen v. Engler, 49 N. Y. Super. Ct. 172; Formby v. Pryor, 15 Ga. 258; Bird v. Breedlove, 24 Ga. 623.

But *contra*, see Norman v. Cole, 3 Esp. 253.

[67] Deering v. Cunningham, 63 Kan. 174, 54 L. R. A. 410; Hatzfield v. Gulden, 7 Watts (Penn.), 152, 32 Am. Dec. 750; Thompson v. Wharton, 7 Bush (Ky.), 563, 3 Am. Rep. 306; Haines v. Lewis, 54 Iowa, 301, 37 Am. Rep. 202; Kribben v. Haycraft, 26 Mo. 396; McGill's Admr. v. Burnett, 7 J. J. Marsh. (Ky.) 640.

[68] Thompson v. Wharton, *supra;* Timothy v. Wright, 8 Gray (Mass.), 522.

[69] Chandler v. Mason, 2 Vt. 193; Lucas v. Pico, 55 Cal. 126; Wilkinson v. Oliveira, 1 Scott (Eng. C. P.) 461, 1 Bing. N. C. 490; Cobb v. Cowdery, 40

But contracts by which the agent undertakes, or which have for their object, the procuring or furnishing, not simply of such evidence as actually exists and may lawfully be produced, but of evidence sufficient to *win* the case or to *establish* a certain fact or to *convict* a certain person, or the procuring of witnesses to testify in a certain manner, or to procure the production of testimony which could be produced only by a violation of a legal duty, stand upon a different basis. The intention and methods of the parties in a given case may be honorable and proper, but the natural and probable result of such an undertaking is to defeat the administration of justice and corrupt the morals of the people by putting a premium upon perjury and by holding out a direct incentive to the subornation of witnesses. It requires no extended argument to establish that such undertakings are contrary to sound public policy and void.[70]

Vt. 25, 94 Am. Dec. 370; Johnson v. Pletsch, 94 Ill. App. 459.

It is not unlawful to employ persons to ascertain whether offences are being committed, it not being contemplated that they shall encourage or bring about violations of the law. People v. Whitney, 105 Mich. 622.

Neither is it objectionable to agree to pay another for producing or disclosing existing and lawful evidence within his knowledge or control and which he can produce or disclose without violating any legal duty. Casserleigh v. Wood, 14 Colo. App. 265, aff'd as Wood v. Casserleigh, 30 Colo 287, 97 Am. St. R. 138; Lucas v. Pico, *supra;* Cobb v. Cowdery, *supra;* Smith v. Hartsell, 150 N. Car. 71, 22 L. R. A. (N. S.) 203. But compare Casserleigh v. Wood, with Young v. Thompson, reported in the same volume, and referred to in the following notes, where a contract not only to supply certain evidence but also to suppress certain testimony was held invalid. (Wood v. Casserleigh in the state court is also denied in Casserleigh v. Wood, 119 Fed. 308.) But where a person had conspired with another to defraud the government and then agreed to furnish evidence of his conspiracy, for a consideration, to a person interested in showing it in order to establish his own right, it was held that the agreement to pay the consideration would not be enforced. Hagan v. Wellington, 7 Kan. App. 74.

A contract by which plaintiff agreed to pay $1,000 for evidence that R. Co. was selling machines at less than a certain price, the evidence to be obtained by entering into a contract with the R. Co. was not invalid. Case Threshing Mch. Co. v. Fisher, 144 Iowa, 45.

[70] Gillette v. Logan County, 67 Ill. 256; Goodrich v. Tenney, 144 Ill. 422, 36 Am. St. R. 459, 19 L. R. A. 371; Hoyt v. Macon, 2 Col. 502; Lucas v. Allen, 80 Ky. 681; Patterson v. Donner, 48 Cal. 369; Hughes v. Mullins, 36 Mont. 267, 13 A. & E. Ann. Cas. 209; Harris v. More, 70 Cal. 502; Sherman v. Burton, 165 Mich. 293, 33 L. R. A. (N. S.) 87; Quirk v. Muller, 14 Mont. 467, 43 Am. St. R. 647, 25 L. R. A. 87; Lyon v. Hussey, 82 Hun (N. Y.), 15, 63 N. Y. St. Rep. 531; Kennedy v. Hodges, 97 Ga. 753; Getchell v. Welday, 2 Ohio N. P. 390, 4 Ohio S. & C. P. Dec. 65; Bowling v. Blum (Tex. Civ. App.), 52 S. W. 97; Neece v. Joseph, 95 Ark. 552, 30 L. R. A. (N. S.) 278; Barngrover v. Pettigrew, 128 Iowa, 533, 111 Am. St. R. 206, 2 L. R. A. (N. S.) 260. See also Delbridge v. Beach, 66 Wash. 416.

Equally pernicious, and for similar reasons, are undertakings to suppress or destroy evidence by concealing, removing or tampering with witnesses, or by compassing the destruction of the means of proof.[71]

§ 111. Unlawful dealings in stocks and merchandise—Gambling in "futures," etc.—So a contract for services to be rendered in unlawful dealings in stocks or merchandise is void. These contracts as-

"We fully agree," said the court in Patterson v. Donner, "that a stipulation that one shall, in consideration of a large sum of money, not only procure witnesses, but procure them to swear to a particular fact, is unlawful."

In Gillett v. Logan County, *supra*, the board of supervisors of the county desiring to prove a certain election to have been carried by illegal means employed an agent to procure testimony for that purpose, agreeing to pay him $100 for the first ten votes which the testimony procured by him proved to be illegal, $200 for the next ten votes, and so on, and an additional sum of $1,200, to be paid when the case was decided in the county's favor. These agreements were held to be void.

In Perry v. Dicken, 105 Pa. 83, 51 Am. Rep. 181, an agreement with an attorney to take a case upon a contingent fee was upheld, even though it was known that the attorney was an indispensable witness.

So public policy requires that witnesses shall testify as to facts within their knowledge without any extra fee beyond the legal fee whether fixed or contingent. See Clifford v. Hughes, 139 App. Div. 730; Burnett v. Freeman, 125 Mo. App. 683; s. c. 134 Mo. App. 709; and the following cases in which a physician's contract for fees for expert testimony in amount contingent upon the amount recovered was held bad. Laffin v. Billington, 86 N. Y. Supp. 267, 14 N. Y. Ann. Cas. 360; Sherman v. Burton, 165 Mich. 293, 33 L. R. A. (N. S.) 87.

In Feltner v. Feltner, 132 Ky. 705, a witness in a pending suit who had been employed for $1,000 to remain out of the state over the time of the trial sued a third person to whom the money had been given to hold until the trial was over and the witness had performed. On the ground of the illegality of the whole contract, as one against public policy, recovery was denied.

In Hough v. State, 145 App. Div. 718, a contract to pay an expert witness for his services, provided his estimate should be substantially less than that of the expert on the other side, was held to be opposed to public policy.

[71] Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Bostick v. McLaren, 2 Brev. (S. Car.) 275; Badger v. Williams, 1 D. Chip. (Vt.) 137; Hoyt v. Macon, 2 Col. 502; Valentine v. Stewart, 15 Cal. 387.

An agreement to pay an employee his salary and expenses to keep out of the reach of process issued to compel him to be a witness against his employer is void. Bierbauer v. Wirth, 5 Fed. Rep. 336, 10 Biss. 60.

So an agreement to keep off the stand is likewise void. Young v. Thompson, 14 Colo. App. 294.

So of an agreement to get a certain witness out of jail and "get him away." Crisup v. Grosslight, 79 Mich. 380.

In Lazenby v. Lazenby, 132 Ga. 836, an agreement "to remain non-committal" as to a pending suit "and not to volunteer any information or assistance to the other side" was held invalid. The court said "If it is not a contract in terms to suppress testimony, it * * * is so closely akin that it falls falls under the condemnation which the law pronounces against contracts entered into for the purposes of suppressing testimony."

sume a great variety of forms but one of the most common is the agreement by a broker to buy or sell goods for future delivery upon "margins." As has been shown in another place,[72] there is no legal objection to a sale of goods to be delivered in the future, even though the seller is not now possessed of the goods and has no other means of acquiring them than to go into the market and buy them. If the parties actually intend a sale and delivery of the goods, the contract is entirely valid;[73] but if, under the guise of such a contract, valid on its face, the real intention of the parties is not to deliver the goods, but merely to speculate in the rise or fall of prices and to pay the difference between the contract price and the market price at the time agreed upon, then the transaction becomes a mere wagering one and is unlawful.[74] In some of the states, this rule is confirmed or extended by statute.[75]

[72] See Mechem on Sales, § 1030 *et seq.*, where this subject is more fully discussed.

[73] If the parties intend actual purchase or sale and delivery of the goods on the part of the broker the contract is valid, even although it is the contemplation of the parties that there shall be no delivery into the principal's personal possession, but that the broker shall again turn the transaction for him. Thompson v. Williamson, 67 N. J. Eq. 212. See Wagner v. Engel-Millar Co., 144 Wis. 486.

[74] Irwin v. Williar, 110 U. S. 499, 28 L. Ed. 225; Embrey v. Jemison, 131 U. S. 336, 33 L. Ed. 172; Bibb v. Allen, 149 U. S. 481, 37 L. Ed. 819; Clews v. Jamieson, 182 U. S. 461, 45 L. Ed. 1183; Cobb v. Prell, 15 Fed. 774; Union Nat'l Bank v. Carr, 15 Fed. 438; Lehman v. Feld, 37 Fed. 852; Marengo Abstract Co. v. Hooper, — Ala. —, 56 So. 580; Raymond v. Parker, 84 Conn. 694; Cunningham v. Nat'l Bank, 71 Ga. 400, 51 Am. Rep. 266; Hentz v. Booz, 8 Ga. App. 577; Lyon v. Culbertson, 83 Ill. 33, 25 Am. Rep. 349; Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414; Samuels v. Oliver, 130 Ill. 73; Pope v. Hanke, 155 Ill. 617, 28 L. R. A. 568; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Wilson v. Nat'l Fowler Bank, 47 Ind. App. 689; Murry v. Ocheltree, 59 Iowa, 435; Timmons v. Timmons, 145 Ky. 259; O'Brien v. Luques, 81 Me. 46; Morris v. Western U. Tel. Co., 94 Me. 423; Stewart v. Schall, 65 Md. 289, 57 Am. Rep. 327; Burt v. Myer, 71 Md. 467; Billingslea v. Smith, 77 Md. 504; Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390; Mohr v. Miesen, 47 Minn. 228; Crawford v. Spencer, 92 Mo. 498, 1 Am. St. R. 745; Connor v. Black, 119 Mo. 126; Sprague v. Warren, 26 Neb. 326, 3 L. R. A. 679; Flagg v. Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308; Cameron v. Durkheim, 55 N. Y. 425; Bigelow v. Benedict, 70 N. Y. 202, 26 Am. Rep. 573; Dows v. Glaspel, 4 N. Dak. 251; Kahn v. Walton, 46 Ohio St. 195; Peters v. Grim, 149 Pa. 163, 34 Am. St. R. 599; Wagner v. Hildebrand, 187 Pa. 136; Riordan v. Doty, 50 S. Car. 537; Waite v. Frank, 14 S. Dak. 626; Barnard v. Backhaus, 52 Wis. 593; Everingham v. Meighan, 55 Wis. 354; Wall v. Schneider, 59 Wis. 352, 48 Am. Rep. 520; Bartlett v. Collins, 109 Wis. 477, 83 Am. St. R. 928; Wagner v. Engel-Millar Co., 144 Wis. 486; and many other cases cited in Mechem on Sales, § 1031.

[75] See for example: *Arkansas*, Dig. Stats. 1894, §§ 1634, 1635; *Georgia*, Code 1895, § 3537; *Illinois*, Hurd's Stats. 1901, ch. 38, §§ 130, 131; *Iowa*,

§ 112. ——— Unless otherwise declared by statute it is not enough to make the contract invalid that one party only intended merely to speculate; it must appear that such was the intention of both parties [76] and that this was their intention when they made the contract.[77] By the weight of authority, a party who alleges that a contract, fair

Code 1897, § 4967; *Michigan*, C. L. 1897, §§ 11, 373; *Mississippi*, Ann. Code, §§ 2117, 1120, 1121; *Missouri*, Rev. Stats. 1899, §§ 2337, 2338; *Ohio*, Bates' Ann. Stats. § 6934a, *et seq.*; *South Carolina*. Code 1902, § 2310 *et seq.*; *Wisconsin*, Stats. 1898, § 2319a. In *California*, see Constitution, art. IV, sec. 26; *Montana*, Rev. Codes § 8416.

If contract void when made, it is not validated by subsequent change in statute. Willcox v. Edwards, 162 Cal. 455.

[76] See Mechem on Sales, § 1032; Crawford v. Spencer, 92 Mo. 498, 1 Am. St. Rep. 745; Wall v. Schneider, 59 Wis. 352, 48 Am. Rep. 520; Murry v. Ocheltree, 59 Iowa, 435; Scanlon v. Warren, 169 Ill. 142; Nash-Wright Co. v. Wright, 156 Ill. App. 243; Pixley v. Boynton, 79 Ill. 351; Ennis v. Edgar, 154 Ill. App. 543; Conner v. Robertson, 37 La. Ann. 814, 55 Am. Rep. 521; Ponder v. Cotton Co., 100 Fed. Rep. 373; Donovan v. Dalber, 124 Mich. 49; Gregory v. Wendell, 40 Mich. 432; Mohr v. Miesen, 47 Minn. 228; Barnes v. Smith, 159 Mass. 344; Hocomb v. Kempner, 214 Ill. 458; Thompson v. Williamson, 67 N. J. Eq. 212. But see McGrew v. Produce Exchange, 85 Tenn. 572, 4 Am. St. Rep. 771, and Connor v. Black, 119 Mo. 126.

The question of the intention of the parties is not to be determined simply by what the parties call their contract or by their professed declarations therein or by the form they have given it. It is a question of fact and in deciding it the circumstances of the parties, their position, their facilities to actually deliver or receive the goods, their ability to pay for them, and the like, may all be taken into account. Mechem on Sales, § 1036; Gaw v. Bennett, 153 Pa. 247, 34 Am. St. Rep. 699; Rogers v. Marriott, 59 Neb. 759; Sprague v. Warren, 26 Neb. 326, 3 L. R. A. 679; Press v. Duncan, 100 Iowa, 355; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Nave v. Wilson, 12 Ind. App. 38; Kullman v. Simmens, 104 Cal. 595; Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302; Dows v. Glaspel, 4 N. Dak. 251; Waite v. Frank, 14 S. Dak. 626; Burt v. Myer, 71 Md. 467; Embrey v. Jemison, 131 U. S. 336, 33 L. Ed. 172.

[77] If the parties really intended an actual sale and delivery at the time they made the contract, the mere fact that they afterwards settle upon the basis of differences does not destroy the validity. Wall v. Schneider, 59 Wis. 352, 48 Am. Rep. 520; Conner v. Robertson, 37 La. Ann. 814, 55 Am. Rep. 521. Or that one of them thought the other would be willing to settle upon that basis, if there was no agreement to that effect. Barnes v. Smith, 159 Mass. 344; MacDonald v. Gessler, 208 Pa. 177.

But though they may not originally have intended an actual delivery, if the buyer afterwards elects to treat it as an actual purchase this is held to validate the contract. Estate of Taylor, Appeal of Lex, 192 Pa. 313; Young v. Glendinning, 194 Pa. 550.

In an action against a broker under Massachusetts Statutes 1890 c. 437, § 2, for money paid on margins, the fact that the defendant actually purchased the stock at the request of the plaintiff and held it subject to his own control until his lien was paid properly may be considered by the jury upon the question whether the defendant had reasonable cause to believe that the plaintiff was carrying on a wagering contract. Post v. Leland, 184 Mass. 601.

upon its face, was really intended as a cover for an illegal transaction, has the burden of proving it.[78] Parol evidence may be used to show the intention though the contract was in writing.[79]

Where the contract is really of the forbidden sort, the courts will not lend their aid to either party in enforcing it, but will usually leave the parties where they have put themselves. The agent, therefore, where he must be deemed a guilty participant, cannot recover his commissions, nor can he have indemnity for liability incurred or reimbursement for advances made, moneys paid or losses sustained.[80]

Moreover, even though the contract be not invalid because both parties did not have an intention to gamble, it is held that, on general grounds of public policy, the one who did intend to gamble can not recover. The other party's innocence while it may enable him to recover on the contract, is held not to enure to the benefit of the guilty party.[81]

[78] Clews v. Jamieson, 182 U. S. 461, 45 L. Ed. 1183; Irwin v. Williar, 110 U. S. 499, 28 L. Ed. 225; Roundtree v. Smith, 108 U. S. 269, 27 L. Ed. 722; Crawford v. Spencer, 92 Mo. 498, 1 Am. St. Rep. 745; Cockrell v. Thompson, 85 Mo. 510; Pratt v. Boody, 55 N. J. Eq. 175; First Nat. Bank v. Oskaloosa Packing Co., 66 Iowa, 41; Conner v. Robertson, 37 La. Ann. 814, 55 Am. Rep. 521; Bigelow v. Benedict, 70 N. Y. 202, 26 Am. Rep. 578; Story v. Salomon, 71 N. Y. 420; Rumsey v. Berry, 65 Me. 570; Williams v. Carr, 80 N. Car. 294; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Clay v. Allen, 63 Miss. 426; Perryman v. Wolffe, 93 Ala. 290; Marengo Abstract Co. v. Hooper, — Ala. —, 56 So. 580; Beadles v. McElrath, 85 Ky. 230, 8 K. L. R. 848; Mohr v. Miesen, 47 Minn. 228; Pixley v. Boynton, 79 Ill. 351.

The rule in Wisconsin seems to be the other way. Barnard v. Backhaus, 52 Wis. 593; Bartlett v. Collins, 109 Wis. 477, 83 Am. St. R. 928; Cassoday, C. J., dissenting in a strong opinion.

In Nebraska it is held that when doubt is thrown by the testimony upon the validity of the transaction, it then devolves upon the defendant to show that the purchase was *bona fide* and for actual delivery. Sprague v. Warren, 26 Neb. 326, 3 L. R. A. 679; Cobb v. Prell, 15 Fed. 774, 5 McCrary, 80, at circuit, is to the same effect.

[79] Wheeler v. Metropolitan Stock Exchange, 72 N. H. 315; Hentz & Co. v. Booz, 8 Ga. App. 577; Wright v. Vaughan, 137 Ga. 52. See Collins v. Blantern, 2 Wilson, 347; *In re* Canfield, 190 Fed. 266.

[80] This question is more fully discussed, *post*, Book IV, Chap. IV, on the Liability of the Principal to the Agent.

[81] Most of these cases cited above are ones in which the claim of an innocent broker was not allowed to be defeated by the principal's proof that the principal intended an illegal transaction. But in Barnes v. Smith, *supra*, the broker who expected that the contract which he secured for his principal would be used as a wagering contract was nevertheless allowed his commission, because the contract was good in form and the other party to it did not appear to have intended or treated it as a wagering contract. On the other hand in Hurd v. Taylor, 181 N. Y. 231, a broker was denied recovery of his

§ 113. Employments creating monopolies or in restraint of trade.—Again, contracts whose purpose is to create an unlawful combination, to bring about a monopoly in articles of common need, to unreasonably restrain trade, to create "corners" in wheat, stock, and other commodities, to control the price of staple articles of commerce, and the like, are opposed to public policy and unenforceable by the rules of the common law, and these rules have frequently been confirmed or extended by express statutes. No contract of agency can lawfully be made for such a purpose.[82]

But a contract to make one the exclusive agent of a certain person or for a certain commodity or in a certain place is not opposed to public policy;[83] nor is a contract to act only as agent for a certain person

commissions in a case when he failed to show any actual purchase or sale of stock and admitted that he regarded the transaction as a wagering arrangement. The court did not disclose certainly what was thought to be the intention of the defendant, and so far as appears he may have been innocent.

In Nash-Wright Co. v. Wright, 156 Ill. App. 243, there was evidence that Wright, the broker's principal, intended to gamble and did not contemplate an actual delivery of the grain; there was no evidence, however, from which such an intention could be imputed to the third persons with whom the contracts were made. In speaking of the contracts, Mack, J., said: "It does not, however, follow that Wright could have enforced them; in fact the law is clearly settled that the gambling intent on his part, even though not participated in by the other side, would prevent him from suing on the contract. This is not because the contract is in itself illegal; mutual illegal intent is necessary for this; but because it is against a sound public policy to permit one who has entered into transactions with an illegal intent, to recover thereon." In Higgins v. McCrea, 116 U. S. 671, 29 L. Ed. 764, which was relied on in the above case, the question was as to whether the defendant could recover under a counterclaim certain sums which he had advanced to the plaintiffs, who were brokers, for the purpose of negotiating gambling contracts. The plaintiffs who were innocent of any intention to participate in gambling had improperly cancelled certain contracts which had been entered into on behalf of the defendant. The court held that the defendant was not entitled to recover, and that the fact that the plaintiffs were innocent of any unlawful purpose, and might themselves have sued on the contract, did not enure to the benefit of the defendant, who confessed that he was attempting to promote an illegal and criminal venture.

[82] Samuels v. Oliver, 130 Ill. 73; Leonard v. Poole, 114 N. Y. 371, 11 Am. St. Rep. 667, 4 L. R. A. 728; Raymond v. Leavitt, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Wright v. Crabbs, 78 Ind. 487; Craft v. McConoughy, 79 Ill. 346; Morris Run Coal Co. v. Barclay Coal Co., 68 Penn. St. 173; Arnot v. Coal Co., 68 N. Y. 558; Street v. Houston Ice Co. (Tex. Civ. App.), 55 S. W. 516. Services in bringing about the consolidation of competing corporations stand upon the same footing. Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. Ed. 979.

[83] Woods v. Hart, 50 Neb. 497; New York Trap Rock Co. v. Brown, 61 N. J. L. 536.

or for the sale of a certain commodity [84] although a contract to sell only goods of a certain sort might be deemed in violation of some of the statutes; [85] nor is a contract that, for a given time after the termination of such an agency, the former agent will not engage with a rival firm or carry on the same business or solicit the former customers.[86]

§ 114. Employment to induce violation of contracts.—Where the act of inducing the violation of a contract would be a legal wrong,—as it often is,—an employment to accomplish that result would also be legally wrong and unenforceable.

§ 115. Deception or defrauding of third persons or the public.—Contracts which have for their purpose, or whose natural and necessary tendency is, to deceive and defraud third persons or the public are clearly opposed to public policy although they may not be forbidden by enactment, and any undertaking to act as agent in promoting or executing such contracts is therefore unenforceable.[87] A typical illustration is found in the familiar "Bohemian Oats" swindle in which a person, who was usually being himself deluded and defrauded, undertook to sell oats or other grain to others upon terms and conditions which could only be carried into effect by deceiving and defrauding those who might be induced to buy.[88]

[84] Weiboldt v. Standard Fashion Co., 80 Ill. App. 67.

[85] See White Dental Mfg. Co. v. Hertzberg (Tex. Civ. App.), 51 S. W. 355.

[86] Eureka Laundry Co. v. Long, 146 Wis. 205, 35 L. R. A. (N. S.) 119; Carter v. Alling, 43 Fed. Rep. 208; Mills v. Dunham, [1891] 1 Ch. 576; Rosenbaum v. U. S. Credit System Co., 65 N. J. L. 255, 53 L. R. A. 449; Rogers v. Maddocks, [1892] 3 Ch. 346; Dubowski v. Goldstein, [1896] 1 Q. B. 478, but compare Perls v. Saalfeld, [1892] 2 Ch. 149. [*Contra*, where the restraint is without territorial limitation. Kinney v. Scarborough Co., 138 Ga. 77, 40 L. R. A. (N. S.) 473.]

So, of a contract that an agent would not, after the termination of the relation, "interfere directly or indirectly with the business" of his former employer, it being limited to a certain district. Barr v. Craven, 89 L. T. Rep. 574.

[87] See Scott v. Brown, [1892] 2 Q. B. 724.

[88] Davis v. Seeley, 71 Mich. 209; McNamara v. Gargett, 68 Mich. 454, 13 Am. St. R. 355; Sutton v. Beckwith, 68 Mich. 303, 13 Am. St. R. 344; Merrill v. Packer, 80 Iowa, 542; Shipley v. Reasoner, 80 Iowa, 548. Compare Rush v. Broussard (Miss.), 30 So. Rep. 635.

The same principle is applied in the following cases, in which the courts thought that, on the face, contracts allowing an agent to sell an agency contract to a subagent who should have similar power to appoint another subagent, so as to provide for an endless chain, were not plans for agencies to sell the goods, but schemes for getting people to buy worthless rights and for taking each purchaser into the scheme that he might try it on others. Twentieth Century Co. v. Quilling, 130 Wis. 318; Bank v. Hanks, 142 Mo. App. 110.

§ 116. "Voting trusts."—The constating instruments of private corporations ordinarily permit shareholders to vote at corporate meetings by agent or "proxy." Powers of attorney for that purpose are, therefore, ordinarily entirely valid. In some states, by statute, the period during which any such power may endure is limited,—for example, to one year.[89] Even though there be no such limitation upon its duration, a power of this sort, like any other, is ordinarily revocable at the pleasure of the giver.[90] The fact that a longer period is named does not alter this result, nor the fact that the authority is called "irrevocable." [91]

Powers of attorney to vote, like others, may be made irrevocable, in accordance with well settled rules, by being given as a security, or by being "coupled with an interest," within the legal definition of that phrase.[92]

Beyond this, there is much apparent conflict in the cases, many holding that any attempt by the shareholder to permanently separate the voting power from the general ownership of the stock is contrary to

[89] A common sort of provision is that "No person shall vote at any meeting of the stockholders of any bank or railroad company, by virtue of any power of attorney not executed within one year next preceding such meeting; and no such power shall be used at more than one annual meeting of such corporation." Connecticut General Stats. (1888) § 1927.

[90] Vanderbilt v. Bennett, 6 Pa. Co. Ct. Rep. 193, 19 Ab. N. C. 460.

[91] Vanderbilt v. Bennett, *supra;* Blackstone v. Buttermore, 53 Pa. 266.

[92] See for example, Mobile, etc., R. Co. v. Nicholas, 98 Ala. 92; Boyer v. Nesbitt, 227 Pa. 398, 136 Am. St. R. 890.

[93] See, for example, the following: Shepaug Voting Trust Cases, 60 Conn. 553, in which a syndicate purchased a majority of the stock in a certain railroad and placed it in the hands of a trustee company to vote for five years as it should be directed by a committee of the members of the syndicate. At the suit of certain members of the syndicate who had declared a revocation as to so much of the stock as they owned, the contract was held invalid and said to be against the policy of the law which required that stockholders exercise their own judgment.

Harvey v. The Linville Improvement Co., *et al.*, 118 N. C. 693, 54 Am. St. R. 749, 32 L. R. A. 265, in which a majority of stockholders in a corporation transferred their stock to a trustee to be voted *in solido* for five years and the pooling agreement and the trust were held invalid at the instance of a purchaser of the equitable interest in some of the shares. The court argued that every owner of stock must be free to vote for the interest of the whole corporation and not of any one clique.

Sheppard v. Power Co., 150 N. C. 776. In the case of a three year pool, the court allowed an injunction against the trustee restraining him from voting the stock at the suit of a subsequent purchaser of equitable interest in some of the stock.

Bridgers v. First National Bank, 152 N. C. 293, 31 L. R. A. (N. S.) 1199. A voting trust was created for the purpose of keeping one particular man from gaining control of the bank. If any of the equitable own-

public policy and void.[93] Other cases permit dealing with stock upon substantially the same conditions as any other kind of property, that is, they determine the case by reference to the nature of the acts and not solely with reference to the kind of property.[94]

As the question is primarily one of corporations rather than agency, no extended discussion of it will be attempted here.[95]

§ 117. Marriage brokerage.—A marriage brokerage contract is an agreement for the procurement of a marriage for a commission or other compensation. Such contracts are clearly opposed to public policy and void, even though in the given case no fraud was practiced on either party. Their tendency is to bring to pass mistaken and unhappy marriages, to countervail parental influences in the training and education of children, and to tempt the exercise of an undue and pernicious influence in respect to the most sacred of human relations.[96]

ers wished to sell or pledge his stock the trustee was to have first option. At the instance of another stockholder, who had not joined in the pool an injunction was granted restraining the trustee from voting the shares.

Morel v. Hoge, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, in which it had been agreed between two factions of stockholders in a corporation, at the time of the corporate organization that one faction should indefinitely have the right to name the majority of the directors. This agreement was held bad and not to bind the parties to it, because it deprived the majority of the stockholders from acting in whatever way they might deem for the benefit of the whole corporation. Cone v. Russell, 48 N. J. Eq. 208, in which the plaintiffs had contracted with the defendants that defendants should have proxy to vote the plaintiffs' shares of stock for five years, upon consideration that one of plaintiffs should be constantly employed as manager, and the agreement was held contrary to public policy. White v. Thomas Inflatable Tire Co., 52 N. J. Eq. 178; Kreissl v. Distilling Co., 61 N. J. Eq. 5, in both of which the court holds the voting trust against public policy, because matters of discretion were irrevocably given into the hands of one who had no other or any beneficial interest in the shares which he voted or in the corporations. Warren v. Pim, 66 N. J. Eq. 353, in which a voting trust for five years was held invalid and the court said that its opinion rested both upon statutory and upon common law grounds. Moses v. Scott, 84 Ala. 608, where a court of equity refused specifically to enforce a voting "trust" agreement and placed its determination largely upon the fact that the restriction amounted to a restraint of trade.

[94] See Brightman v. Bates, 175 Mass. 105; Carnegie Trust Co. v. Security L. Ins. Co., 111 Va. 1, 31 L. R. A. (N. S.) 1186; Smith v. San Francisco, etc., Co., 115 Cal. 584, 56 Am. St. R. 119, 35 L. R. A. 309; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24; Kantzler v. Bensinger, 214 Ill. 587. See also Winsor v. Commonwealth Coal Co., 63 Wash. 62, 33 L. R. A. (N. S.) 63.

[95] For discussions, see 1 Yale L. Jour. 1, 13 id. 109; 17 Harvard L. Rev. 364; 10 Columbia L. Rev. 658; 64 Albany L. Jour. 187; 69 Central L. Jour. 390; Note, 16 L. R. A. (N. S.) 1140; Note, 56 Am. St. Rep. 138.

[96] Hermann v. Charlesworth, [1905] 2 K. B. 123, 1 A. & E. Ann. Cas. 691; White v. Equitable Nuptial Benefit

Moneys paid to the broker under such a contract, can, it is held, be recovered back although the broker has brought about introductions and has incurred expense in so doing.[97]

§ 118. Corruption of agents, corporate officers, etc.—Contracts for services to be rendered in attempting to corrupt, bribe or mislead the servant or agent of another, whether he be the agent of a private individual or a corporate officer or agent, as by giving him secret gratuities, fees or commissions, to induce him to disregard, slight or ignore his principal's interests, or to be less zealous and watchful in the discharge of his duty, or to assume to his principal the appearance of a disinterestedness or candor which he does not in fact feel, or to enter into the secret service of the other party, or in any other manner to violate the trust and confidence reposed in him, are obviously corrupt and void.[98]

Union, 76 Ala. 251, 52 Am. Rep. 325, 20 Cent. L. Jour. 288; Johnson v. Hunt, 81 Ky. 321; *In re* Grobe, 127 Iowa, 121; Hellen v. Anderson, 83 Ill. App. 506; Duval v. Wellman, 124 N. Y. 156; Morrison v. Rogers, 115 Cal. 252, 56 Am. St. R. 95; Place v. Conklin, 34 App. Div. 191; Wenninger v. Mitchell, 139 Mo. App. 420; Crawford v. Russell, 62 Barb. (N. Y.) 92.

See also James v. Jellison, 94 Ind. 292, 48 Am. Rep. 151.

A contract to hasten an intended marriage is a marriage brokerage contract and is void. Jangraw v. Perkins, 76 Vt. 127, 104 Am. St. R. 917.

[97] Hermann v. Charlesworth, *supra*. But see Chalfant v. Payton, 91 Ind. 202, 46 Am. Rep. 586. Cf. Place v. Conklin, *supra*.

[98] See Atlee v. Fink, 75 Mo. 100, 42 Am. Rep. 385, where an agreement secretly made by a lumber dealer with one employed to supervise the erection of buildings for another and to pass upon accounts for materials, but not to make purchases, by which the lumber dealer agreed to pay him a commission on sales made to the employer through his influence, was held void as against public policy.

So where a secret gratuity is given to the agent with the intention of influencing his mind in favor of the giver of the gratuity, and the agent on subsequently entering into a contract with such giver on behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to that particular contract, the transaction is fraudulent as against the principal and the contract is voidable at his option. Smith v. Sorby, 3 Q. B. Div. 552. Even though the agent was not in fact influenced against his principal's interests, the contract is corrupt. Harrington v. Victoria Graving Dock Co., 3 Q. B. Div. 549. See also Bollman v. Loomis, 41 Conn. 581; Western Union Tel. Co. v. Railroad Co., 1 McCrary (U. S. C. C.), 418; Summers v. Carey, 69 App. Div. 428; Sirkin v. Fourteenth Street Store, 124 App. Div. 384, reversing s. c. 54 Misc. 135, 55 Misc. 288; Smith v. Townsend, 109 Mass. 500.

A contract by an architect, who is to oversee the erection of a building for the owner, to enter into relations with a builder whose work he was thus expected to supervise, cannot be enforced. Page v. Moore, 235 Pa. 161.

Where it is part of the contract of employment of a salesman that he may give bribes or bonuses to the

These principles find frequent application, among many other cases, in those in which gifts of money, land or other things have been made or promised to the officers, agents or directors of railroad companies in consideration that they will use their influence or authority in favor of locating the railroad line or its stations or shops at particular places. The interests of the railroad company and of the public are alike imperiled by such contracts.[99] The same rules also apply to undertakings to secure, by such methods, elections or appointments to corporate offices, the taking of particular corporate action, the purchase of supplies and the like.[1]

§ 119. Corruption of public officers.—The doctrines of the preceding section apply also, it scarcely needs to be said, to the case of the public officer. Many specific illustrations have already been given in the preceding pages, but it may still further be laid down generally that any contract with such an officer tending to lead him to disregard his duty, or to be less zealous in its performance, or to be more partial to one than another, or to do more than his legal duty, as, for example, by promising him extra fees or rewards for doing for the promisor what it was already his duty under the law to do, or for doing for the promisor what it was not his duty to do at all, or by promising or paying him less to induce or permit the officer to do less than his legal duty, is within the prohibited class.[2]

agents of purchasers and that his employer will reimburse him for the amounts so expended, the whole contract of employment is unenforceable. Smith v. Crockett Co., 85 Conn. 282, 39 L. R. A. (N. S.) 1148.

[99] Woodstock Iron Co. v. Extension Co., 129 U. S. 643, 32 L. Ed. 819; Fuller v. Dame, 18 Pick. (Mass.) 472; Bestor v. Wathen, 60 Ill. 138; Linder v. Carpenter, 62 Ill. 309; St. Louis, etc., R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; Reed v. Johnson, 27 Wash. 42, 57 L. R. A. 404; Roby v. Carter, 6 Tex. Civ. App. 295; McCowen v. Pew, 153 Cal. 735, 21 L. R. A. (N. S.) 800; Sauerhering v. Rueping, 137 Wis. 407; Holladay v. Patterson, 5 Ore. 177; Peckham v. Lane, 81 Kan. 489, 25 L. R. A. (N. S.) 967, 19 A. & E. Ann. Cas. 369; McGuffin v. Coyle, 16 Okla. 648, 6 L. R. A. (N. S.) 524. To same effect: Lum v. McEwen, 56 Minn. 278.

Where the agent is an officer of a municipal corporation, the same rule applies. Railroad Co. v. Morris, 10 Ohio Cir. Ct. 502, 6 O. C. D. 640, 3 Ohio Dec. 479, aff'd 57 Ohio St. 658. See also Noble v. Davison, — Ind. —, 96 N. E. 325.

[1] See Singers-Bigger v. Young, 166 Fed. 82; Dieckmann v. Robyn, 162 Mo. App. 67.

[2] See Mechem on Public Officers, §§ 359–378; Brown v. First Nat. Bank, 137 Ind. 655, 24 L. R. A. 206; Cheney v. Unroe, 166 Ind. 550, 117 Am. St. R. 391; Adams County v. Hunter, 78 Iowa, 328, 6 L. R. A. 615; Burck v. Abbott, 22 Tex. Civ. App. 216; Gallaher v. Lincoln, 63 Neb. 339; Montague v. Massey, 76 Va. 307; Orr v. Sanford, 74 Mo. App. 187; Leveroos v. Reis, 52 Minn. 259.

Of course, if the matter lies wholly outside the domain of his official duties, he is as free to contract as an

§ 120. Other cases involving same principles.—Other cases involving the same principles may be cited. Thus, an undertaking for a contingent compensation to endeavor to procure the discharge of a drafted man;[3] an agreement for using personal influence with public officers to secure the favorable allowance of an account;[4] an employment for a contingent compensation of one, who ostensibly acted only as a disinterested physician, to use his endeavors in procuring from a railroad company as large damages as possible for one who has been injured in a railroad accident;[5] an agreement to pay one for assuming to be the confidential friend and adviser of another, and in that capacity to advise the latter to buy goods of the promisor;[6] an employment to buy shares in order to create the appearance of a demand for them so that future purchasers may be deceived as to their value;[7] an employment to obtain government land by fraudulent and perjured testimony;[8] and the like,—all violate the rules of public policy and are not enforceable. This list might be greatly extended, but the cases given are sufficient to illustrate the principles.

§ 121. Agent must participate in unlawful purpose.—In order, however, to render the undertaking in these cases void, as between the principal and the agent, it is necessary that the agent should have participated in the unlawful purpose of the principal, or that, knowing of that purpose, he has directly assisted in giving it effect. Thus where the agent, as for example a broker, is employed simply to bring parties together to contract, he is not affected by the illegality of the contract which they alone make, without his aid or participation, although he knew, or had reason to believe, that they intended to enter into an unlawful arrangement.[9] But if he makes or assists in making the unlawful contract for them, or if he brings them together for the very purpose of entering into an illegal arrangement, he is *particeps criminis*

individual. See McCandless v. Allegheny Bessemer Steel Co., 152 Pa. 139; Edmunds v. Bullett, 59 N. J. L. 312.

[3] Bowman v. Coffroth, 59 Penn. St. 19; O'Hara v. Carpenter, 23 Mich. 410.

[4] Devlin v. Brady, 32 Barb. (N. Y.) 518.

[5] Thomas v. Caulkett, 57 Mich. 392, 58 Am. Rep. 369. See also Jerome v. Bigelow, 66 Ill. 452, 16 Am. Rep. 597.

[6] Bollman v. Loomis, 41 Conn. 581. To same effect: McDonnell v. Rigney, 108 Mich. 276; Labinsks v. Holst, 84 N. Y. Supp. 991.

[7] Scott v. Brown, [1892] 2 Q. B. 724.

[8] Moore v. Moore, 130 Cal. 110, 80 Am. St. R. 78.

[9] Roundtree v. Smith, 108 U. S. 269, 27 L. Ed. 722; Ormes v. Dauchy, 45 N. Y. Super. Ct. 85; Patrick v. Littell, 36 Ohio St. 79; DeGroot v. VanDuzer, 17 Wend. (N. Y.) 170; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Crane v. Whittemore, 4 Mo. App. 510.

with them.[10] In the cases which come most frequently before the courts the broker is so immediately a party and so clearly a participant in their means and ends, that he cannot hope to escape the consequences.[11]

Clearly if the undertaking was lawful on its face, and the agent was ignorant of the facts or the purpose which alone rendered it unlawful, he is not affected by its illegality.[12]

The effect of the illegality upon the mutual rights of the principal and agent will be more fully discussed in later sections.[13]

§ 122. Whole contract void when entire.—It is well settled that where a contract is an entire one, and contains some elements which are legal and others which are illegal, it cannot be so apportioned as to select and sustain those elements only which are lawful. If any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void, and no action can be maintained upon it.[14] Where, however, the contract is a divisible or ap-

[10] "It is certainly true," says Matthews, J., in Irwin v. Williar, 110 U. S. at p. 510, "that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction."

To same effect: Embrey v. Jemison, 131 U. S. 336, 33 L. Ed. 172; Pope v. Hanke, 155 Ill. 617, 28 L. R. A. 568; Kahn v Walton, 46 Ohio St. 195; Dows v. Glaspel, 4 N. Dak. 251; Wagner v. Hildebrand, 187 Pa. 136.

[11] See Bartlett v. Collins, 109 Wis. 477, 83 Am. St. R. 928; Lyons v. Coe, 177 Mass. 382; Cashman v. Root, 89 Cal. 378, 23 Am. St. R. 482, 12 L. R. A. 511; Sprague v. Warren, 26 Neb. 326, 3 L. R. A. 679; Morris v. Norton, 75 Fed. Rep. 912; Lully v. Morgan, 21 D. C. 88; Violett v. Mangold (Miss.), 27 So. 875; Northrup v. Buffington, 171 Mass. 468; O'Brien v. Luques, 81 Me. 46; Burt v. Myer, 71 Md. 467; Floyd v. Patterson, 72 Tex. 202, 13 Am. St. Rep. 787, aff'd 18 S. W. 654; Riordan v. Doty, 50 S. Car. 537.

[12] Roys v. Johnson, 7 Gray (Mass.), 162; Wright v. Crabbs, 78 Ind. 487; Pape v. Wright, 116 Ind. 502; Haines v. Busk, 5 Taunt. (Eng. C. P.) 521.

It is enough to invalidate if he learned of the illegality before he fully performed the contract, and then went on to complete it. Small v. Lowrey, 166 Mo. App. 108.

Upon the general question of participation in unlawful purposes, see Hubbard v. Moore, 24 La. Ann. 591, 13 Am. Rep. 128; Mahood v. Tealza, 26 La. Ann. 108, 21 Am. Rep. 546; Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138; Harris v. Woodruff, 124 Mass. 205, 26 Am. Rep. 658; Walsh v. Hastings, 20 Colo. 243.

[13] See *post*, Book IV, Ch. IV.

[14] Parsons on Contracts, I, 486, *et seq.*; Powers v. Skinner, 34 Vt. 274,

portionable and not an entire one, and the lawful elements can be separated from the unlawful, the legitimate portions may be given effect.[15]

§ 123. Distinction between illegal and merely void contracts—Employment to make latter.—A contract may be void, without being either illegal, immoral or opposed to public policy, as, for example, a perfectly unexceptionable contract which is declared "void" for want of written evidence by the statute of frauds. The employment of an agent to make such a contract would ordinarily be subject to no prohibition, and contracts respecting it could be enforced. Other cases falling under statutes to the same effect may be met with.[16]

II.

ACTS OF A PERSONAL NATURE.

§ 124. Personal duty, trust or confidence cannot be delegated to an agent.—The second exception to the general rule that whatever one may lawfully do in his own right and in his own behalf he may lawfully delegate to an agent, is, that a purely personal duty, trust or power imposed upon or vested in a particular person cannot be delegated by him to another. The considerations which declare the duty personal may be found in the statute which requires or authorizes the act, in the custom which permits it, or in the inherent nature of the act itself. Thus powers which are conferred upon one in consideration of his personal qualities or characteristics, or as the result of special trust and confidence reposed in him, or which clearly contemplate the exercise of his personal knowledge, judgment or experience, should clearly be executed by him in person.[17] So an authority which is con-

80 Am. Dec. 677; Filson v. Himes, 5 Penn. St. 452, 47 Am. Dec. 422; Rose v. Truax, 21 Barb. (N. Y.) 361; Humbolt County v. Stern, 136 Cal. 63; Pardridge v. Cutler, 104 Ill. App. 89; McNeese v. Carver, 40 Tex. Civ. App. 129. See also Central N. Y. Tel. Co. v. Averill, 199 N. Y. 128, 139 Am. St. R. 878, 32 L. R. A. (N. S.) 494.

[15] Bishop on Contracts, § 487; Parsons on Contracts, I, 486–488; McVicker v. McKenzie, 136 Cal. 656; Osgood v. Central Vt. Ry. Co., 77 Vt. 334, 70 L. R. A. 930; Faist v. Dahl, 86 Neb. 669. See also Piper v. Boston & M. R. R., 75 N. H. 435.

[16] See Jones v. Ames, 135 Mass. 431, where a recovery was allowed upon a contract respecting dealings upon margin which a statute made void but not illegal.

[17] See Lyon v. Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Merrill v. Trust Co., 24 Hun (N. Y.), 300; Litka v. Wilcox, 39 Mich. 94. Contracts involving the delegation of personal official duties are opposed to public policy. Ellis v. Batson, — Ala. —, 58 So. 193.

Even though a mother might not be liable for decoying her child away from its father, she cannot lawfully appoint an agent to do it. Her natural love for the child might limit her in doing acts only for its welfare; but the agent would not be subject to such restraints. State v. Branden-

ferred, or a duty which is created by statute, may, by the express terms or necessary effect of the act, be required to be performed by the person only who is named.[18] So, too, where a man is enabled to do a thing by special custom it may well be that he cannot do it by an agent, if he is not warranted by the custom in so doing.[19]

§ 125. Illustrations — Voting — Affidavits — Statutory requirements.—Illustrations of these principles are numerous. Thus, for example, on grounds of public policy as well as the language of the law and the inherent nature of the act, an elector who is entitled to vote at a public election must do so in person, and cannot send an agent or give a proxy to vote for him, unless there be some express provision authorizing it.[20]

So, while, as has been seen, a statutory power is ordinarily as much within the maxim *qui facit per alium facit per se* as any other power [21] yet the language of the statute, the end to be accomplished, or the evil to be remedied, may be such as to demand a personal execution. Thus where it appears from the language of a statute or from its relation to other statutes, that the legislature had clearly in mind the distinction

burg, 232 Mo. 531, 32 L. R. A. (N. S.) 845.

[18] Thus where the law for the licensing of vessels required that the oath of ownership should be taken by the owner, an oath by the master, acting as agent for the owner, is not sufficient. United States v. Bartlett, Dav. (U. S. D. C.) 9, 2 Ware, 17, 24 Fed. Cas. p. 1021.

[19] See Combes' Case, 9 Coke, 75a.

[20] See Mechem on Public Officers, § 187. A stockholder in a corporation cannot vote by proxy unless this is authorized by statute, charter or by-law. Commonwealth v. Bringhurst, 103 Pa. 134, 49 Am. Rep. 119; Com. v. Detwiller, 131 Pa. 614, 7 L. R. A. 357; Market St. Ry. Co. v. Hellman, 109 Cal. 571.

[21] *Ante*, § 80. The mere fact that an authority is given or an act required by a statute does not exclude the doing of the act by agent unless there is something in the statute properly leading to that result. Said Sterling, J., in Jackson v. Napper, 35 Ch. Div. 162, "I understand the law to be that, in order to make out that a right conferred by statute is to be exercised personally and not by an agent, you must find something in the act, either by way of express enactment or necessary implication, which limits the common law right of any person who is *sui juris* to appoint an agent to act on his behalf. Of course the legislature may do so, but, *prima facie*, when there is nothing said about it a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other purpose." Said Quain, J., in Reg. v. Kent, L. R. 8 Q. B. 305, "We ought not to restrict the common law rule, *qui facit per alium facit per se*, unless the statute makes a personal signature indispensable." To same effect: *In re* Whitley Partners, 32 Ch. Div. 337, where it was held that a subscriber to a corporation memorandum could sign by agent; Jackson v. Napper, 35 Ch. Div. 162, where it was held that an applicant for registration of a trade mark could act by agent; Dennison v. Jeffs, [1896] 1 Ch. 611, where it was held that a statutory consent to the dissolution of a partnership could be executed by agent.

between acts in person and those done by an agent, and yet made no provision for the latter; and, still more clearly, where a statute, like the statute of frauds, in some sections expressly provides for execution by an agent but in others which are in question has made no such provision, it is held to be a fair inference that in the latter cases personal execution was intended.[22] And where a statute required an affidavit to be made concerning matters peculiarly within the knowledge of a certain person, it was held that he must make the affidavit himself, and that one made by an agent would not suffice.[23]

§ 126. ——— Assignments—Wills—Marriage.—So it has been held that a statutory power to make an assignment for the benefit of creditors so clearly contemplated that the assignor was expected to exercise his own judgment in determining whether an assignment should be made and if so to whom and when and upon what terms, that a general power to make such an assignment could not be delegated to an agent.[24]

The same rule would apply to the making of wills. It is expected that the testator will exercise his own judgment concerning his relations to the donees, their needs, his obligations to them, and the like; and, while he may of course have clerical assistance, he doubtless may not delegate his general authority and duty in this regard to an agent.

This is doubtless also true respecting marriage. Contracts to marry,

[22] In Hyde v. Johnson, 3 Scott, 289, 2 Bing. N. C. 776, where the question was whether an admission made through an agent was sufficient under the statute of limitations, as an admission signed "by the party chargeable thereby" it was held not to be, and the court referring to other statutes, and particularly to the statute of frauds, said that it appeared "that the legislature well knew how to express the distinction between a signature by the party and a signature by his agent," and that as the statute did not provide for the latter method it was to be deemed to be excluded. But however sound the rule may be, the case seems wrong on its facts. See also Clark v. Alexander, 8 Scott's N. R. 147; Toms v. Cuming, 8 Scott's N. R. 910. *Held*, not to apply in Arkansas. Fordyce v. Seaver, 74 Ark. 395.

So under statutes excluding actions for assurances and representations as to credit, etc., "unless such representation or assurance be made in writing signed by the party to be charged therewith," signature by an agent has been held not to suffice. Williams v. Mason, 28 L. T. (N. S.) 232; Swift v. Jewsbury, L. R. 9 Q. B. 301; Swift v. Winterbotham, L. R. 8 Q. B. 244; Hirst v. West Riding, etc., Bank, [1901] 2 K. B. 560.

[23] United States v. Bartlett, Dav. 9, 2 Ware, 17, 24 Fed. Cas., p. 1021.

Where a petition proceeds upon information and belief, a verification by an agent who is not shown to be in a position to have such information and belief, is not enough. *In re* Roukous, 128 Fed. 648. But otherwise where the agent is the one who has the information. *In re* African Farms, [1906] 1 Ch. 640. See also Bangs v. McIntosh, 23 Barb. (N. Y.) 591.

[24] Minneapolis Trust Co. v. School District, 68 Minn. 414.

may doubtless be made through a messenger; but general authority to make marriage engagements would doubtless not be upheld; and as to the act of marriage, the substitution of an agent or representative, while at times allowed to princes,[25] would not be tolerated generally.[26]

The German Civil Code contains many express provisions, some of which, at least, are probably merely declaratory of principles which would be deemed general. Thus as agent may not be employed to give parental approval to the adoption of a child, to avoid a marriage, to repudiate legitimacy, to declare legitimacy, to rescind testamentary dispositions, and the like.

Many other cases are cited in the notes.

The principle which is involved here is, in many respects, the same as that which controls the delegation of authority by an agent to a sub-agent, which is fully considered in a later chapter.[27]

It must also be kept in mind that, as will be seen in a later section [28] what is done in the presence and by the direction of a person, even though so done by another person, is, in law, ordinarily regarded as the personal act of the former, and therefore not involving delegation.

[25] See comments on "Marriage through an Agent," in Brissaud, History of French Private Law, Continental Legal History Series, Vol. II, p. 103, note.

[26] As to wills and marriage see *dicta* in Com. v. Warehouse Co., 107 Ky. 1, 21 Ky. Law Rep. 573; Minneapolis Trust Co. v. School District, *supra*.

Under the statute in Illinois providing for the recording of town plats, the acknowledgment cannot be made by an agent. Gosselin v. Chicago, 103 Ill. 623; Thompson v. Maloney, 199 Ill. 276, 93 Am. St. R. 133.

Under the Indiana statute (Acts 1895, p. 248, § 9) respecting licenses to sell liquor, it was held that authority given to voters to protest—not against a license to a particular person or a license to anyone—but against licenses to such persons as the attorney might "see fit" to object, could not be delegated. Such a discretionary authority must be exercised by the voter in person. Cochell v. Reynolds, 156 Ind. 14.

Duty imposed by statute upon a committee of a political party to call an election, cannot be delegated. Montgomery v. Chelf, 118 Ky. 766, 26 Ky. Law Rep. 638.

Under the early statutes authorizing a married woman to convey her land by deed signed by her and separately acknowledged, it was held that she could not convey by an agent though his power of attorney was so separately acknowledged by her. Sumner v. Conant, 10 Vt. 9; Mott v. Smith, 16 Cal. 533; Lewis v. Coxe, 5 Har. (Del.) 401; Steele v. Lewis, 1 T. B. Mon. (Ky.) 48.

[27] See *post*, Ch. VI.

[28] See *post*, § 208.

CHAPTER IV

WHO MAY BE PRINCIPAL OR AGENT; AND HEREIN OF JOINT PRINCIPALS AND AGENTS

§ 127. Purpose of this chapter.

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§ 127. Purpose of this chapter.—It is proposed in this chapter to determine who are competent to enter into the relation of principal and agent, and to consider briefly the special rules which apply to those cases in which more than one person undertakes to act in either capacity. In the execution of this purpose there will be considered: I. Who may be principal; II. Who may be agent; III. Joint principals, and IV. Joint agents.

I.

WHO MAY BE PRINCIPAL.

§ 128. What considerations involved.—As has been already seen, the appointment of an agent, as distinguished from a servant, is made in contemplation of business dealing, through that agent, on account of the principal with third persons. There are thus, as has previously been pointed out, three persons and three sets of relations involved in the appointment and authorization of an agent, viz.: the principal, the

agent, and the third person with whom the agent is to deal, and the relations and obligations of each one of these to every other one. This fact bears directly upon the subject matter of the present section. From the standpoint of the principal therefore there are two aspects; as between the principal and the agent, who is competent to be a principal? and as between the principal and the third person, who is competent to be a principal? If contractual obligations are to be entered into by the proposed principal both with the agent and the third person, the considerations will ordinarily be the same. If contractual obligations are to be entered into with one of them, but not necessarily with the other, the considerations may differ. If it be assumed that the characteristic of *agency* as distinguished from *service*, is that the agent is to create or modify or affect contractual relations between the principal and the third person, then, from that side of it at least, the principal must be one who has the contractual capacity to so deal with the third person. If contractual relations between the principal and the agent are also required, then contractual capacity adequate to that end is also requisite.

If *service* instead of *agency* is contemplated, the case will be different. The obligations here to third persons at least may often be in tort rather than in contract and a different degree of capacity may be required, or may suffice, in this instance from that involved in the other.

Inasmuch as agency is usually a means rather than an end, the most important aspect is usually, who can *act* by agent rather than who can *appoint* an agent. Taking up this aspect first—

§ 129. The general rule—Every person competent to act in his own right.—It may be stated as the general rule that by the common law every person who is competent to act in his own right and in his own behalf may act by an agent.[1] It has been seen also that as a general rule a person may do by agent whatever he may do in person. The reverse of this is also true in general, viz.: that a person who is incompetent to act in his own right and in his own behalf cannot act by agent; neither can one do by agent what he cannot do in person.

The relation, as has been seen, is created primarily for the purpose of investing the agent with authority to act for and represent the principal in the transaction of business. His purpose is ordinarily to bring

[1] Combes' Case, 9 Co. Rep. 75: Com. Dig. "Attorney," c. I.

In the language of the codes of California, Dakota and Georgia, "Any person, having capacity to contract, may appoint an agent." Cal. Code, § 2296; Dak. Code, § 1338; Ga. Code, § 2181.

about, or in some way to affect or modify, contractual relations between his principal and third persons. For the time and to the extent limited, the agent is to be the *alter ego* of the principal; his act is, in law, to be the act of the principal, and the capacity and character in which the agent is to act are those of the principal. It follows, then, as a necessary conclusion, that the same kind and degree of legal competency which would be requisite were the principal present and acting in his own person, are in general necessary when he is present and acts in the person of his agent.

The converse of these principles, as it finds expression in the general rule already given, also follows as a necessary sequence, that he who has this capacity and who is thus competent to act in person in a given case, may, unless restrained by some statutory or other legal prohibition, act in that case through the agent of his choice.

§ 130. Private corporations.—The same rule applies ordinarily to artificial persons authorized to enter into contractual relations. Thus authority to appoint the necessary and proper agents for the transaction of the corporate business is usually conferred upon corporations in express terms, but in the absence of such express authority, the power to appoint will be implied. This power is a necessary incident to the power to carry on the business for which the corporation was created, inasmuch as it is only through the employment of agents that the executive functions of the corporation can be exercised.[2]

The existence of the agency and the effect of the agent's acts in these cases are subject to the same rules which apply to individuals. Thus it is said in a recent case, "It is well settled that a corporation may contract and be contracted with through an agent whose authority may be implied from facts and circumstances showing recognition or ratification by the corporation. Indeed, it seems that the same pre-

[2] Protection Life Ins. Co. v. Foote, 79 Ill. 361; Hurlbut v. Marshall, 62 Wis. 590; St. Andrews Land Co. v. Mitchell, 4 Fla. 192, 54 Am. Dec. 340; Lyman v. White River Bridge Co., 2 Aik. (Vt.) 225, 16 Am. Dec. 705; Washburn v. Nashville, etc., R. R. Co., 3 Head (Tenn.), 638, 75 Am. Dec. 784; Kitchen v. Cape Girardeau & State L. R. Co., 59 Mo. 514.

As is said in Washburn v. Nashville, etc., R. R. Co., *supra*, "The corporation of necessity acts through the instrumentality of its officers and agents. If not prohibited by the charter, it may delegate its authority to its officers and agents so far as may be necessary to effect the purposes of its creation. It must act in this mode or not at all."

Extended citation of the cases upon this point belongs rather to works on Corporations. See Morawetz on Corporations, I, § 503; Ang. & Ames on Corporations, § 284; Thompson on Corporations, V, § 5832.

sumptions are applicable in this respect to corporations as to natural persons." [3]

§ 131. Public corporations.—The rule applies also to public corporations, towns, cities, states. Any one of these having authority to act in a matter or manner, for which a constituted public agent or officer is not by law provided, may act through agents, general or special, as the exigencies of the case may require.[4]

§ 132. Partnerships.—The same general principle applies to partnerships. It is, of course, competent for the partners to provide in their partnership articles, what agents shall be employed and in what manner. So all of the partners acting together may undoubtedly appoint agents for a purpose or in a manner other than that originally contemplated or prescribed. And in the absence of restrictions in the articles, each partner also has implied power to employ for the firm such servants and agents as are necessary and proper for the transaction of the partnership business.[5]

The rule applies to limited partnerships as well as to ordinary partnerships.[6]

§ 133. Incompetency—In general.—Incompetency to enter into this relation may arise either (a) from some defect in the mental equipment of the party or (b) from the operation of law. The former type may be chronic or temporary, curable or incurable, and may arise from a variety of causes. This form of incompetency is sometimes termed *natural*, while that arising from the operation of the law is termed *legal* incompetency.

Of the first kind are the defects of idiots, lunatics and drunken persons; while aliens, infants and married women afford illustrations of the latter.

The effect of some of these forms of incompetency, so far as they are applicable to the law of agency, will be noticed here.

[3] Moyer v. East Shore Terminal Co. (1894) 41 S. Car. 300, 44 Am. St. R. 709.

[4] See Hall v. Wisconsin, 103 U. S. 5, 26 L. Ed. 302; State v. Torinus, 26 Minn. 1.

[5] Beckham v. Drake, 9 M. & W. 79; Banner Tobacco Co. v. Jenison, 48 Mich. 459; Harvey v. McAdams, 32 Mich. 472; Wheatley v. Tutt, 4 Kan. 240; Charles v. Eshleman, 5 Colo. 107; Frye v. Saunders, 21 Kan. 26, 30 Am. Rep. 421; Coons v. Renick, 11 Tex. 134, 60 Am. Dec. 230; Carley v. Jenkins, 46 Vt. 721; Durgin v. Somers, 117 Mass. 55; Burgan v. Lyell, 2 Mich. 102; St. Andrews Bay Land Co. v. Mitchell, 4 Fla. 192, 54 Am. Dec. 340; Lucas v. Bank of Darien, 2 Stew. (Ala.) 280; Clark v. Slate Valley R. Co. (1890), 136 Pa. 408, 10 L. R. A. 238.

[6] Park Bros. & Co. v. Kelly Axe Mfg. Co. 49 Fed. 618.

1. Persons Naturally Incompetent

§ 134. Persons of unsound mind—Idiots—Lunatics—Habitual drunkards, etc.—The question of the contractual capacity of persons of unsound mind presents many complications: The person may have been incompetent from birth; his unsoundness of mind may be partial only; it may not be evident to the casual observer; he may never have been judicially declared insane, and the like. The contract in question may have been one for necessaries; it may have been entered into while the other party was ignorant of the insanity and may have been so far performed that the parties can not be restored to their original position.

It is often said, especially in the older cases, that the contracts [7] and particularly the deeds [8] of the insane person, whether made before or after an adjudication of insanity, are void; but the prevailing view according to the modern authorities is that such contracts, made before adjudication, are at most merely voidable and not void,[9] except in cases where the infirmity is so radical and apparent as to destroy any semblance of a consenting mind. Fair contracts for necessaries may be enforced to the extent of their value where the necessaries were supplied in good faith;[10] and, by the weight of authority, an executed contract, fairly made in ignorance of the insanity, can not be set aside on the part of the insane party, unless he restores what he may have

[7] See American Trust & Banking Co. v. Boone, 102 Ga. 202, 66 Am. St. R. 167, 40 L. R. A. 250.

[8] Van Deusen v. Sweet, 51 N. Y. 378 (though this is not now the rule in New York: Blinn v. Schwarz, 177 N. Y. 252, 101 Am. St. R. 806); Edwards v. Davenport, 20 Fed. 756; German Savings Society v. De Lashmutt, 67 Fed. 399, following Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73; Wilkinson v. Wilkinson, 129 Ala. 279. See also Farley v. Parker, 6 Ore. 105, 25 Am Rep. 504; Rogers v. Blackwell, 49 Mich. 192; Hanley v. National Loan Co., 44 W. Va. 450; Owings' Case, 1 Bland Ch. (Md.) 370 17 Am. Dec. 311; Brigham v. Fayerweather, 144 Mass. 48; Valpey v. Rea, 130 Mass. 384; Halley v. Troester, 72 Mo. 73; Galloway v. Hendon, 131 Ala. 280.

[9] Blinn v. Schwarz, 177 N. Y. 252, 101 Am. St. R. 806; French Lumbering Co. v. Theriault, 107 Wis. 627, 51 L. R. A. 910, 81 Am. St. R. 856; Flach v. Gottschalk Co., 88 Md. 368, 71 Am. St. Rep. 418, 42 L. R. A. 745; Jordan v. Kirkpatrick, 251 Ill. 116; Ætna L. Ins. Co. v. Sellers, 154 Ind. 370, 77 Am. St. R. 481, citing many other Indiana cases: Castro v. Geil, 110 Cal. 292, 52 Am. St. Rep. 84; First Nat. Bank v. McGinty, 29 Tex. Civ. App. 539; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71. See also Amos v. Amer. Trust & Sav. Bank, 221 Ill. 100; Gingrich v. Rogers, 69 Neb. 527.

[10] Richardson v. Strong, 13 Ired. (N. C.) 106, 55 Am. Dec. 430; *In re* Renz, 79 Mich. 216. See also McKee v. Ward (Ky.), 38 S. W. 704, 18 Ky. L. Rep. 987; McKee v. Purnell (Ky.), 38 S. W. 705, 18 Ky. L. Rep. 879.

received under it.[11] After an adjudication of insanity, however, contracts entered into are usually held void.[12] Though ordinarily insane, the person affected may make a valid contract during a sane interval.[13] Within the operation of these rules are to be included persons whose mental powers have been permanently impaired by dissipation or other cause attributable to their own acts, as well as those whose incapacity arises from causes beyond their own control.[14]

§ 135. ——— Contracts through agents usually voidable.—The considerations above set forth are applicable to the question of the appointment of an agent by an insane person and of the liability of an insane person for an act done by his alleged agent. Usually such an

[11] Molton v. Camroux, 4 Exch. 17; Beavan v. McDonnell, 9 Exch. 309; Campbell v. Hooper, 3 Smale & G. 153; Moss v. Tribe, 3 Post. & F. 297; Blinn v. Schwarz, 177 N. Y. 252, 101 Am. St. R. 806; Feigenbaum v. Howe, 32 (N. Y.) Misc. 514; Mutual L. Ins. Co. v. Hunt, 79 N. Y. 541; Hicks v. Marshall, 8 Hun, 327; Riggs v. American Tract Society, 84 N. Y. 330; Carter v. Beckwith, 128 N. Y. 312; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Dec. 428; Abbott v. Creal, 56 Iowa 175; Alexander v. Haskins, 68 Iowa, 73; Harrison v. Otley, 101 Iowa, 652; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610; Ronan v. Bluhm, 173 Ill. 277; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Rusk v. Fenton, 14 Bush (Ky.), 490, 29 Am. Rep. 413; Wilder v. Weakley, 34 Ind. 181; Northwestern Mut. F. Ins. Co. v. Blankenship, 94 Ind. 535; Copenrath v. Kienby, 83 Ind. 18; Beals v. See, 10 Penn. St. 56, 49 Am. Dec. 573; Yauger v. Skinner, 14 N. J. Eq. 389; Gribben v. Maxwell, 34 Kans. 8, 55 Am. Rep. 233; Bank v. Sneed, 97 Tenn. 120, 56 Am. St. R. 788; Strodder v. Granite Co., 99 Ga. 595; More v. Calkins, 85 Cal. 177; Riggan v. Green, 80 N. Car. 236, 30 Am. Rep. 77; National Metal Edge Box Co. v. Vanderveer, — Vt. —, 82 Atl. 837.

But see Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Gibson v. Soper, 6 Gray (Mass.), 279, 66 Am. Dec. 414; Bond v. Bond, 7 Allen (Mass.), 1; Chew v. Bank, 14 Md. 318; Rogers v. Blackwell, 49 Mich. 192; Edwards v. Davenport, 20 Fed. Rep. 756; Henry v. Fine, 23 Ark. 417.

In Jordan v. Kirkpatrick, 251 Ill. 116, a note and mortgage upon land executed by an insane woman, in a transaction in which her husband purported to act as her agent and having received the money abandoned her, were set aside without requiring her to return the money. The court held that the duty to restore was limited to that which the lunatic had received.

[12] See Carter v. Beckwith, 128 N. Y. 312; Boyer v. Berryman, 123 Ind. 451; American Trust & Banking Co. v. Boone, 102 Ga. 202, 66 Am. St. R. 167, 40 L. R. A. 250; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Burnham v. Kidwell, 113 Ill. 425.

[13] McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610; Beckwith v. Butler, 1 Wash. (Va.) 224; Jones v. Perkins, 5 B. Monr. (Ky.) 222; *In re* Gangwere, 14 Penn. St. 417, 53 Am. Dec. 554; Tozer v. Saturlee, 3 Grant (Penn.), 162; Lilly v. Waggoner, 27 Ill. 395.

[14] Bliss v. Railroad Co., 24 Vt. 424; Menkins v. Lightner, 18 Ill. 282; Bush v. Breinig, 113 Penn. St. 310, 57 Am. Rep. 469.

act is voidable but not void if done before an adjudication of insanity.[15] In a few cases his formal power of attorney to confess judgment or convey land is held to be void,[16] but no very satisfactory reason for this view is apparent and the weight of modern authority regards this act as standing upon the same footing as the making of the conveyance itself and to be voidable rather than void.[17] A fair contract, made in ignorance of the insanity, with the agent of an insane person, would, doubtless, in accordance with the general rule, only be set aside upon the application of the insane person upon condition that he restore what he had in fact received under it.[18]

[15] Blinn v. Schwarz, 177 N. Y. 252, 101 Am. St. R. 806; Wamsley v. Darragh, 12 N. Y. Misc. 199; Merritt v. Merritt, 43 App. Div. 68; Reams v. Taylor, 31 Utah, 288, 120 Am. St. R. 930, 11 Ann. Cas. 51, 8 L. R. A. (N. S.) 436.

Void after adjudication. Gillet v. Shaw, 117 Md. 508, 83 Atl. 394; Pearl v. McDowell, 26 Ky. (3 J. J. Marsh.) 658, 20 Am. Dec. 199.

The most elaborate treatment of the question is to be found in McLaughlin v. Daily Telegraph Co., 1 Commonwealth L. R. 243, a case decided by the High Court of Australia (Appeal Refused [1904] A. C. 776). In this case a married man, insane and incapable of transacting any business (though he had lucid intervals) was induced to give an absolute power of attorney to his wife, who knew the facts but was acting in good faith, authorizing her to dispose of his real or personal estate. Acting under this, the wife sold and transferred certain shares of stock held by her husband in the defendant and other companies, both the buyers and the corporations acting in good faith and in ignorance of the insanity. The husband, having recovered his sanity, brought suit to cancel these transfers and to be reinstated upon the books. *Held*, that the power of attorney was *void;* the transfers invalid, and the plaintiff entitled to relief. The plaintiff however, offered in his bill to reimburse the defendants to the extent of all moneys received by his pretended agent as the proceeds of the sale, and the decree was made upon this basis. See also McLaughlin v. City Bank of Sydney, 9 N. S. Wales, 319, cited in a following note.

[16] Dexter v. Hall, 82 U. S. (15 Wall.) 9, 21 L. Ed. 73; McClun v. McClun, 176 Ill. 376; Plaster v. Rigney, 97 Fed. Rep. 12.

See also Elias v. Enterprise Building & Loan Ass'n, 46 S. C. 188; Clay v. Hammond, 199 Ill. 370, 93 Am. St. Rep. 146.

[17] Williams v. Sapieha, 94 Tex. 430; Wamsley v. Darragh, 12 N. Y. Misc. 199.

[18] In Jordan v. Kirkpatrick, 251 Ill. 116, referred to *supra*, where a married woman while insane had, through the intervention of her husband who assumed to act as her agent, made a note and mortgage upon which he obtained the money and abandoned her, she was allowed to disaffirm without restoring the money, which she had never received.

In McLaughlin v. City Bank of Sydney, 9 New South Wales State Rep. 319, where a married woman, while her husband was insane and incompetent to act, obtained from him a power of attorney under which she raised money and pledged and mortgaged his property, it was held that he could repudiate the acts, but that the court, upon a proper showing, would work out a subrogation to the extent that the money had been used to pay his legally binding debts. See

§ 136. ——— **Torts of servants or agents.**—With respect of the torts of the alleged servant or agent of an insane person, it is held that, while the insane person's estate may be charged for his own torts, it is not liable for the tort of one who assumed to be his servant or agent.[19]

§ 137. **Drunken persons as principals.**—The fact of being a drunkard, or mere drunkenness at the time, does not of itself incapacitate.[20] There must be drunkenness, or the impairment of intellect as the result of drunkenness, to such an extent that the person is incapable of comprehending the nature and effect of his act.[21]

Sober interval. The contract of a habitual drunkard, however, is binding, if made during a sober interval.[22] His contracts of agency, and his contracts through an agent, of course stand upon the same ground.

§ 138. **Ratification or disaffirmance.**—A contract made by a party during a period of incompetence may be ratified or disaffirmed by him after his competency is restored.[23] And this disaffirmance may be effected by the incompetent's guardian or committee also,[24] or by his personal representative after the incompetent's death.[25] Upon this question, the rules governing contracts generally apply.[26]

also McI aughlin v. Daily Telegraph Co., 1 Commonwealth L. R. 243, referred to in the second preceding note.

[19] Gillet v. Shaw, 117 Md. 508, 83 Atl. 394; Ward v. Rogers, 51 N. Y. Misc. 299; Reams v. Taylor, 31 Utah, 288, 120 Am. St. R. 930, 11 Ann. Cas. 51, 8 L. R. A. (N. S.) 436.

[20] Pickett v. Sutter, 5 Cal. 412; Henry v. Ritenour, 31 Ind. 136; Caulkins v. Fry, 35 Conn. 170; Reynolds v. Dechaums, 24 Tex. 174; Cavender v. Waddingham, 5 Mo. App. 457; Joest v. Williams, 42 Md. 565, 13 Am. Rep. 377; Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306.

[21] Bates v. Ball, 72 Ill. 108; Van Wyck v. Brasher, 81 N. Y. 260; Schramm v. O'Connor, 98 Ill. 539; Bush v. Breinig, 113 Pa. 310, 57 Am. Rep. 469.

[22] Riteer's Appeal, 59 Pa. 9.

[23] Gibson v. Soper, 6 Gray (Mass.), 279, 66 Am. Dec. 414; Bush v. Breinig, 113 Pa. 310, 57 Am. Rep. 469; Allis v. Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; Arnold v. Richmond Iron Works, 1 Gray (Mass.), 434; Carrier v. Sears, 4 Allen (Mass.), 337; Howe v. Howe, 99 Mass. 98; White v. Graves, 107 Mass. 328; Blakeley v. Blakeley, 33 N. J. Eq. 508; Nichol v. Thomas, 53 Ind. 53; Mohr v. Tulip, 40 Wis. 82; Elston v. Jasper, 45 Tex. 409; Turner v. Rusk, 53 Md. 65; Northwestern Mut. F. Ins. Co. v. Blankenship, 94 Ind. 535; Carpenter v. Rodgers, 61 Mich. 384, 1 Am. St. Rep. 595.

[24] McClain v. Davis, 77 Ind. 419; Campbell v. Kuhn, 45 Mich. 513, 40 Am. Rep. 479; Halley v. Troester, 72 Mo. 73; Moore v. Hershey, 90 Pa. 196; Gingrich v. Rogers, 69 Neb. 527.

[25] Campbell v. Kuhn, *supra;* Schuff v. Ransom, 79 Ind. 458.

[26] See Bishop on Contracts, § 974.

2. Persons Legally Incompetent.

§ 139. Who included.—Of the persons who may be regarded as legally incompetent the most important are the infant, the married woman, and the alien. The incompetency of the infant is of a mixed sort. During his early years, his incapacity is natural; this disability gradually fades away as he approaches maturity and he may in fact become fully competent before he reaches the legal age of maturity. Here however the legal incapacity attaches to him, and continues with him until the statutory age has been attained,—an age which may be and is more or less arbitrarily fixed. The incapacity of the married woman and the alien is purely artificial and depends wholly upon the rules of law which prescribe it.

§ 140. Infants as principals.—The capacity of an infant to enter into contractual and business obligations is limited; and the law respecting it is far from being in a satisfactory condition. Speaking generally an infant has, for his own protection, a limited power to charge himself for benefits actually received of the sort termed "necessaries," though it is perhaps questionable whether this obligation is not *quasi*-contractual rather than contractual. Even in this field the infant is not bound by executory contracts for necessaries not actually received. Outside of this field of necessaries, the general rule is that the acts and contracts of the infant are voidable by him at his election.

If it be now attempted to apply these general rules to the question of agency for an infant principal, there would be at once two aspects: the relation between the infant principal and his agent, and the relation of the infant principal to third persons. As to the first, unless there might be cases in which the intervention of an agent to procure necessaries might be regarded as itself a necessary, all contractual obligations between the infant and his agent, such as those of employment, payment, and the like, would be voidable at the infant's option.

With reference to third persons, the general rule of agency would permit the infant to act through an agent to the same extent that he could act in person; that is to say, most of his acts and contracts done or made through an agent would be voidable by the infant, just as they would be if done by him in person, but they would not be void. Contracts for necessaries actually received, made through an agent, would bind the infant, either contractually or *quasi* contractually, as they would if he had made them in person.

In the analogous field of partnership, it is settled that the infant's partnership contracts are not void. He may be a partner and exercise all the rights of one, and while he may escape personal responsi-

bility on his contract either to his copartner or to creditors, it is held that he can not, in the absence of fraud, recover what he paid for being admitted as a partner, nor can he withdraw his contributions to capital until the firm debts have been paid.

Notwithstanding these considerations, however, this is not the way in which the actual law upon the subject has been developed, and a principle quite different in theory, though perhaps not radically different in result, has been adopted.

§ 141. ——— Infant's appointment of agent generally held void.— It has been regarded as the settled doctrine of the law that an infant cannot empower an agent or attorney to act for him.[27] Indeed, the rule deduced from the authorities has been said to be that the only act which an infant is under a legal incapacity to perform is the appointment of an attorney, or, in fact, an agent of any kind.[28] The reason upon which this rule depends, has been stated by the learned editors of the American Leading Cases, as follows: "The constituting of an attorney by one whose acts are in their nature voidable, is repugnant and impossible, for it is imparting a right which the principal does not possess,—that of doing valid acts. If the acts when done by the attorney remain voidable at the option of the infant, the power of attorney is not operative according to its terms; if they are binding upon the infant, then he has done through the agency of another what he could not have done directly—binding acts. The fundamental principle of law in regard to infants requires that the infant should have

[27] Armitage v. Widoe, 36 Mich. 124; Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Lawrence v. McArter, 10 Ohio, 37; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Pickler v. State, 18 Ind. 266; Tapley v. McGee, 6 Ind. 56; Hiestand v. Kuns, 8 Blackf. (Ind.) 345; Fetrow v. Wiseman, 40 Ind. 155; Burns v. Smith, 29 Ind. App. 181, 94 Am. St. R. 268; Cole v. Pennoyer, 14 Ill. 158; Robbins v. Mount, 4 Robt. (N. Y.) 553; Mustard v. Wohlford's Heirs, 15 Gratt. (Va.) 329, 76 Am. Dec. 209; Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. Ed. 73; Bennett v. Davis, 6 Cow. (N. Y.) 393; Robinson v. Weeks, 56 Me. 102; Wambole v. Foote, 2 Dak. 1; Waples v. Hastings, 3 Harr. (Del.) 403; Carnahan v. Alderdice, 4 Harr. (Del.) 99; Roof v. Stafford, 7 Cow. (N. Y.) 179; Flexner v. Dickerson, 72 Ala. 318; Glass v. Glass, 76 Ala. 368; Sadler v. Robinson, 2 Stew. (Ala.) 520; Philpot v. Bingham, 55 Ala. 435; Pyle v. Cravens, 4 Litt. (Ky.) 17; Bool v. Mix, 17 Wend. (N. Y.) 120; Wainwright v. Wilkinson, 62 Md. 146; Deford v. State, 30 Md. 200; State v. Field, 139 Mo. App. 20; Turner v. Bondalier, 31 Mo. App. 582; Poston v. Williams, 99 Mo. App. 513; Holden v. Curry, 85 Wis. 504; Millsaps v. Estes, 134 N. C. 486; Lutes v. Thompson, 5 Pa. Co. Ct. 451; Knox v. Flack, 22 Penn. St. 337; Doe v. Roberts, 16 M. & W. 778.

[28] See note to Tucker v. Moreland, 1 Am. Lead. Cases, 224, 5th Ed. 280.

the power of affirming such acts done by the attorney as he chooses, and avoiding others, at his option; but this involves an immediate contradiction, for to possess the right of availing himself of any of the acts, he must ratify the power of attorney, and if he ratifies the power, all that was done under it is confirmed. If he affirms part of a transaction, he at once confirms the power, and thereby, against his intention, affirms the whole transaction. Such personal and discretionary legal capacity as an infant is vested with is, therefore, in its nature, incapable of delegation; and the rule that an infant cannot make an attorney is, perhaps, not an arbitrary or accidental exception to a principle, but a direct, logical necessity of that principle. But if the considerations suggested as the foundation of this rule be not satisfactory, the rule itself is established by a conclusive weight of authority." [29]

This reasoning, as will be observed, is based upon the theory that an act of an infant done through an agent must in any event be more binding then if done by the infant in person; and that the assumption is that the infant can not do *voidable* acts through an agent as well as in person.

§ 142. ——— Ratification by infant.—Upon the principle that one cannot subsequently affirm what he could not previously have authorized, or that he cannot affirm a void act, it has likewise been held that an infant cannot ratify and confirm what one, as an agent, has assumed to do in his name.[30] Neither, if it be *void,* could he ratify it after he becomes of age.[31]

[29] Id. 247, 5th Ed. 305.

[30] Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77, in which the plaintiff was an infant whose cow had been sold by her father. Later he bought another cow and gave it to her in place of the first. The father's creditors have the second cow and the plaintiff claims it against them. But the court held that she could set up no claim at all to second cow (her father was insolvent at the time and could not make a gift) even although she had subsequently assented to a sale and replacement on her behalf, for infant could not have an agent, the appointment was void and could not be ratified.

Poston v. Williams, 99 Mo. App. 513, the infant plaintiff sued in replevin to recover a horse which the defendant had received in trading, as the plaintiff's agent, the plaintiff's horse. Recovery was denied upon the ground that replevin would be an action in the nature of affirmance and that an infant's appointment of an agent was a void act incapable of ratification. But see Ward v. Steamboat, 8 Mo. 358.

Armitage v. Widoe, 36 Mich. 124, a father without the infant son's knowledge made in the infant's name a contract for purchase of real estate and made part payment under the contract. The son when he learned of the contract sought to call the contract his own but on the ground of infancy to avoid it and recover the part payments that had been made. Upon the ground that an infant cannot authorize an agent, and therefor cannot ratify an agent's acts, that all

In the few cases, however, in which the act of appointment or the act done by the agent is deemed voidable only, the former infant after maturity may ratify and confirm.[32] If the more liberal rule hereinafter contended for should prevail, there would be no reason why the infant might not ratify, where he could authorize, even during minority.[33]

such attempts are entirely void, the suit was dismissed.

Doe v. Roberts, 16 M. & W. 778. An executor on behalf of infant remaindermen accepted rent from a tenant who had held from year to year under the life tenant and with right to a notice to quit. It was held that this acceptance of rent did not make a similar contract between the infants and the tenant valid, and that the infants might bring ejectment without previous notice to quit. Baron Parke said: "If an infant appoints a person to make a lease it does not bind the infant, neither does his ratification bind him. There is no doubt about the law."

[31] In Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756, wherein a father purporting to act for his minor son made a bond for a deed of the infant's land and it was claimed that the son, after becoming of age, had ratified it, it was held that it was not possible to ratify it. The bond, not being the act of the infant himself (in which case it would have been merely voidable) but an act by an alleged agent,—which an infant cannot have—was *void*, and there cannot be ratification of a void act.

See also Lutes v. Thompson, 5 Pa. Co. Ct. 451; Weidenhammer v. McAdams, —— Ind. App. ——, 98 N. E. 883.

[32] See Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; (the defendant had, while still an infant, made through an agent a promissory note, and after he had attained his majority had acknowledged it and promised to pay. This ratification was held sufficient to bind the defendant).

Hastings v. Dollarhide, 24 Cal. 195; (it was held that one who after majority ratifies an endorsement made on his behalf by an agent during principal's infancy is bound by the endorsement).

Coursolle v. Weyerhauser, 69 Minn. 328 (the court held that a power of attorney, given after majority, for the purpose of ratifying the locating of a claim and a sale of land under a power of attorney which had been given before majority, was good as a ratification and binding upon the giver).

Ferguson v. Houston, etc., Ry. Co., 73 Tex. 344; (where it was held that even if the infant could not ratify the act after maturity, his conduct since that time might be sufficient to estop him).

In Stone v. Ellis, 69 Tex. 325, it was held that there might be ratification after maturity.

In Sims v. Smith, 99 Ind. 469, 50 Am. Rep. 99, it was held that if an infant married woman makes a deed with her husband of her land and authorizes him to deliver it, and he delivers it with her consent after she becomes of age, she is bound.

For ratification, or estoppel to question, where sales made without authority by a guardian are approved after wards come of age, see Tracy v. Roberts, 88 Me. 310, 51 Am. St. R. 394; Deford v. Mercer, 24 Iowa, 118, 92 Am. Dec. 460.

[33] In Johannson v. Gudmundson, 19 Manitoba L. Rep. 83, 11 West. L. Rep. 176, where the father of the infant plaintiffs paid the defendant a certain sum of money at their request upon a contract in writing by which

§ 143. ——— Further of rule.—This rule, as has been seen, as well as the rule governing the contracts of infants generally, finds its reason in the law's desire to guard and protect the interests of the infant. Like other rules, its rigor should be abated when the necessity for it no longer exists.

It is difficult to harmonize all of the cases upon this subject, but an examination of the facts of some of the leading ones will disclose the occasions upon which it was invoked, and throw light upon the limits of its application.

Thus it is held that an infant's power of attorney to sell or mortgage his lands;[34] his warrant of attorney to confess judgment against him;[35] his assent to the act of another in assuming as the infant's agent to sell his property;[36] or to bind him to a purchase of real estate;[37] his authority to another to represent him in court;[38] and any letter of attorney not conveying a present interest,[39] are void.

the defendant agreed to sell and convey to the plaintiffs a certain farm, it was held that the infants could so far ratify the act as to be able to recover damages for the breach of the contract. One judge regarded the father as a messenger rather than an agent, and also said that the contract could be enforced as a trust for the benefit of the infants. The other two judges held that an infant could always appoint an agent to do an act for the infant's benefit, and that he could even during infancy do it by subsequent ratification.

In Ward v. Steamboat, 8 Mo. 358, the owners of a boat, some of whom were minors, sued under a statute for injury to the reversionary interest; in order to show that their interest was reversionary, they had to rely upon a lease which was executed by the adult owners only; but the court held that the suit might be maintained, and said that an infant might affirm a contract made for him, and that then no one else can question its validity. But see Poston v. Williams, 99 Mo. App. 513.

[34] Lawrence v. McArter, 10 Ohio, 37; Philpot v. Bingham, 55 Ala. 435; Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Thompson v. Lyon, 20 Mo. 155, 61 Am. Dec. 599; Mortgage: Rocks v. Cornell, 21 R. I. 532; Sawyer v. Northan, 112 N. C. 261.

[35] Bennett v. Davis, 6 Cow. (N. Y.) 393; Knox v. Flack, 22 Penn. St. 337; Karcher v. Green, 8 Houst. (Del.) 163; Fuqua v. Sholem, 60 Ill. App. 141.

[36] Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

[37] Armitage v. Widoe, 36 Mich. 124.

[38] Tapley v. McGee, 6 Ind. 56; Starbird v. Moore, 21 Vt. 529; Somers v. Rogers, 26 Vt. 585; Fuller v. Smith, 49 Vt. 253; Millsaps v. Estes, 134 N. C. 486 (submission to arbitration by any one for infant not binding).

The question of the infant's employment of an attorney presents two aspects: *first*, his liability to pay for the services and *second*, his liability for what his attorney does. 1. Legal services required to preserve or protect the infant's person, liberty or personal rights are usually regarded as necessaries to the extent of their actual value. Barker v. Hibbard, 54 N. H. 539, 20 Am. Rep. 160; Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151; Askey v. Williams, 74 Tex. 294, 5 L. R. A. 176; Petrie v. Williams, 68 Hun (N. Y.), 589; Crafts v. Carr, 24 R. I. 397, 96 Am. St. Rep. 721, 60 L. R. A. 128.

So, too, the rule has been declared without limitation in many cases where it was not necessary to the decision of the case,[40] being used merely by way of illustration or asserted in order to round out some general proposition in reference to the powers of infants.

§ 144. ——— Dissent, exceptions.—This unqualified statement of the rule, however, has not been without dissent in modern times, and judges have in several cases yielded to it only upon the ground that it was long established.[41]

So it has been held that, notwithstanding the rule, an infant might appoint an agent to do an act unquestionably to his advantage,[42]—as to receive seizin of an estate conveyed to him,— and this exception is, in reason, undoubtedly well founded.[43]

So what is sometimes termed a qualified form of agency may be established by the appointment by a competent court of a guardian for the infant's estate; and upon the doctrine of an agency, implied or created by law, an infant husband may be bound for necessaries pur-

Services in protecting or securing his property rights have been held not necessaries. Phelps v. Worcester, 11 N. H. 51; but even in these cases the tendency is to hold them necessaries when they are in fact needful and beneficial. Searcy v. Hunter, 81 Tex. 644, 26 Am. St. 837.

See also Thrall v. Wright, 38 Vt. 493.

Examination of public records and advice as to infant's rights as heir of his deceased father, held not a necessary in Cobbey v. Buchannan, 48 Neb. 391. So where the attorney was appointed guardian *ad litem*. Englebert v. Troxell, 40 Neb. 195, 26 L. R. A. 177, 42 Am. St. Rep. 665.

2. As to the effect of admissions, waivers, receipts, etc., made by attorneys, guardians, etc., of infants, see the exhaustive note to Kromer v. Friday, 10 Wash. 621, 32 L. R. A. 671; Belivean v. Amoskeag Co., 68 N. H. 225, 44 L. R. A. 167, 73 Am. St. Rep. 577; Glass v. Glass, 76 Ala. 368.

[39] Lawrence v. McArter, 10 Ohio, 37.

[40] Of this class are Cole v. Pennoyer; Robbins v. Mount; Dexter v. Hall; Robinson v. Weeks; Fetrow v. Wiseman; Flexner v. Dickerson; Mustard v. Wohlford's Heirs; Roof v. Stafford; Fonda v. Van Horne; Bool v. Mix; Heistand v. Kuns; Harner v. Dipple; and others cited in § 141, *supra*.

An infant deposited money with stockbrokers to speculate in stocks. He never received the stocks and the speculation resulted in a loss. *Held*, he might repudiate the arrangement and recover his deposit in full. Mordecai v. Pearl, 63 Hun, 553, aff'd no opinion, 136 N. Y. 625.

[41] See Philpot v. Bingham, 55 Ala. 435; Fetrow v. Wiseman, 40 Ind. 155.

[42] See Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Tucker v. Moreland, 10 Pet. (U. S.) 58. In Halsbury's Laws of England, Vol. I, p. 150, it is said that an agent can bind a minor for necessaries; and, though no cases are cited, it is believed that no one would doubt it.

[43] See *per* Lord Mansfield in Zouch v. Parsons, 3 Burr. 1794. In Ewer v. Jones, 9 Q. B. 623, Erle, J., arguendo asks: "Cannot an infant authorize an agent to turn out a wrongdoer?" In that case it was held that an agent could justify a trespass by the command of his infant principal.

chased by his wife,[44] though neither of these cases can probably be regarded as a matter of agency at all.

In a few cases courts have gone further. Thus it has been held that a note in the firm name given by the adult partner is not so far void that it cannot be ratified by an infant partner after he becomes of age.[45] And the same conclusion was reached where an infant gave a power of attorney under which a promissory note payable to his order was indorsed and delivered;[46] and where an infant authorized his brother, also an infant, to indorse and deliver a promissory note payable to the former, who was under guardianship.[47] But other courts have refused to follow these.[48]

§ 145. ——— In reason how.—The tendency of modern cases, although they are by no means harmonious, has been to regard all contracts made by an infant, with the exception of his appointment of an agent, in a more liberal spirit, and to treat them as voidable merely, or if void at all, as void only in those cases where they cannot by any possibility be to his advantage.[49]

Why this exception of the contract made through an agent should exist is not made clear by the authorities, nor is any sufficient reason apparent,[50] and in some late well considered cases its soundness is de-

[44] Cantine v. Phillips, 5 Harr. (Del.) 428.

[45] Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229. See the notes to this case in Am. Dec.

[46] Hastings v. Dollarhide, 24 Cal. 195.

[47] Hardy v. Waters, 38 Me. 450. So it seems that where an infant seeks to disaffirm a voidable contract and demand restoration of property parted with by him, he may make such demand through an agent or attorney. Towle v. Dresser, 73 Me. 252.

[48] See Turner v. Bondalier, 31 Mo. App. 582, where it is held that the infant's appointment of an agent to make the affidavit in replevin is void, and Hardy v. Waters and Hastings v. Dollarhide, *supra*, are denied. See also Petrie v. Williams, 68 Hun (N. Y.), 589.

[49] In 1 Am. Lead. Cases, cited above, the learned editors say: "The numerous decisions which have been had in this country justify the settlement of the following definite rule as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessaries. The only act which he is under a legal disability to perform is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable by him at his election." See also Bishop on Contracts, Ed. 1887, §§ 917–935.

[50] Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496; Patterson v. Lippincott, 47 N. J. L. 457, 54 Am. Rep. 178; Cummings v. Powell, 8 Tex. 80. See Bishop on Contracts, New Ed. § 930, where the learned author says: "In reason, we shall find it difficult to see why an infant, a person of imperfect capacity, cannot as validly act through another whose capacity has become perfected by age, and therefore presumably furnishing a sort of protection, as by his sole and unguarded self," and he refers to Whitney v. Dutch, and Bool v. Mix, cited, *supra*. See also remarks of Holmes,

nied.[51] Indeed no satisfactory reason is perceived why the rule should not be that, within the limits and to the extent within which he may bind himself by his contracts, he may also bind himself by the intervention of an agent appointed by him for that purpose.[52] To such end it is believed the authorities will come although it must be conceded that the present weight of authority is against it.

§ 146. ——— Effect of rule.—The general adoption of the view that the infant may thus act by agent would not radically change the results worked out by the existing rules, except as to the possibility of ratification,[53] and the introduction of the well known rule that only the infant or those who represent him may question the act.[54] The obligations of the infant to the agent could still be avoided, as an infant partner may now avoid his obligations to his copartner; and the infant's obligations, to third persons, arising from the agency, could still be avoided by him,[55] very much as an infant partner may now avoid personal obligations to firm creditors.

§ 147. ——— Liability of infant for torts of agent or servant.—With respect of the liability of an infant for the torts of one alleged to be his servant or agent, much the same condition of the law is found as in the case of contracts.[56] Under any view, an infant of sufficient age would doubtless be held liable for a tort committed under his immediate direction and control, without any reference to the question of agency, on the ground that it was his own act.[57] With reference to his liability for the merely negligent act of his servant or agent, not directly caused by the infant, the latter would doubtless not be bound wherever it is held that an infant cannot appoint an agent or servant

J., in Fairbanks v. Snow, 145 Mass. 153, 1 Am. St. Rep. 446, citing Whitney v. Dutch, *supra;* Welch v. Welch, 103 Mass. 562; Moley v. Brine, 120 Mass. 324.

[51] Coursolle v. Weyerhauser, 69 Minn. 328; Benson v. Tucker, —— Mass. ——, 98 N. E. 589; Johannson v. Gudmundson, 19 Manitoba, 83, 11 West. L. Rep. 176. See also Ferguson v. Houston, etc., Ry. Co., 73 Tex. 344; Simpson v. Prudential Ins. Co., 184 Mass. 348, 63 L. R. A. 741, 100 Am. St. R. 560.

[52] Thus an infant may by agent bind himself for necessaries. Fruchey v. Eagleson, 15 Ind. App. 88.

[53] See *ante*, § 140.

[54] Thus in Patterson v. Lippincott, 47 N. J. L. 457, 54 Am. Rep. 178, it was held that the other party to a contract made through an agent with an infant could not recover damages from the agent for an alleged breach of warranty of authority, where it did not appear that the infant had repudiated or intended to repudiate the contract on his part. In Continental Nat. Bank v. Strauss, 137 N. Y. 148, 553, it is said to be the presumption that the infant will not plead infancy.

[55] Vogelsang v. Null, 67 Tex. 465.

[56] See *ante*, § 141.

[57] Sikes v. Johnson, 16 Mass. 389. See also Burnham v. Seaverns, 101 Mass. 360, 100 Am. Dec. 123.

at all.[58] Even if it should be held that an infant's appointment of an agent or servant was not void but voidable merely, the infant would doubtless be permitted to avoid the consequences of his servant's negligence, by avoiding the employment of the servant, in any case in which the tort could not be regarded as his own act.

§ 148. Married woman as principal—Could not be at common law—Now generally may be.—An unmarried woman, whether maid or widow, was, at the common law, subject to no general contractual disabilities, and could therefore appoint and act through agents as freely as a man; and this rule, of course, still prevails. But a married woman at common law was, in general, incapable of entering into contracts and therefore could neither enter into contractual obligations to an agent nor make contracts with thirds persons through an agent.[59] Modern stat-

[58] In Cooley on Torts (2d Ed.) 128, it is said: "As the doctrine *respondeat superior* rests upon the relation of master and servant which depends upon contract actual or implied, it is obvious that it can have no application to the case of an infant employer, and he therefore is not responsible for torts of negligence by those in his service." This is quoted with approval and made the basis of the decision in Burns v. Smith, 29 Ind. App. 181, 94 Am. St. Rep. 268. So in Robbins v. Mount, 33 How. Pr. (N. Y.) 24, 4 Robt. 553, it is said of the infant, "He cannot in law become a master or be responsible as a master for the negligence or want of skill of his servant."

See also Lowery v. Cate, 108 Tenn. 54, 57 L. R. A. 673 and note, 91 Am. St. Rep. 744.

In the case of wrongs resulting from the ownership of real estate, however, a different rule applies. Thus in Cooley on Torts (2d Ed.) 122, it is said: "An infant as the owner or occupant of lands is under the same responsibility with other persons for any nuisance created or continued thereon to the prejudice or annoyance of his neighbors, and for such negligent use or management of the same, by himself or his servants, as would render any other owner or occupant liable to an adjoining proprietor." This is quoted and relied upon in McCabe v. O'Connor, 4 N. Y. App. Div. 354.

So in a case involving the liability of an infant landowner for trespasses committed by his agent in the course of the management of the land, the trial court charged the jury that the infant was not liable, but the supreme court said: "If the instruction goes beyond the liability—growing out of and inseparable from the relation of principal and agent, formed by contract positive or implied, and protects the infant of sufficient intelligence and judgment from accountability for torts involved and done in the necessary prosecution of the business of the agency and the attainment of its ends, we are not prepared to concur in its correctness in law. We do not see why the rule in such case, *qui facit per alium facit per se*, does not apply." Smith v. Kron, 96 N. C. 392.

[59] Welsbrod v. Chicago, etc., Ry Co., 18 Wis. 35, 86 Am. Dec. 743; Dorrance v. Scott, 3 Whart. (Penn.) 313, 31 Am. Dec. 509; Caldwell v. Waters, 18 Penn. St. 79, 55 Am. Dec. 592; Appeal of Freeman, 68 Conn. 533, 37 L. R. A. 452, 57 Am. St. R. 112; State v. Clay, 100 Mo. 571; Marshall v. Rutton, 8 T. R. 545; Lewis v. Lee, 3 B. & C. 291; Fairthorne v. Blaquire, 6 M. & S. 73.

utes, however, have quite generally removed her disability, at least so far as her separate property is concerned, and she may now undoubtedly appoint an agent to represent her in dealing with those matters concerning which she is thus made competent to act in person.[60] In this respect, her competency is usually made coextensive with the right of a *feme sole*. Her capacity to contract, however, is purely statutory and she cannot confer upon her agent any greater powers than she might herself exercise in the premises. Her agent, therefore, can bind her only while acting within the limits fixed to her capacity.[61]

[60] Weisbrod v. Chicago, etc., Ry. Co., *supra;* McLaren v. Hall, 26 Iowa, 297; Knapp v. Smith, 27 N. Y. 277; Woodworth v. Sweet, 51 N. Y. 8; Bodine v. Killeen, 53 N. Y. 93; Rowell v. Klein, 44 Ind. 290; Munger v. Baldridge, 41 Kan. 236, 13 Am. St. R. 273; First Com'l Bank v. Newton, 117 Mich. 433; Crosby v. Washburn, 66 N. J. L. 494; Lathrop-Hatten Lumber Co. v. Bessemer Sav. Bank, 96 Ala. 350; Bertschy v. Bank of Sheboygan, 89 Wis. 473; Morris v. Linton, 61 Neb. 537; Linton v. National L. Ins. Co., 104 Fed. 584; Stout v. Perry, 152 N. C. 312, 136 Am. St. R. 826. See cases cited in § 161, *et seq., post.*

[61] Kenton Insurance Co. v. McClellan, 43 Mich. 564; Nash v. Mitchell, 71 N. Y. 199, 27 Am. Rep. 38; Frazee v. Frazee, 79 Md. 27; Bowles v. Trapp, 139 Ind. 55; Strode v. Miller, 7 Idaho, 16; McCollum v. Boughton, 132 Mo. 601, 35 L. R. A. 480; Freeman's Appeal, 68 Conn. 533, 57 Am. St. R. 112, 37 L. R. A. 452; McFarland v. Heim, 127 Mo. 327, 48 Am. St. R. 629; Spurlock v. Dornan, 182 Mo. 242; Troy Fertilizer Co. v. Zachry, 114 Ala. 177.

By what law married woman's capacity governed—Conflict of laws.— In Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, a married woman did not have capacity to make a contract of guarantee in Massachusetts. It was held she could appoint an agent to make such a contract in Maine, where such disability did not exist.

The same was held in First Nat. Bank v. Mitchell, 34 C. C. A. 542, 92 Fed. 565. But, on the same state of facts, the state court came to the contrary conclusion. Freeman's Appeal, 68 Conn. 533, 37 L. R. A. 452, 57 Am. St. R. 112.

In Baum v. Birchall, 150 Pa. 164, 30 Am. St. R. 797, a bond, signed by a Pennsylvania woman in Pennsylvania, was delivered by her agent in Delaware where she would have had capacity to make it. The bond was held valid although no such contract could be made at her domicile.

So in Conn. Mut. Ins. Co. v. Westervelt, 52 Conn. 586, the assignment of an insurance policy was held valid, when filled out by an agent in a state where capacity existed.

In Loftus v. Farmers' & Merchants' Nat. Bank, 133 Pa. 97, 7 L. R. A. 313, a married woman in New York appointed an agent to sell municipal bonds in Pennsylvania. *Held*, valid since such power was expressly given by a statute of the latter state.

In Thompson v. Taylor, 66 N. J. L. 253, 54 L. R. A. 585, 88 Am. St. R. 485, a married woman could not sign an accommodation note in New Jersey but could in New York. The note was signed in New Jersey, but as its inception dated from its negotiation by her agent in New York, the latter law was held to govern. To the same effect, see Voigt v. Brown, 42 Hun (N. Y.), 394. But

Where the married woman may appoint an agent, she may appoint her husband as the agent, as will be more fully seen hereafter.[62]

§ 149. ——— How agent appointed by—General effect.—The appointment of an agent by a married woman may be made in the same manner as by any other principal, and when appointed the same legal consequences and effects result from the relation which would flow from the appointment by any other principal of like capacity.[63]

As was said in a leading case,[64] in New York: "With the removal of common law disabilities from married women corresponding liabilities have necessarily been imposed upon them. They take the civil rights and privileges conferred, subject to all the incidental and correlative burdens and obligations, and their rights and obligations are to be determined by the same rules of law and evidence by which the rights and obligations of the other sex are determined under like circumstances. To the extent, and in the matters of business in which they are by law permitted to engage, they owe the same duty to those with whom they deal, and to the public, and may be bound in the same manner as if they were unmarried. Their common law incapacity cannot serve as a shield to protect them from the consequences of their acts, when they have statutory capacity to act. A married woman is *sui juris* to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. * * * She has all the legal capacity to do every act incident to the business or trade in which she may engage which a *feme sole* would have, that is, full legal capacity to transact the business, including, as incidents to it, the capacity to

contra, Union Nat. Bank v. Chapman, 169 N. Y. 538, 57 L. R. A. 513, 88 Am. St. R. 614.

In Union Nat. Bank v. Hartwell, 84 Ala. 379, the agent only had authority to act in the state where the principal did not have capacity to contract. *Held*, that the agent could not contract.

In Basilea v. Spagnuolo, 80 N. J. L. 88, the note was dated and made payable in New Jersey where the principal had no capacity to contract. *Held*, that there would be a presumption of authority to negotiate only in that state and negotiation in New York would not be binding. But *contra*, see Voigt v. Brown, *supra*.

In Johnston v. Gawtry, 11 Mo. App. 322, the agent's act created a charge on land. Capacity of principal in such cases is determined by the law of the state where the land is located. In like manner, the validity of a power of attorney to sell land is determined by the law of the state where the land is situated. Morris v. Linton, 61 Neb. 537; Bissel v. Terry, 69 Ill. 184.

[62] See *post*, § 169.

[63] See cases cited *post*, §§ 169, 170.

[64] Bodine v. Killeen, 53 N. Y. 93.

contract debts and incur obligations in any form, and by any means, by which others acting *sui juris* can assume responsibility. * * * She is bound by the appearances which she has given to the transaction, and upon the faith of which others have acted, up to the limits of her legal capacity to act."

§ 150. ——— Liability of married woman for torts of agents or servants.—While the common law rules prevailed, a married woman, as has been seen, could not enter into contracts in person or by agent and could therefore incur no contractual liability by contract made by another as her agent. And so with respect of her torts; while she might be liable for the acts of another so committed under her immediate direction as to be in law her own acts, if she would have been liable if they had been committed by her in person [65] she could not be liable merely by reason of her previous or subsequent assent.[66]

Where her common law disabilities still prevail or in cases to which the modern statutes do not extend, she is not liable for the torts of one alleged to be her servant.[67] But where she acts in the larger fields of business created by the modern statutes, and employs servants and agents, she is responsible for their torts in the same way as any other master or principal.[68]

§ 151. Aliens—Alien enemies.—The mere fact that one is an alien does not in general disqualify him to be either principal or agent. An alien, unless forbidden, may do business, make contracts, acquire property—though he is often forbidden to hold land—and the like, and he may usually do this through an agent like any other person. An alien enemy, however, cannot, it is said, appoint an agent, or act by agent across the line of hostilities, certainly not for commercial purposes;[69] though, as will be seen, if he already has one before the breaking out of hostilities, the agency is not necessarily terminated as to all purposes.[70]

[65] See Sikes v. Johnson, 16 Mass. 389. See also the interesting note appended to this case by the reporter.

[66] See Vanneman v. Powers, 56 N. Y. 39; Ferguson v. Brooks, 67 Me. 251.

[67] Ferguson v. Neilson, 17 R. I. 81, 33 Am. St. 855, 9 L. R. A. 155, the disabilities of married women not having been removed in Rhode Island.

[68] Shane v. Lyons, 172 Mass. 199, 70 Am. St. 261; Ferguson v. Brooks, 67 Me. 251; Flesh v. Lindsay, 115 Mo. 1, 37 Am. St. 374.

[69] See United States v. Grossmayer, 76 U. S. (9 Wall.) 72, 19 L. Ed. 627; Hubbard v. Matthews, 54 N. Y. 43, 13 Am. Rep. 562; Keershaw v. Kelsey, 100 Mass. 561.

[70] See *post*, Chapter VIII, *Termination of Relation.*

II.

WHO MAY BE AGENTS.

§ 152. In general.—Having thus seen who is competent to be the principal in the relation, attention will now be given to the question who is competent to be the agent. Here several aspects may present themselves: 1. Who in general is competent to be agent; 2. Incompetency from some peculiar relation in which the parties already stand either to one another or to the subject matter of the agency; and 3. Incompetency from lack of professional or other similar standing.

1. Competency in General.

§ 153. What questions arise.—The question of the competency of the agent may present itself in determining the rights and liabilities of three groups of persons: (*a*) As between the principal and third persons; (*b*) As between the principal and the agent; and (*c*) As between the agent and third persons. Of these three, the first is the most important aspect. The primary purpose in the creation of agency is to bring the principal and third persons into relations with each other, and not at all to create obligations between the agent and the third person or necessarily between the agent and the principal. If the principal and the agent are both *sui juris,* then the rights of the third person against the principal as well as the rights of the principal against the agent, of the agent against the principal and of the third person against the agent, if such rights exist, may all be valid and enforceable; but where the agent is not *sui juris* some or all of these rights may be imperfect or unenforceable.

§ 154. Less competency in agent may suffice than is required of principal.—From the standpoint of the rights and liabilities arising between the principal and the third person with whom the agent deals, it is obvious that a less degree of competency may suffice in the agent than in the principal. The agent acts only in a representative capacity and exercises only a derivative authority. The act to be performed is to be done by the principal's direction and on the principal's account. The material question, therefore, is whether the principal had the

capacity to do the act and the right to cause it to be done by another. The agent is not expected to bind himself, or to act upon any authority or capacity of his own. He is but the instrument through which the principal's power is to be exercised, the channel through which the principal's capacity is to flow. If the principal's power is adequate, if his capacity is sufficient, it is not at all essential that the agent also shall have the capacity which would be required if he were himself the principal. It is from this standpoint that it is often said that any person may be an agent,[71] and that it has been declared that monks, infants, feme coverts, persons attainted, outlawed or excommunicated, slaves or villeins, and aliens are competent to act as agents.[72]

§ 155. Infant as agent.—As has been already seen, an infant is generally held not to be competent to be a principal. He may, however, be an agent or a servant in such sense that his acts as such, within the scope of the authority conferred upon him, will bind his principal in formal transactions as well as informal ones to the same degree and in the same manner as though the agent were an adult.[73] The infancy of the agent will also ordinarily be immaterial as affecting the liability to the principal of the third persons who have had dealings with the principal through an infant agent.

It is evident, however, that the relation between a principal and his infant agent is not a perfect one, for though the infant may bind his principal by his acts, and though the principal is bound by his contracts with the infant, the infant himself may escape the liabilities to the principal for the express or implied contractual obligations which an adult agent would assume under like circumstances.[74] Neither does such a relation afford to third persons who may deal with the infant agent, that protection which would be insured to them if the agent were *sui juris;* for it would not be contended, for example, that, in the absence

[71] Cal. Code, § 2296.

[72] Ewell's Evans on Agency, 17; Wharton, Agency, § 14.

[73] Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; Ewell's Evans on Agency, 17.

"The law is perfectly settled that an infant may absolutely and irrevocably execute a power, either by absolute deed, or otherwise, as fully and effectually as an adult person." Sheldon v. Newton, 3 Ohio St. 494.

"An infant can exercise a power even though it be coupled with an interest, where an intention appears that it should be exercisable during minority." *Per* Jessel, M. R., *In re* Cardross, 7 Ch. Div. 728. An infant may exercise a power of appointment over personalty conferred by a marriage settlement. *In re* D'Angibau, 15 Ch. Div. 228.

[74] See Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Widrig v. Taggart, 51 Mich. 103; Whitmarsh v. Hall, 3 Den. (N. Y.) 375; Vent v. Osgood, 19 Pick. (Mass.) 572; Lufkin v. Mayall, 25 N. H. 82; Robinson v. Weeks, 56 Me. 102.

of fraud, the infant would be bound by an implied warranty of authority, or that, failing to bind his principal, he bound himself.

§ 156. Child as agent of parent.—An infant may be the agent or servant either of his parent or of strangers, but in either case it must be by virtue of some actual authorization, express or implied. Even when he is to act for his parent, it must be by reason of the parent's authorization, either express or implied, for, except possibly in some cases respecting necessaries,[75] a child has no implied authority, merely because he is the child,[76] to bind his parent as his agent, as, for example, in buying or selling goods, making contracts, or loaning the parent's property;[77] nor has he any power, merely because he is the

[75] As to this question, which is not within the scope of this work, see Porter v. Powell, 79 Iowa, 151, 18 Am. St. R. 353, 7 L. R. A. 176; Fowlkes v. Baker, 29 Tex. 137, 94 Am. Dec. 270; Finn v. Adams, 138 Mich. 258, 4 A. & E. Ann. Cas. 1186; Alvey v. Hartwig, 106 Md. 254, 14 A. & E. Ann. Cas. 250.

[76] No authority results merely from the relationship. Ritch v. Smith, 82 N. Y. 627, 60 How. Prac. 157; Walsh v. Curley, 16 N. Y. Supp. 871; McMahon v. Smith, 136 App. Div. 839; Cousins v. Boyer, 114 App. Div. 787; Hovey v. Brown, 59 N. H. 114; Nuckolls v. St. Clair, 1 Colo. App. 427, 29 Pac. 284; Freeman v. Robinson, 38 N. J. L. 383, 20 Am. Rep. 399; Hickox v. Bacon, 17 S. Dak. 563; Hoag v. Hay, 103 Iowa, 291; Fisher v. Lutz, 146 Wis. 664; Habhegger v. King, 149 Wis. 1, 135 N. W. 166, 39 L. R. A. (N. S.) 881.

[77] "A son has no authority, as such, to lend his father's property, and there is no presumption that such authority has been given to a son. It may be shown that authority to lend tools and the like has been given to a son expressly, or such an authority may be inferred from the conduct of the father tending to show that he reposed such confidence and intrusted such discretion to the son, as by showing that on other occasions the son had lent the father's property of a similar kind, and the father, upon the facts coming to his knowledge, approved what he had done, but without such proof the son stands in the same position as a stranger." Johnson v. Stone, 40 N. H. 197, 77 Am. Dec. 706.

Minor son living at home is not presumed to be the father's agent in hiring a tutor during vacations. Peacock v. Linton, 22 R. I. 328, 53 L. R. A. 192.

Where a minor son has paid out his father's money for an unauthorized purpose, *e. g.*, for pipes and tobacco, the father on tendering back the articles may recover the money. A tender and demand made by the plaintiff's wife is sufficient. Sequin v. Peterson, 45 Vt. 255, 12 Am. Rep. 195.

Money entrusted to a minor son for a specific purpose and applied by him without the father's consent in compounding a crime committed by the son may be recovered by the father. Burnham v. Holt, 14 N. H. 367.

The right of a child to use property devoted to the purposes of the family, in the usual and ordinary way, may be implied, and where the child invites another to participate in that use, as for example to drive the father's horses in company with the child upon an occasion when the child might properly use them, the person so invited cannot be treated by the father as a wrong-doer. Bennett v. Gillette, 3 Minn. 423, 74 Am. Dec. 774.

child, and when he is not acting as the parent's servant, to subject the parent not himself at fault to liability for the child's torts.[78]

The parent may make the child his agent or servant, and this, as in the case of other persons, may be done expressly, or be inferred from the conduct of the parent—his acts or omissions, his acquiescence, his approval.[79]

The lack of actual authorization may also be supplied as in other cases by the subsequent ratification, either express or implied, of the parent,[80] and under the same qualifications and conditions.[81]

Where the parent's horse is ridden by the son with the parent's authority "it would seem to be an inference of law, or an incident of such authority or loan, that the son might consent to anything respecting the horse, which in common prudence, would be necessary to his existence or preservation." White v. Edgman, 1 Over. (Tenn.) 19.

[78] Tifft v. Tifft, 4 Den. (N. Y.) 175; Smith v. Davenport, 45 Kan. 423, 11 L. R. A. 429, 23 Am. St. R. 737; Baker v. Morris, 33 Kan. 580; Hagerty v. Powers, 66 Cal. 368, 56 Am. Rep. 101; Wilson v. Garrard, 59 Ill. 51; Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336; Brohl v. Lingeman, 41 Mich. 711; Needles v. Burk, 81 Mo. 569, 51 Am. Rep. 251; Paul v. Hummel, 43 Mo. 119, 97 Am. Dec. 381; Teagarden v. McLaughlin, 86 Ind. 476, 44 Am. Rep. 332; Winkler v. Fisher, 95 Wis. 355; Schaefer v. Osterbrink, 67 Wis. 495, 58 Am. Rep. 875; Hoverson v. Noker, 60 Wis. 511, 50 Am. Rep. 381.

[79] Many cases in which agency for the parent is implied from conduct, are cited, in the following chapter, upon *Appointment and Authorization of Agents*, *post*, § 274, *et seq.*

For a case of rather direct appointment, *e. g.*, where a father told a store keeper to let his daughter have whatever she wanted out of the store, see Harper v. Lemon, 38 Ga. 227.

Many cases involving the question of the liability of a parent for the negligence of his son as his servant, are found in the chapter upon the *Liability of the Principal to Third Persons.*

For automobile cases, see Stowe v. Morris, 147 Ky. 386, 39 L. R. A. (N. S.) 224 (Daily v. Maxwell, 152 Mo. App. 415, and Lashbrook v. Patten, 1 Duv. 316, were relied upon); Doran v. Thomsen, 76 N. J. L. 754, 131 Am. St. R. 677, 19 L. R. A. (N. S.) 335; Moon v. Matthews, 227 Pa. 488, 136 Am. St. Rep. 902, 29 L. R. A. (N. S.) 856; Smith v. Jordan, 211 Mass. 269.

For a gun case. Brittingham v. Stadiem, 151 N. C. 299.

[80] Evidence that a minor son had on several occasions signed for the father with his consent tends to show that he was authorized to sign upon a subsequent similar occasion. Watkins v. Vince, 2 Stark. 368. See also Weaver v. Ogletree, 39 Ga. 586. Authority to sign could not be inferred from the fact that the son had on several occasions signed, if it did not appear that the father knew it, nor can authority properly be deduced from acquiescence in a single instance. Greenfield Bank v. Crafts, 2 Allen (Mass.), 269.

Where a son makes an exchange of a horse belonging to his father and the father apparently acquiesces for a considerable period of time, he cannot afterwards repudiate the act. Hall v. Harper, 17 Ill. 82. So where the son sold a half interest in his father's mowing and reaping machine and the father acquiesced for two years. Swartwout v. Evans, 37 Ill. 442; Condon v. Hughes, 92 Mich. 367, is to the same effect. See also Thayer v. White, 53 Mass. (12 Metc.) 343; Booker v. Tally, 21 Tenn. (2 Humph.) 308.

[81] Knowledge necessary. White v. Mann, 110 Ind. 74. Act must have

§ 157. Parent as agent of child.—A parent as such, whether father or mother, is not *per se* agent of the child, to bind him or his estate whether the child be infant or adult.[82] While the child is an infant, the parent as such has no greater authority than as a natural guardian. If the child be an adult he may appoint his parent as agent as in the case of any other person.[83] If the child be an infant he could appoint his parent as agent if he was competent to appoint an agent for any purpose.[84]

§ 158. Slaves as agents.—During the time of slavery it was held that a slave could act as agent.[85] Said the court in one case:[86] "It is not questioned that a master may constitute his slave his agent, and I cannot conceive of any distinction between the circumstances which constitute a slave and a freeman an agent,—they are both the creatures of the principal and act upon his authority. There is no condition, however degraded, which deprives one of the right to act as a private agent; the master is liable even for the act of his dog done in pursuance of his command." While this statement could easily be shown to contain several errors, yet so far as it means merely that a master is liable for the acts of his slave within the scope of the authority conferred upon him, it is doubtless unexceptionable.

§ 159. Women.—The contractual disabilities under which women were placed at common law were practically all not disabilities of sex but disabilities by marriage. The unmarried woman, whether maid or widow, was free to have an agent and certainly free to be one.

§ 160. Married women—As agents for third persons.—Notwithstanding her incapacity to appoint an agent, a married woman might, at common law, be the agent of third persons,[87] even in their dealings with her husband.[88] Her capacity in this respect, however, like that of other persons not competent to contract generally, was necessarily a limited one, as the married woman was incapable of assuming the

been done as agent. Fisher v. Lutz, 146 Wis. 664.

[82] Parent not *ipso facto* agent of minor child. Keeler v. Fassett, 21 Vt. 539, 52 Am. Dec. 71; Linton v. Walker, 8 Fla. 144, 71 Am. Dec. 105; Pittsburg, etc., Ry. Co. v. Haley, 170 Ill. 610; Houston, etc., Ry. Co. v. Bradley, 45 Tex. 171; Clark v. Smith, 13 S. Car. 585.

[83] See Reeves v. Kelly, 30 Mich. 133; Jordan v. Greig, 33 Colo. 360.

[84] See Patterson v. Lippincott, 47 N. J. L. 457, 54 Am. Rep. 178.

[85] Governor v. Daily, 14 Ala. 469; Powell v. State, 27 Ala. 51; Lyon v. Kent, 45 Ala. 656; Chastain v. Bowman, 1 Hill (S. C.), 270.

[86] Chastain v. Bowman, *supra*.

[87] Hopkins v. Mollineux, 4 Wend. (N. Y.) 465; Singleton v. Mann, 3 Mo. 464; Butler v. Price, 110 Mass. 97; McKee v. Kent, 24 Miss. 131; Whitworth v. Hart, 22 Ala. 343; Goodwin v. Kelly, 42 Barb. (N. Y.) 194; Gray v. Otis, 11 Vt. 628; Sawyer v. Cutting, 23 Vt. 486; White v. Oeland, 12 Rich. (S. C.) 308.

[88] Story on Agency, § 7.

reciprocal liabilities and obligations which the perfect relation imposes upon the agent,[89] and as her duties to her husband and her family rendered her assumption of many undertakings impossible.

The effect of the modern statutes has been to enlarge this limited capacity according as they have enlarged her capacity to deal as a *feme sole,* and where the removal of her disabilities is complete, or where with the consent of her husband or of the law, she is competent to carry on business as a *feme sole,* her capacity to bind herself to the same extent by all of the obligations of an agent would seem to be a necessary consequence.[90]

§ 161. Wife as agent for her husband. 1. In domestic affairs.— Both at the common law and under the modern statutes, the wife may be the agent of her husband. This agency is often said to be of two kinds: 1. That which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge her husband's credit for the purpose of obtaining those necessaries which the husband himself has neglected or refused to furnish; and,

2. That which arises from the authority of the husband, expressly or impliedly conferred as in other cases.

The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature, and her authority of the kind first mentioned is limited in its nature and extent by the legal requirements fixed for its creation, of the existence of which those persons who assume to deal with her as such agent must take notice at their peril.[91] The full consideration of this question—the

[89] See Tucker v. Cocke, 32 Miss. 184; Carleton v. Haywood, 49 N. H. 314.

[90] See cases cited in note 2 to § 169, *post.* Many interesting questions arise in connection with this subject, which are not yet determined, as for example: How far is a married woman acting as agent for her husband or for a third person, bound by an implied or express warranty of her authority? What if she exceeds her authority? What if she conceals her principal? What, if intending to bind her principal, she so executes a written contract, as, in form, to bind herself? How far may she assume responsibility as an agent to third persons without her husband's consent? Upon this point, see Pullman v. State, 78 Ala. 31.

[91] Clark v. Cox, 32 Mich. 204; Eames v. Sweetser, 101 Mass. 78; Raynes v. Bennett, 114 Mass. 424; Morrison v. Holt, 42 N. H. 478, 80 Am. Dec. 120; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Jones v. Gutman, 88 Md. 355; Bonney v. Perham, 102 Ill. App. 634; Wanamaker v. Weaver, 176 N. Y. 75, 98 Am. St. R. 621, 65 L. R. A. 529; Constable v. Rosener, 82 N. Y. App. Div. 155, aff'd 178 N. Y. 587; Rea v. Durkee, 25 Ill. 503; Henderson v. Stringer, 2 Dana 291; Vusler v. Cox, 53 N. J. L. 516; Debenham v. Mellon, 6 App. Cas. 24; Manby v. Scott, 1 Mod. 124; Jolly v. Rees, 15 C. B. N. S. 628.

authority strictly speaking not being referable to the law of agency at all—belongs properly to a treatise upon the marriage relation.[92]

Closely allied to the first kind and sometimes confused with it, though really belonging to the second, because really depending upon the doctrines of agency, is the agency of the wife resulting from the manner in which she and her husband live, and the situation in which he has placed her. Many varieties of situation, of course, present themselves, and it seems impossible to reconcile all of the cases.

§ 162. ——— Wife as domestic manager.—When a man maintains a domestic establishment and places his wife in charge of it, she takes by implication, as domestic manager, the power to make those contracts and purchases respecting the conduct and maintenance of the household affairs which are naturally and ordinarily incident to the wife's management of such an establishment. Supplies for the house, domestic service, medical attendance, articles for the use of the wife and children, and the like, suitable to the style in which the husband lives, and of the sort and amount which are ordinarily ordered by the wife under such circumstances, would fall within this rule.[93] This rule, it is to be observed, does not necessarily depend upon marriage, for any other woman placed in the same situation might have substan-

[92] See Stewart on Husband and Wife, §§ 89–98; Bishop on Married Women, Chap. 30; Schouler on Husband and Wife. See also Hatch v. Leonard, 165 N. Y. 435.

[93] See, for example, the opinions of Lord Selborne and Lord Blackburn in Debenham v. Mellon, 6 App. Cas. 24, 2 Eng. Rul. Cas. 441, though the actual case there was not of this sort.

In Haberman v. Gasser, 104 Wis. 98, upon the ground that the wife, a domestic manager, was her husband's agent to purchase supplies, she was allowed to rescind a contract for meat which proved bad and recover the consideration and still to have a tort action for injuries to herself from the bad meat.

In Baker v. Witten, 1 Okla. 160, an authority referable to the second class of cases is confused with the first.

In Cory v. Cook, 24 R. I. 421, in a case in which the defendant's wife had supplied board the converse of the rule was applied and the court held that the claim for the board money belonged to her husband's estate.

This authority covers of course only matters such as fairly belong to the domestic management of the kind of establishment maintained by the husband and does not cover other things: the receiving the husband's telegram, Western Union Tel. Co. v. Moseley, 28 Tex. Civ. App. 562, or the purchase of an expensive guitar and music, Phillipson v. Hayter, 19 Week. Rep. 130, 40 L. J. C. P. (N. S.) 14, L. R. 6 C. P. 38, 23 L. T. (N. S.) 556; Reid v. Teakle, 13 C. B. 627, 22 L. J. C. P. (N. S.) 161, 17 Jurist, 841, or of unnecessary jewelry, Montague v. Benedict, 3 B. & C. 631, 5 Dowl. & R. 532, 3 L. J. K. B. 94, 27 Rev. Rep. 444. See also Montague v. Espinasse, 1 Carr. & P. 356; Phillips v. Sanchez, 35 Fla. 187.

See also M'George v. Egan, 7 Scott, 112, 5 Bing. N. C. 196, 3 Jurist, 266, in which the wife's position as domestic manager was allowed to cover a contract for school for a child that lived in the family.

tially the same authority.[94] Neither is the rule affected by the modern statutes removing the contractual disabilities of married women.[95]

Like any other authority so created, this would not be affected by secret limitations sought to be placed upon it;[96] and it would continue, for the protection of third persons who had been led to rely upon it, until they were notified of its discontinuance.[97]

That the wife had thus been made domestic manager could be proved either by direct statements or admissions of the husband, or by proof of conduct reasonably warranting that conclusion.

§ 163. ——— Some cases seem to hold that from marriage and cohabitation a presumption will arise that the wife is domestic manager which will suffice until the contrary is shown;[98] but that this presumption may be rebutted.[99] In many of these cases the facts un-

[94] See *per* Pollock, C. B., in Reneaux v. Teakle, 8 Ex. at p. 682; *per* Lord Selborne, in Debenham v. Mellon, 6 App. Cas. at p. 33.

[95] Wilson v. Herbert, 41 N. J. L. 454, 32 Am. Rep. 243.

[96] See *per* Lord Selborne in Debenham v. Mellon, 6 App. Cas. 24, 2 Eng. Rul. Cas. 441.

[97] It may thus continue as to such persons after the separation of the parties, or the making of other arrangements. Sibley v. Gilmer, 124 N. C. 631; Cowell v. Phillips, 17 R. I. 188, 11 L. R. A. 182; Hartjen v. Ruebsamen, 19 N. Y. Misc. 149; Bonwit, Teller & Co. v. Lovett, 102 N. Y. Supp. 800; Watts v. Moffet, 12 Ind. App. 399; Hudson v. Sholem & Sons, 65 Ill. App. 61.

This kind of authority can, of course, be cut off by notice. Keller v. Phillips, 39 N. Y. 351. See also Harshaw v. Merryman, 18 Mo. 106.

[98] Thus in New Jersey it is said, "where husband and wife are living together, the wife has implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management, and for articles furnished to her for her personal use suitable to the style in which the husband chooses to live. Under such circumstances the presumption is in favor of the wife's authority to contract on behalf of her husband. 1 Ev. Pr. & A. 166; Wilson v. Herbert, 41 N. J. L. 454, 32 Am. Rep. 243; Jolly v. Rees, 15 C. B. N. S. 628; Notes to Manby v. Scott, 3 Smith's Lead. Cas." Vusler v. Cox, 53 N. J. L. 516. To the same effect see: Bergh v. Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. R. 362; Wagner v. Nagel, 33 Minn. 348; Flynn v. Messenger, 28 Minn. 208, 41 Am. Rep. 279; Tyler v. Messenger Co., 17 App. D. C. 85; Furlong v. Hysom, 35 Me. 332; Bradt v. Shull, 46 App. Div. 347; Tebbets v. Hapgood, 34 N. H. 420; Wiler v. Fiegel, 10 W. N. C. 240 (Pa.).

[99] From marriage and cohabitation there is a presumption that the wife has authority for contracts for supplies for herself and the family, but that presumption apparently may be rebutted by the husband by showing that he had supplied the house or that he had given her money and requested her not to deal on credit. Baker v. Carter, 83 Me. 132, 23 Am. St. R. 764; Wanamaker v. Weaver, 176 N. Y. 75, 65 L. R. A. 529, 98 Am. St. R. 621; Jones v. Gutman, 88 Md. 355; Compton v. Bates, 10 Ill. 78; Morgan v. Chetwynd, 4 Fost. & F. 451; Lane v. Ironmonger, 13 M. & W. 368, 14 L. J. (N. S.) Ex. 35; Jolly v. Rees, 15 C. B. (N. S.) 628, 33 L. J. C. P. (N. S.) 177, 10 Jurist (N. S.), 319, 10 L. T. (N. S.) 298, 12 Week. Rep. 473.

doubtedly were such as to justify a finding that the wife was actually the domestic manager with the husband's express or implied consent (though the cases are not put upon that ground), and without that element, or, at least, the fact of a domestic establishment, it would be difficult to reconcile them with many others which hold that from marriage and cohabitation alone no such agency can be implied.

§ 164. ——— Authority of this sort, arising from the acts of the parties and not by act of law, would be revocable like any other. And it might be revoked by acts as well as by words, as in the case of any other authority. The breaking up of the domestic establishment, the separation of the parties, and the like, suggest situations of this sort. The same requirements as to notice of termination would also here exist.

§ 165. ——— **Authority when no domestic establishment maintained.**—Even though the wife were not in fact put in charge of the domestic establishment—perhaps because there was none maintained—and had therefore no authority upon that ground, it may still be true that authority to act as agent for her husband in domestic affairs can be deduced from a course of dealing with the actual consent or the acquiescence of the husband.[1] Such a course of dealing might be sufficient either to show an actual authority or to raise an estoppel in favor of those who had relied upon it.

Where the wife has not been made domestic manager, and there is no evidence of authority deducible from a course of dealing, acquiescence, and the like, the authority of the wife as the husband's agent arising merely from marriage and cohabitation, is very limited, and is dependent upon the fact that he has failed to supply her with those things which are necessary and suitable to her position. If he had, in fact, made a suitable provision for her, he could not be bound.[2] These questions, however, are not considered in this work.

[1] Thus see Jones v. Gutman, 88 Md. 355; Hartjen v. Ruebsamen, 19 N. Y. Misc. 149; Bonwit, Teller & Co. v. Lovett, 102 N. Y. Supp. 800; Anthony v. Phillips, 17 R. I. 188, 11 L. R. A. 182. See also Proctor v. Woodruff, 119 N. Y. Supp. 232; Johnson v. Briscoe, 104 Mo. App. 493.

[2] Thus where the husband and wife were not keeping a house of their own, but were serving, he as manager and she as manageress of a hotel where they were supplied with food and lodging, and the husband had made the wife a sufficient allowance for clothing and forbidden her to buy upon his credit, it was held that the husband was not liable for clothing purchased by her. Debenham v. Mellon, 6 App. Cas. 24, 2 Eng. Rul. Cas. 441. See also Dolan v. Brooks, 168 Mass. 350; Wanamaker v. Weaver, 176 N. Y. 75, 98 Am. St. R. 621, 65 L. R. A. 529; Rosenfeld v. Peck, 149 N. Y. App. Div. 663; Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 440; Alley v. Winn, 134 Mass. 77.

§ 166. ——— Wife may bind herself though domestic manager.—Where the wife has authority to bind her husband, she may, nevertheless, under modern statutes, bind herself, if she sees fit to do so; but the same rule would be applicable here as elsewhere that a known agent acting as such is presumed to intend to bind his principal rather than himself, and this presumption must be overcome before she can be charged.[3]

§ 167. Wife as husband's agent. 2. In non-domestic affairs.—Agencies of the second class, that is, those not relating to purely domestic affairs rest upon the same considerations which control the creation and existence of the relation between other persons. The wife may be either the general or the special agent of her husband by virtue of his authorization, and this authorization may, as in other cases, be express or implied; and may be conferred by specialty or by parol; or by precedent act or subsequent ratification.[4] Her authority in this

[3] Powers v. Russell, 26 Mich. 179; Wilson v. Herbert, 41 N. J. L. 454, 32 Am. Rep. 243; Feiner v. Boynton, 73 N. J. L. 136; Moore v. Copeley, 165 Pa. 294, 44 Am. St. R. 664.

[4] Cox v. Hoffman, 4 Dev. & Batt. (N. C.) 180; Sibley v. Gilmer, 124 N. C. 631; Burk v. Howard, 13 Mo. 241; Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567; McKinley v. McGregor, 3 Whart. (Penn.) 369; Camerlin v. Palmer Co., 10 Allen (Mass.), 539; Pickering v. Pickering, 6 N. H. 120; Abbott v. McKinley, 2 Miles (Penn.), 220; Gray v. Otis, 11 Vt. 628; Miller v. Delamater, 12 Wend. (N. Y.) 433; Mickelberry v. Harvey, 58 Ind. 523; Heny v. Sargent, 54 Cal. 396; Pullan v. State, 78 Ala. 31; Ladd v. Newell, 34 Minn. 107; Lang v. Waters, 47 Ala. 624; Felker v. Emerson, 16 Vt. 653; 42 Am. Dec. 532; Cantrell v. Colwell, 3 Head (Tenn.), 471; Edgerton v. Thomas, 9 N. Y. 40; Weber v. Collins, 139 Mo. 501; Hartjen v. Ruebsamen, 19 Misc. (N. Y.) 149; Bonwit, Teller v. Lovett, 102 N. Y. Suppl. 800. See also the following cases which treated a husband's agency for his wife upon the same principle: Harper v. Dail, 92 N. C. 394; Knapp v. Smith, 27 N. Y. 277; Buckley v. Wells, 33 N. Y. 518; Singleton v. Mann, 3 Mo. 465; Weisbrod v. Chicago, etc., Ry. Co., 18 Wis. 35, 86 Am. Dec. 743; Sims v. Smith, 99 Ind. 469, 50 Am. Rep. 99; Penn v. Whiteheads, 12 Gratt. (Va.) 74; Miller v. Watt, 70 Ga. 385; Vail v. Meyer, 71 Ind. 159; Louisville Coffin Co. v. Stokes, 78 Ala. 372. See also Hardenbrook v. Harrison, 11 Colo. 9; Conrad v. Abbott, 132 Mass. 330.

Where written authority would be requisite in other cases, it is requisite when the wife is the agent. Edwards v. Tyler, 141 Ill. 454; but not otherwise. Reeves v. McNeill, 127 Ala. 175.

Wife's acts during husband's absence.—The agency of the wife that may be implied from the domestic arrangements, may be enlarged by the fact, that the husband during his absence has left the wife in charge of his affairs. See the following cases:

In Buford v. Speed, 74 Ky. 338, the wife was in charge while her husband was absent serving in the confederate army. For the purpose of protecting his property from confiscation the wife employed and consulted with lawyers. After his return he expressed approbation of her management during his absence but the court in holding him for the attorneys' fees relies only upon the authority implied from the necessity of the circumstances.

case, however, when implied, is to be implied from acts and conduct, and not from her position as wife alone; and when based upon subsequent ratification, is to be established by other evidence than that alone

In Church v. Landers, 10 Wend. (N. Y.) 79, it was held that in the protracted absence of her husband a wife may hire out one of his horses, even although he may have given her general instructions not to do so. But held not so, where his absence was only for a day or two. Savage v. Davis, 18 Wis. 608.

In Evans v. Crawford County, etc., Insurance Company, 130 Wis. 189, 118 Am. St. R. 1009, 9 L. R. A. (N. S.) 485, during the husband's absence the house burned and the wife made the proof of loss, and the court, speaking of an agency in the wife by necessity because of the husband's absence, allowed a suit upon the policy which required proof of loss by the insured.

In Felker v. Emerson, 16 Vt. 653, 42 Am. Dec. 532, the husband was absent for several months and the wife was in charge. During that time a creditor attached cattle and hay. The wife requested that the hay be fed to the cattle, and this request was held to bind the husband.

In Meader v. Page, 39 Vt. 306, the husband was working in one state and left his wife in charge of affairs in another, where the home and the family were. He sent her money and she managed things herself. On a visit home he ordered two tombstones and promised to pay by money which should be sent to the wife. When the money came she used some of it however to buy flour, because she believed that price was rising, and borrowed enough more of the defendant to pay for the tombstones. The husband was held liable on the loan.

But in Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384, while the husband was away and the wife in charge a creditor of the husband levied on land. The wife agreed that the creditor might cut grass growing on the land and take the hay in payment of the debt, and it was held that she had no implied power to make such agreement.

In Cantrell v. Colwell, 3 Head (Tenn.), 471, a wife, during her husband's absence, was in charge of their farm and upon seeing plaintiff's horse in one of the fields asked a man to get it out. The man unnecessarily threw a stone and broke the horse's leg. Upon the ground that because of the husband's absence the wife had by necessity an authority to appoint an agent to care for things and authority to attend to the business of the farm, the husband was held liable.

In Casteel v. Casteel, 8 Blackford (Ind.) 240, 44 Am. Dec. 763, a husband had abandoned his wife and family and had left them upon a small farm. The wife hired the plaintiff to work the farm and the husband was held liable upon the contract as principal. The upper court says that from these circumstances "the jury has the right to consider her as authorized by her husband to procure its (the farm's) cultivation by labor."

In Fisher v. Conway, 21 Kan. 18, 30 Am. Rep. 419, the plaintiff had gone away for a while and left his wife upon the farm. During his absence, the defendants came upon the land and threshed and carried off grain. Kansas had a statute not allowing a wife to testify for or against her husband "except concerning transactions where one acted as agent for the other." Although there was no evidence of any express arrangement between the plaintiff and his wife, the court allowed her to testify as to the incidents of the alleged trespass on the ground that, during the husband's absence, the wife was by implication his agent to defend his possession. See also Butts v. Newton, 29 Wis. 632; Moore v. Simpson, 5 Little (Ky.), 49.

which is incident to the relation of the parties.[5] But when the agency is found to exist, the wife may bind her husband-principal to the same extent and in the same manner as any other agent might bind him under the same circumstances.

How far the relation of agent of her husband may impose upon the wife duties and obligations to third persons with whom she deals, is a question suggested in a preceding section. How far the same relation may impose upon the wife contractual obligations to her husband, is a question which belongs rather to a treatise upon their mutual rights and duties than to this.

The mere absence of the husband, however, would not usually justify a sale by the wife of his property. Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312. Nor the return by her of goods ordered by him and shipped to him. Richelieu Wine Co. v. Ragland, 43 Ill. App. 257.

Husband's ratification, acquiescence, etc.—Where a wife without previous authority makes a contract even in her own name, or does something else really on her husband's behalf, the husband may ratify simply by bringing suit relying upon that act. See Grant et al. v. White, 42 Mo. 285; Evans v. Crawford Co., etc., Insurance Co., 130 Wis. 189, 18 Am. St. R. 1009, 9 L. R. A. (N. S.) 485. See also Wright v. Couch, 113 S. W. 321 (Tex. Civ. App.), in which the ratification was accomplished by retaining in the house the piano which the wife had bought on credit.

In Stotts v. Bates, 73 Ill App. 640, the husband was held bound upon an agreement that board should be paid for her maintenance in her daughter's home, made orally by the wife in his presence and without his objection.

In Cook v. Newby, 213 Mo. 471, a wife had written a letter making an offer on behalf of her husband to the defendant; the defendant offered in evidence the letter with evidence that it was written with the husband's knowledge and at his request. It was held error to exclude the letter.

In Shuman v. Steinel, 129 Wis. 422, 116 Am. St. R. 961, 7 L. R. A. (N. S.) 1048, 9 Ann. Cas. 1064, it was held that when a wife had without previous authority signed in her own name a contract for the purchase of books, the husband was not bound thereby, even although he had subsequently said that he would pay if he had ordered. The court thought that this was no ratification because she had not purported to act as agent.

[5] Pickler v. Pickler, 180 Ill. 168; McNemar v. Cohen, 115 Ill. App. 31; Nat. Fire Ins. Co. v. Wagley (Tex. Civ. App.), 68 S. W. 819; McBride v. Adams, 84 N. Y. Supp. 1060; Heyert v. Reubman, 86 N. Y. Suppl. 797; Ross v. Dunn, 130 Mich. 443; Martin v. Oakes, 42 N. Y. Misc. 201; Essington v. Neill, 21 Ill. 139 (dictum); Thompson v. Brown, 121 Ga. 814; Colby v. Thompson, 16 Colo. App. 271; Syring v. Zelenski, 77 N. J. L. 406; Ness v. Singer Co., 68 Minn. 237. See also Howe v. Finnegan, 61 N. Y. App. Div. 610.

In Brown v. Woodward, 75 Conn. 254, in which the question of fact was whether the wife had been the defendant's agent to borrow money, the court held that the relationship of husband and wife was not enough of itself to constitute the wife agent, but that it was evidence which they might consider on the question of agency. The court said, "The acts of his wife would more readily be supposed to have been with his knowledge and authority than would those of a stranger."

§ 168. ——— Wife as husband's sub-agent.—Where the husband is agent for a third person, the wife as such is in no sense the sub-agent of the principal, or the agent of her husband in the performance of his duties to the principal, so as to bind either one for her acts. The husband might make her his sub-agent on his own responsibility, or he could make her such with the principal's express or implied consent, but she would not stand in either relation simply because she was the agent's wife.[6]

§ 169. Husband as agent for his wife.—It has been seen that within the limits of her power under modern statutes to enter into contracts, acquire, manage and dispose of property and carry on business a married woman may act by agent,[7] and it is well settled that her husband may be the agent. A husband has, however, by virtue of his relation alone, no implied power to act as the agent of his wife in the transaction of her business.[8] Whatever authority he exercises in

[6] While an attorney was absent from home, a letter came to him, containing a draft for collection. His wife opened the letter and received the money upon the draft, but the money never reached the principal. *Held*, not payment. Day v. Boyd, 53 Tenn. (6 Heisk.) 458.

[7] *Ante*, § 148.

[8] Hoffman v. McFadden, 56 Ark. 217, 35 Am. St. R. 101; Wagoner v. Silva, 139 Cal. 559; Steele v. Gold Fissure Co., 42 Colo. 529, 126 Am. St. R. 177; Dussoulas v. Thomas, 6 Pennewell (Del.), 1; Jordan v. Delaware Tel. & Tel. Co., — Del. —, 75 Atl. 1014; Foertsch v. Germuller, 9 D. C. App. 351; Rheam v. Martin, 26 D. C. App. 181; Byne v. Corker, 100 Ga. 445; Vizard v. Moody, 119 Ga. 918; Devine v. McMillan, 61 Ill. App. 571; Pratt v. Davis, 118 Ill. App. 161. (While the wife still has lucid intervals of complete sanity and when no emergency exists, the husband is not authorized, merely as husband, to consent to a serious operation upon her.) McLaren v. Hall, 26 Iowa, 297; Price v. Seydel, 46 Iowa, 696; Spratt v. Hugard, 5 Ky. L. R. 422; Hayes v. Walker, 25 Ky. L. R. 1045, 76 S. W. 1099; Aiken v. Robinson, 52 La. 925; Succession of Sangpiel, 114 La. 767; Steward v. Church, 108 Me. 83; Taylor v. Welslager, 90 Md. 414; Wait v. Baldwin, 60 Mich. 622, 1 Am. St. R. 551; Just v. State Bank, 132 Mich. 600; Detroit Lumber Co. v. Cleff, 164 Mich. 276; Anderson v. Gregg, 44 Miss. 170; Crawford v. Redus, 54 Miss. 700; Henry v. Sneed, 99 Mo. 407, 17 Am. St. R. 580; McCollum v. Boughton, 132 Mo. 601, 35 L. R. A. 480; Cox v. Railroad, 111 Mo. App. 394; State v. Dickmann, 146 Mo. App. 396; Norfolk Nat'l Bank v. Nenow, 50 Neb. 429; Cate v. Rollins, 69 N. H. 426; Aarons v. Klein, 29 Misc. (N. Y.) 639; Kurtz v. Potter, 44 (N. Y.) App. Div. 262, aff'd 167 N. Y. 586; Garber v. Spirak, 114 N. Y. Suppl. 762; Ricks v. Wilson, 154 N. C. 282; Stichtenoth v. Rife, 6 Ohio Cir. Ct. R. 540, 3 O. C. D. 575; Cushman v. Masterson, — Tex. Civ. App. —, 64 S. W. 1031; Laufer v. Powell, 30 Tex. Civ. App. 604; Stroter v. Brackenridge, 102 Tex. 386; Red River Nat'l Bank v. Bray, —— Tex. Civ. App. —, 132 S. W. 968; Reed v. Newcomb, 64 Vt. 49; Drake v. Drake, 142 Wis. 602.

Statutory Agency of Husband. In a few states, the husband has been at times made the statutory manager of his wife's separate estate. See for example, Sencerbox v. First Nat. Bank, 14 Idaho, 95; Gross v. Pigg, 73 Miss. 286.

that capacity must be derived as in the case of any other agent from her prior appointment either express or implied, or be confirmed by her subsequent ratification. He may, however, be authorized in the same manner and be invested with the same power and authority as any other agent, and when duly authorized his acts bind her, within the limits of her capacity, and of his authority, to the same extent as though she acted in person.[9]

[9] Louisville Coffin Co., v. Stokes, 78 Ala. 372; Hoene v. Pollak, 118 Ala. 617, 72 Am. St. R. 189; Reeves v. McNeill, 127 Ala. 175; Hickey v. Thompson, 52 Ark. 234; Puget Sound Lumber Co. v. Krug, 89 Cal. 237; Foster v. Jones, 78 Ga. 150; Wortman v. Price, 47 Ill. 22; Haight v. McVeagh, 69 Ill. 624; Walker v. Carrington, 74 Ill. 446; Patten v. Patten, 75 Ill. 446; Cubberly v. Scott, 98 Ill. 33; Bennett v. Stout, 98 Ill. 47; Richards v. Lumber Co., 169 Ill. 238; Amer. Express Co. v. Lankford, 2 Ind. Ter. 18; Rowell v. Klein, 44 Ind. 290, 15 Am. Rep. 235; Lichtenberger v. Graham, 50 Ind. 288; Griffin v. Ransdell, 71 Ind. 440; Pattison v. Babcock, 130 Ind. 474; Taylor v. Angel, 162 Ind. 670; Colt v. Lawrenceburg, etc., Co., 44 Ind. App. 122; McLaren v. Hall, 26 Iowa, 297; Hamilton v. Hooper, 46 Iowa, 515, 26 Am. Rep. 161; Meylink v. Rhea, 123 Iowa, 310; Rathke v. Tyler, 136 Iowa, 284; Munger v. Baldridge, 41 Kan. 236, 13 Am. St. R. 273; Wilkinson v. Elliott, 43 Kan. 590, 19 Am. St. R. 158; Jones v. Read, 1 La. Ann. 200; Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. R. 436; Coolidge v. Smith, 129 Mass. 554; Arnold v. Spurr, 130 Mass. 347; Duggan v. Wright, 157 Mass. 228; Shane v. Lyons, 172 Mass. 199, 70 Am. St. R. 261; Rankin v. West, 25 Mich. 195; McBain v. Seligman, 58 Mich. 294; First Comm. Bank v. Newton, 117 Mich. 433; Farley v. Stroeh, 68 Mo. App. 85; Eystra v. Capelle, 61 Mo. 578; Rodgers v. Pike County Bank, 69 Mo. 590; Ragan v. Railroad Co., 111 Mo. 456; Long v. Martin, 152 Mo. 668; Knappen v. Freeman, 47 Minn. 491; Ross v. Baldwin, 65 Miss. 570; Reed v. Morton, 24 Neb. 760, 1 L. R. A. 736, 8 Am. St. R. 247; Harris v. Weir-Shugart Co., 51 Neb. 483; Taylor v. Wands, 55 N. J. Eq. 491, 62 Am. St. R. 818; Elliott v. Bodine, 59 N. J. L. 567; Black v. McQuaid, 75 N. J. L. (46 Vroom.), 639, (authority by implication); Third Nat'l Bank v. Guenther, 123 N. Y. 568, 20 Am. St. R. 780; Wronkow v. Oakley, 133 N. Y. 505, 28 Am. St. R. 661, 16 L. R. A. 209; Bazemore v. Mountain, 121 N. C. 59; Stout v. Perry, 152 N. C. 312, 136 Am. St. R. 826; Mitchell v. Jodon, 22 Pa. Super. Ct. 304; Baxter v. Maxwell, 115 Pa. 469; Bodey v. Thakara, 143 Pa. 171, 24 Am. St. R. 526; Harrisburg Nat'l Bank v Bradshaw, 178 Pa. 180, 34 L. R. A. 597; Quebec Bank v. Jacobs, Rep. Jud. Que., 23 C. S. 167; Brown v. Thompson, 31 S. C. 436, 17 Am. St. R. 40; Scottish Mortg. Co. v. Deas, 35 S. C. 42, 28 Am. St. R. 832; Allen v. Garrison, 92 Tex. 546; Richmond v. Voorhees, 10 Wash. 316; Whiting v Doughton, 31 Wash. 327; Trapnell v. Conklyn, 37 W. Va. 242, 38 Am. St. R. 30; Weisbrod v. Chicago, etc., Ry. Co., 18 Wis. 35, 86 Am. Dec. 743; Austin v. Austin, 45 Wis. 523; Lavassar v. Washburne, 50 Wis. 200; Mayers v. Kaiser, 85 Wis. 382, 39 Am. St. R. 849, 21 L. R. A. 623; Wood v. Armour, 88 Wis. 488, 43 Am. St. R. 918; Williams v. Paine, 169 U. S. 55, 42 L. Ed. 658.

"The authority of a husband to act for his wife in the matter of making a loan will not be presumed from the circumstance that he has acted for her in other matters, but must be proved, like any other fact, by competent legal evidence." Three Rivers Nat. Bank v. Gilchrist, 83 Mich. 253.

§ 170. ——— The usual attributes of agency also attach. Notice to her agent is notice to her,[10] representations made by him affect her,[11] the incidents of undisclosed agency apply to her,[12] as in other cases of agency. The duties and disabilities of an agent also apply to him. Thus he cannot, for example, use his power for his own advantage.[13]

Authority given by a married woman to her husband to sign her name as surety for his benefit does not include authority to sign her name as principal. Farmington Savings Bank v. Buzzell, 61 N. H. 612. Nor will authority to manage her plantation authorize him to bind her by negotiable paper. Folger v. Peterkin, 39 La. Ann. 815. Authority to a husband to deposit his wife's note in a bank does not include authority to collect the note or to dispose of the proceeds. Norfolk Nat. Bank v. Nenow, 50 Neb. 429.

A power of attorney from a wife to her husband to release a mortgage is not evidence to show him to be a general agent. Trimble v. Thorson, 80 Iowa, 246. The mere fact that the wife owns the premises upon which her husband carries on his business, does not tend to show that he does so as her agent. Dickerson v. Rogers, 114 N. Y. 405; Willson v. Underhill, 83 Hun (N. Y.), 233; Jones v. Harrell, 110 Ga. 373.

By allowing her husband to manage and to dispose of the products of her farm and thereby making him agent to manage the farm, a wife does not by implication give him general power to sell. Saunders v. King, 119 Iowa, 291. And in general the husband agent can bind his wife only by acts within the scope of his authority. Joplin v. Freeman, 125 Mo. App. 717; Slaughter v. Elliot, 138 Mo. App. 692; Taylor v. Taylor, 54 Ore. 560.

The fact of the husband's agency for his wife can not be established by his declarations. Sanford v. Pollock, 105 N. Y. 450; Jarvis v. Schaefer, 105 N. Y. 289; Three Rivers Nat. Bank v. Gilchrist, 83 Mich. 253; Ferris v. Baker, 127 Cal. 520; Bank of Ravenna v. Dobbins, 96 Mo. App. 693; Brown v. Daugherty, 120 Fed. 526; First Nat. Bank v. Leland, 122 Ala. 289; Baer v. Terry, 105 La. 479; Jones v. Harrell, 110 Ga. 373. But, subject to the statutes governing the competency of the husband as a witness against his wife, it may be shown by his *testimony*. American Express Co. v. Lankford, 2 Ind. Ter. 18; Long v. Martin, 152 Mo. 668; Christian v. Smith, 85 Mo. App. 117; Anderson v. Ames, 151 Mass. 11; Paulsen v. Hall, 39 Kan. 365; Roberts v. Northwestern Nat. Ins. Co., 90 Wis. 210.

Secret limitations upon the husband's general or apparent authority have no other effect than in other cases. Bates v. Holladay, 31 Mo. App. 162; Cowie v. Nat'l Bank, 147 Wis. 124.

Where written authority would be requisite in other cases it is requisite when the husband is agent. Shanks v. Michael, 4 Cal. App. 553.

Some statutes require that the authority given by a married woman shall be in writing. First Nat. Bank v. Leland, 122 Ala. 289.

[10] Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Allen v. Garrison, 92 Tex. 546; Tilleny v. Wolverton, 50 Minn. 419; Weightman v. Washington Critic Co., 4 D. C. App. 136; Forsythe v. Brandenburg, 154 Ind. 588; Copeland v. Dixie Co. (Ala. App.), 57 So. 124; Elias Brewing Co. v. Boeger, 74 Misc. (N. Y.) 547.

[11] Knappen v. Freeman, 47 Minn. 491. See also Allen v. Garrison, *supra;* Quarg v. Scher, 136 Cal. 406; Deering & Co. v. Veal, 25 Ky. L. R. 1809; Kelley v. Andrews, 102 Iowa, 119; Enslen v. Allen, 160 Ala. 529; Bell v. McJones, 151 N. C. 85.

[12] Puget Sound Lumber Co. v. Krug, 89 Cal. 237; Harris v. Silverman, 154 Mo. App. 694.

[13] Arnett v. Glenn, 52 Ark. 253, as by taking his own debt in payment of an account due her.

The third person, also, is bound in the same way and to the same extent as in any other case.[14]

§ 171. ——— Proof required.—Because of the relation existing between them and of the opportunities which it affords for coercion and evasion, it has been held that the evidence of his agency, whether it is sought to be established by the wife's prior appointment or her subsequent ratification, must be clear and satisfactory, and sufficiently strong to explain and remove the equivocal character in which the wife is placed.[15] This rule, however, it is held, does not mean that a

[14] Runyon v. Snell, 116 Ind. 164, 9 Am. St. Rep. 839; Magerstadt v. Schaefer, 110 Ill. App. 166, 213 Ill. 351. See also Wasem v. Raben, 45 Ind. App. 221; Hunt v. Rhodes Bros., 207 Mass. 30. See also Taylor v. Minigus, 66 Ill. App. 70.

[15] Rowell v. Klein, 44 Ind. 290; McLaren v. Hall, 26 Iowa, 297; Eystra v. Capelle, 61 Mo. 578; Mead v. Spalding, 94 Mo. 43; Alexander v. Perkins, 71 Mo. App. 286; Bridges v. Russell, 30 Mo. App. 258; Francis v. Reeves, 137 N. C. 269.

In McLaren v. Hall, *supra*, Cole, J., says, at page 305: "the husband may act as agent for the wife. In order to bind her, however, he must be previously authorized to act as her agent, or she must subsequently with express or implied knowledge of his act, ratify it. The evidence necessary to establish a ratification by the wife of a contract made by her husband as her agent, must be of a stronger and more satisfactory character than that required to establish a ratification by the husband of the act of the wife as his agent, or than as between independent parties. And this for the reason that (in the general experience of the past, at least, if not in the philosophy of the present), the wife is under the control of, and subordinate to, the husband; and neither good law nor sound reason will require the wife to destroy the peace of her family and endanger the marriage relation by open repudiation or hostile conduct toward her husband, in order to save her property from liability for his unauthorized contracts. Of course it is necessary in every case, in order to bind her that he should, at least, claim to act as her agent; and her ratification should be shown by those unmistakable acts or declarations which evince a knowledge of the contract by which she is sought to be bound, and an intention to adopt or ratify it as her own." See also Sanford v. Pollock, 105 N. Y. 450.

It is, on the contrary, suggested in Cattell v. Ferguson, 3 Wash. 541, that "less proof would probably suffice to establish the agency of the husband in such matters [the erection of a house on the wife's land] than where the relationship of husband and wife does not exist." See also Simes v. Rockwell, 156 Mass. 372, 31 N. E. 484; Jefferds v. Alvord, 151 Mass. 94; Henderson v. State, 55 Tex. Cr. R. 640.

In Hoene v. Pollak, 118 Ala. 617, 72 Am. St. R. 189, a wife who could not read or write had always entrusted to her husband the management and control of her stock in the H. Coal Co. He had voted it in favor of transferring all the assets to a new company, and had received the new stock in her name. It was found that she knew of the transaction, and it was held, she was bound by his acts and could not have the deed set aside.

Mechanics' Liens on Wife's Property.—In Wheaton v. Trimble, 145 Mass. 345, 1 Am. St. R. 463, where the wife's real estate was managed by the husband "just as he used to when it was his" it was held that he had authority to create a mechanic's lien upon it. Her knowledge and personal direction of the work

different principle as to the weight of evidence, is to be applied in these than in other civil cases. Where the attention of the jury has been properly directed to the considerations involved, the question of agency or not is to be determined by the fair preponderance of the evidence.[16]

showed she assented to this exercise of his authority. The same knowledge was of importance in Richards v. Spry Lumber Co., 169 Ill. 238, in which the wife was bound by an agreement to pay the sub-contractor before the general contractor, where the husband had general charge of the property and had executed the general contract as agent of the wife.

Where the husband was in charge merely for this particular operation, but the wife knew of the work and did not object, she is bound by the lien created. Jobe v. Hunter, 165 Pa. 5, 44 Am. St. R. 639.

On similar facts, even her express objection could not limit the authority, according to Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. R. 436, on the ground that she was the responsible party even though unknown to the material man, and she could limit the actual agency only by bringing her objection to his notice.

Other cases deny that the actual agency was ever in existence against her positive objection. The lower court was reversed in Zeigler v. Galvin, 45 Hun (N. Y.), 44, because it found as fact that the husband and wife were agreed that the husband should pay for the work, and then found, as matter of law, that he was only her agent because it was her house, the work was done at her request, and for her benefit. Here knowledge and assent to the work were not conclusive of agency. On the same ground, the lower court was sustained in requiring the plaintiff to prove the wife's actual intent that the husband should act as her agent. "The wife might very naturally acquiesce in having the proposed building erected * * * and yet most strenuously object, if thereby her property was to be encumbered." Rust-Owen Lumber Co. v. Holt, 60 Neb. 80, 83 Am. St. R. 512. Also Hoffman v. McFadden, 56 Ark. 217, 35 Am. St. R. 101

Where the wife takes an active part in directing the work, changing the plans, or procuring the contract, she is bound by the acts of the husband. Bumgartner v. Hall, 163 Ill. 136; Bevan v. Thackara, 143 Pa. 182, 24 Am. St. R. 529; Spears v. Lawrence, 10 Wash. 368, 45 Am. St. R. 789. But her interest must be more significant than the participation that any woman might take in her husband's project. Hoffman v. McFadden, *supra*.

In Bevan v. Thackara, *supra*, the court said that to establish the agency it must be proved that the contract was reasonably necessary for the improvement of the separate estate of the wife. But a finding of agency was sustained in Maxcy Mfg. Co. v. Burnham, *supra*, in spite of the fact that the husband afterward sold the lumber, and it did not go to benefit the estate directly.

See also Bodey v. Thackara, 143 Pa. 171, 24 Am. St. R. 526.

[16] In Long v. Martin, 152 Mo. 668, the court referring to the cases above cited said: "Upon the strength of these cases it is contended that when a question of this kind is submitted to a jury under conflicting evidence they should be instructed to find in favor of the wife if a doubt remains in their minds although a fair preponderance of the evidence is against her. We do not think that is the law. We recognize the wisdom and justice of the principles announced in the cases above referred to. It would be very unjust to draw the same inferences from a married woman's behavior in reference to her husband's management of her property as we would naturally draw

But these considerations are important. If, for example, a man buys a sewing machine or piano for his wife, or makes repairs upon her house which is their dwelling, he may be doing it on his own account as her husband, or on her account as her agent. Surely, if he is to bind her as her agent, it should appear that any acts or acquiescence on her part, relied upon as showing her authority, should indicate approval of his acts as her agent and not merely acquiescence in what he does as her husband. If the act be one which he himself ought to do as husband, still clearer evidence should be required before she is charged for it as his principal.

§ 172. ——— Statutory provisions.—In some states, the rules of agency are changed by statute when they would apply to an agency of the husband for his wife. Some statutes forbid such agency for certain purposes.[17] Another statute giving the husband the right of management of his wife's property is construed to make him her agent [18] in contracts concerning that property but not generally.[19] Another statute provides that where, without written recorded contract between husband and wife changing the relation, the husband carries on business with the means of the wife, such business shall be held to be on her account by her husband as agent.[20] Other statutes make

from the conduct of parties not bearing that relation to each other. If it be a question of implied agency, a ratification, or estoppel, the jury should be so cautioned in instructions that they would know how to distinguish wifely conduct from business acts. The trial judge should magnify the office of wife over that of the mere woman of business. But after the jury has been properly cautioned and instructed along that line so that they will know how to appreciate and weigh the evidence they should render their verdict according to its fair preponderance." See also Holden v. Kutscher, 17 N. Y. Misc. 540; Arnold v. Spurr, 130 Mass. 347.

And the burden of proof is of course upon him who relies upon the agency. Sanders v. Brown, 145 Ala. 665.

[17] Van Brunt v. Wallace, 88 Minn. 116; Sutton v. Brekke, 117 Minn. 519 (all contracts between husband and wife as to her real estate, void); Sanford v. Johnson, 24 Minn. 172 (to convey any interest in his wife's realty, which was held to cover giving a lease). In Sawyer v. Biggart, 114 Iowa, 489, under a statute which provided that when property was owned by husband or wife, the other could have no interest therein which could be the subject of contract between them, it was held that neither could make a contract constituting the other his attorney to convey or release the expectant or potential interest in the property of the other.

[18] See Dority v. Dority, 30 Tex. Civ. App. 216, aff'd 96 Tex. 215; Sencerbox v. Bank, 14 Idaho, 95.

[19] Owens v. New York, etc., Land Co. (Tex. Civ. App.), 32 S. W. 1057; Parker v. Wood, 25 Tex. Civ. App. 506; Sutherin v. Chesney, 85 Kan. 122.

[20] This was so even to the extent of charging her by virtue of the statute with a liability as principal. Johnson v. Jones, 82 Miss. 483.

both husband and wife liable for family expenses on debts incurred by either.[21]

§ 173. Corporations as agents.—Within the scope of its corporate powers, unless there are express provisions in its charter or constating instruments to the contrary, a corporation may act as agent, either for an individual, a partnership or another corporation.[22] Many of the great corporations of the country are organized for this express purpose under statutes or charters conferring and defining their powers and the methods of executing them;[23] but even in other cases, authority so to act might be implied as auxiliary to their main purposes.

But where the power is not expressly conferred and cannot be thus implied, the corporation could not lawfully undertake to act as agent;[24] though if it had in fact done so it would not be permitted, in many jurisdictions at least, to escape responsibility by alleging that its act was *ultra vires*.

§ 174. Partnership as agents.—The same rule applies to the case of partnerships. They may be organized expressly for that purpose, or they may, within the limits of their powers, undertake to act as agent as an incident to their general business. Where authority is thus delegated to a firm, it is an appointment of the firm as the agent, and not of the individual members as several and separate agents. Hence in the absence of anything to show a contrary intent, either partner may execute the power, and the act of one in that respect is the act of the partnership and is in strict pursuance of the power.[25]

[21] See Mandell Bros. v. Fogg, 182 Mass. 582, 94 Am. St. R. 667, 17 L. R. A. (N. S.) 426, in which the Massachusetts court refused to enforce the Illinois statute against a Massachusetts woman for goods bought in Illinois by her husband without her knowledge while they were both temporarily in Illinois.

[22] Anderson v. First Nat. Bank, 5 N. Dak. 451. (This case held that a corporation might properly act as agent of its debtor in selling his security which it held as collateral. Its dictum was that a mere agency to collect would be *ultra vires*, but that the bank which had undertaken so to act, to its principal's injury, would be estopped to plead *ultra vires*.) San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 29 L. R. A. 839; McWilliams v. Detroit Mills Co., 31 Mich. 275; Land, etc., Co. v. Gillam, 49 S. Car. 345; Dye v. Virginia Midland Ry. Co., 20 D. C. App. 63; Green-Grieb-Sherman Co. v. Quinlen Co., 148 Ill. App. 1. See also Jemison v. Citizens' Savings Bank, 122 N. Y. 135, 19 Am. St. R. 482, 9 L. R. A. 708.

[23] Killingsworth v. Trust Co., 18 Oreg. 351, 17 Am. St. R. 737, 7 L. R. A. 638.

[24] Peck-Williamson, etc., Co. v. Board of Education, 6 Okla. 279. A corporation organized under a general act providing for general business corporations cannot hire attorneys and do a law business. *In re* Bensel, 68 Misc. 70.

[25] Deakin v. Underwood, 37 Minn. 98, 5 Am. St. Rep. 827; Eggleston v. Boardman, 37 Mich. 14; McLaughlin v. Wheeler, 1 S. Dak. 497; Frost v.

§ 175. Alien enemies as agents.—While it seems to be generally agreed "that an agent constituted before a war may continue to represent his principal in transactions not contrary to the policy or interests of the government of the agent's residence, though the principal be an enemy resident under the hostile government," [26] it is said also to be agreed that "the agency must have been created before the war began, for there is no power to appoint an agent for any purpose, after hostilities have actually commenced." [27]

2. Disqualification from Adverse Interest.

§ 176. What here included.—A person may be disqualified to act as agent in a particular case not by reason of any personal disability which would disqualify him for acting as agent generally, but merely by reason of some peculiar relation which he already occupies towards the subject matter of the agency or towards one of the parties to be dealt with. There will be occasion to consider more fully the principles involved when dealing with the duties of the agent to his principal [28] and other subjects,[29] but the matter requires brief attention here, as furnishing one of the reasons why the relation of principal and agent should not be assumed at all in particular cases.

§ 177. One cannot be agent if duty and interest conflict.—A person will not be permitted to take upon himself the character of an agent, where, on account of his relation to others, or on account of his own personal interest, he would be compelled to assume incompatible and inconsistent duties and obligations. An agent owes to his principal a loyal adherence to his interest,[30] and it would be a fraud upon the principal and would contravene sound public policy, to permit a person, without the full knowledge and consent of his proposed principal, to enter into a relation involving such a duty, when his allegiance had already been pledged to one having adverse interests, or when his own personal interests would be antagonistic to those of his principal.[31]

Erath Cattle Co., 81 Tex. 505, 26 Am. St. R. 831; McCulloch Land & C. Co. v. Whitefort, 21 Tex. Civ. App. 314.

Where a firm executes a deed as agent one of the partners who signs for the firm may also acknowledge the execution. McCulloch L. & C. Co. v. Whitefort, *supra*.

[26] See United States v. Grossmayer, 76 U. S. (9 Wall.) 72, 19 L. Ed. 627; New York L. Ins. Co. v. Davis, 95 U. S. 425, 24 L. Ed. 453; Hubbard v. Matthews, 54 N. Y. 43, 13 Am. Rep. 562; Buford v. Speed, 74 Ky. (11 Bush.) 338; Small v. Lumpkin, 69 Va. (28 Gratt.) 832.

[27] In United States v. Grossmayer, *supra*.

[28] See *post*, Book IV, Chap. II.

[29] See *post*, Book IV, Chap. II, Chap. VII.

[30] See *post*, Book IV, Chap. II.

[31] See Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66; Scribner v. Collar, 40 Mich. 375, 29 Am. Rep.

With such full knowledge and consent, however, he may usually be agent.

§ 178. One cannot be agent of both parties—When.—A person may act as agent of two or more principals in the same transaction, if his duties to each are not such as to require him to do incompatible things;[32] or if he is employed in a capacity which does not imply trust and confidence, as where he is a mere middleman who brings parties together and then leaves them to bargain for themselves.[33] But wherever from the nature of his employment, each of two principals with opposing interests is entitled to the benefits of the agent's judgment, discretion or personal influence, he will not be permitted to act as agent of both parties, except with their full knowledge and consent.[34] If, however,

541; Lynch v. Fallon, 11 R. I. 311, 23 Am. Rep. 458; Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Sessions v. Payne, 113 Ga. 955; Morey v. Laird, 108 Iowa, 670; Marsh v. Buchan, 46 N. J. Eq. 595; Hammond v. Bookwalter, 12 Ind. App. 177; Campbell v. Baxter, 41 Neb. 729; Shepard v. Hill, 6 Wash. 605; Colbert v. Shepherd, 89 Va. 401; Hafner v. Herron, 165 Ill. 242; Armstrong v. O'Brien, 83 Tex. 635; Friezenhahn v. Bushnell, 47 Minn. 443; Hobson v. Peake, 44 La. Ann. 383; Euneau v. Rieger, 105 Mo. 659; and see, generally, the cases cited in following sections.

[32] Nolte v. Hulbert, 37 Ohio St. 445; Hinckley v. Arey, 27 Me. 362; Scott v. Mann, 36 Tex. 157; Cottom v. Halliday, 59 Ill. 176; Sheperd v. Lanfear, 5 La. 336, 25 Am. Dec. 181; Northrup v. Germania Fire Ins. Co., 48 Wis. 420, 33 Am. Rep. 815; Adams Mining Co. v. Senter, 26 Mich. 73; Union Planters' Bank v. Edgell (Miss.), 33 So. 409.

[33] See *post*, Brokers; Pollatscheck v. Goodwin, 17 N. Y. Misc. 587; Casey v. Donovan, 65 Mo. App. 521.

[34] Hinckley v. Arey, *supra;* Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 197; New York Ins. Co. v. National Ins. Co., 14 N. Y. 85; Meyer v. Hanchett, 39 Wis. 419, s. c. 43 Wis. 246; Greenwood v. Spring, 54 Barb. (N. Y.) 375; Sumner v. Charlotte, etc., R. R. Co., 78 N. C. 289; Shirland v. Monitor Iron Works, 41 Wis. 162; Bray v. Morse, 41 Wis. 343; Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Stewart v. Mather, 32 Wis. 344; Farnsworth v. Brunquest, 36 Wis. 202; Farnsworth v. Hemmer, 1 Allen (Mass.), 494, 79 Am. Dec. 756; Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168; Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66; Lynch v. Fallon, 11 R. I. 311, 23 Am. Rep. 458; Pugsley v. Murray, 4 E. D. Smith (N. Y.), 245; Everhart v. Searle, 71 Penn. St. 256; Scribner v. Collar, 40 Mich. 375, 29 Am. Rep. 241; Sessions v. Payne, 113 Ga. 955; Clendenning v. Hawk, 10 N. Dak. 90; Alta Investment Co. v. Worden, 25 Colo. 215; Tinsley v. Penniman, 12 Tex. Civ. App. 591; British Am. Assur. Co. v. Cooper, 6 Colo. App. 25; Greenwood Ice & Coal Co. v. Georgia Home Ins. Co., 72 Miss. 46; Armstrong v. O'Brien, 83 Tex. 635; Morey v. Laird, 108 Iowa, 670; Hammond v. Bookwalter, 12 Ind. App. 177; Fitzgerald v. Fitzgerald Const. Co., 44 Neb. 463, 160 U. S. 556; Campbell v. Baxter, 41 Neb. 729; Shepard v. Hill, 6 Wash. 605; Leathers v. Canfield, 117 Mich. 277, 45 L. R. A. 33; Hafner v. Herron, 165 Ill. 242; Marsh v. Buchan, 46 N. J. Eq. 595; Black v. Miller, 71 Ill. App. 342; Van Vlissingen v. Blum, 92 Ill. App. 145; Hampton v. Lackens, 72 Ill. App. 442; Perkins v. Quarry Co., 11 N. Y. Misc. 328; Chapman v. Currie, 51 Mo. App. 40.

having full knowledge of his relations to each, they see fit mutually to confide in him, there can be no legal objection to such an employment,[35] nor will either of the principals be permitted afterwards to escape responsibility because of such double employment.[36]

§ 179. One cannot be party and agent for opposite party.—For the same reason, one cannot, without the full knowledge and consent of the opposite party, be both a party and the agent for the opposite party in the same transaction. Thus, as will be more fully explained hereafter,[37] except with the full knowledge and consent of his principal, an agent appointed to buy or lease lands or goods for his principal cannot buy or lease of himself; and an agent to sell or lease lands or goods for his principal cannot sell or lease to himself,[38] and the like; nor can an agent authorized to receive payment for his principal bind the latter by the receipt of money due from himself.[39]

As will also be more fully stated later, what he cannot do directly, he will not be permitted to do indirectly; it is not material that he had no fraudulent intent, or that the principal sustained no actual injury.[40]

§ 180. Other party as agent to sign memorandum under Statute of Frauds.—While there does not appear to be any reason why, in the ordinary case of a written contract or memorandum, one party may not, in the presence and by the direction of the other at least, sign the latter's name to the contract or memorandum made between them,[41]

[35] Adams Mining Co. v. Senter, 26 Mich. 73; Colwell v. Keystone Iron Co., 36 Mich. 53; Fitzsimmons v. Southern Express Co., 40 Ga. 330, 2 Am. Rep. 577; Rowe v. Stevens, 53 N. Y. 621; Joslin v. Cowee, 56 N. Y. 626; Whiting v. Saunders, 22 N. Y. Misc. 539; Rolling Stock Co. v. Railroad, 34 Ohio St. 450; Leekins v. Nordyke, 66 Iowa, 471; Alexander v. Northwestern University, 57 Ind. 466; Rosenthal v. Drake, 82 Mo. App. 358,

[36] Fitzsimmons v. Southern Express Co., *supra;* DeSteiger v. Hollington, 17 Mo. App. 387; Robinson v. Jarvis, 25 Mo. App. 421, and cases in preceding notes.

[37] See *post*, Book IV, Chap. II.

[38] Ames v. Port Huron Log Driving Co., 11 Mich. 139, 83 Am. Dec. 731; Van Epps v. Van Epps, 9 Paige (N. Y.), 237; Dutton v. Willner, 52 N. Y. 319; Conkey v. Bond, 36 N. Y. 430; Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600; Ruckman v. Bergholz, 37 N. J. L. 437; Bain v. Brown, 56 N. Y. 285; Kerfoot v. Hyman, 52 Ill. 512; Parker v. Vose, 45 Me. 54; White v. War, 26 Ark. 445; Stewart v. Mather, 32 Wis. 344; Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. Ed. 482; Euneau v. Rieger, 105 Mo. 659; Tilleny v. Wolverton, 46 Minn. 256; Clendenning v. Hawk, 10 N. Dak. 90; Rorebeck v. Van Eaton, 90 Iowa, 82; Colbert v. Shepherd, 89 Va. 401; Finch v. Conrade, 154 Pa. 326; Webb v. Marks, 10 Colo. App. 429; Hodgson v. Raphael, 105 Ga. 480; Burke v. Bours, 92 Cal. 108; Russell v. Bradley, 47 Kan. 438; Friesenhahn v. Bushnell, 47 Minn. 443; Hobson v. Peake, 44 La. Ann. 383; Disbrow v. Secor, 58 Conn. 35; Van Dusen v. Bigelow, 13 N. D. 277.

[39] See *post*, Book IV, Chap. II, *Agent's duty of Loyalty.*

[40] See *post*, Book IV, Chap. II, *Agent's duty of Loyalty.*

[41] In Bird v. Boulter, 4 B. & Ad. 443, the solicitor general, Sir John Camp-

it is held that, in the case of the note or memorandum required by the statutes of frauds, the other party cannot be the agent referred to in the statute.[42] The theory is that it would defeat the whole purpose of the statute if the other party, who could not under the statute directly establish the contract by oral testimony, may do so indirectly by establishing by such testimony that he was made the agent of the other to sign the note or memorandum.

3. Incompetence from Lack of Professional or Other Similar Standing.

§ 181. Lack of professional standing may disqualify.—Incapacity to act as agent in a given situation may also arise from the lack of some required professional training, standing or position. Thus though one may have the right to prosecute or defend his cause in court, "either in person or by an attorney or agent of his choice," it is held that, if he chooses to appear by agent, that agent must be an attorney at law.[43]

Similar questions would arise if the authority could only be exercised upon the floor of a particular stock exchange, and no one but members of the exchange could act there. So if none but a licensed broker or auctioneer was competent to act, the lack of the necessary license would work a disability.

bell, argued that "at common law, there is nothing to prevent one contracting party from being the agent of the other; an obligor, for instance, from giving an obligee a power of attorney to execute a bond for him; a lessee from executing a lease as attorney of the lessor; a party from accepting a bill by procuration, payable to his own order;—assuming the authority in each case to be complete, which would be matter of evidence."

In Clough v. Clough, 73 Me. 487, 40 Am. Rep. 386, it is said by the court *arguendo*. "An agent cannot contract with himself. He cannot as agent for the grantor execute a deed to himself. But he can prepare a deed running to himself, even to the signing and sealing, and if the grantor then adopts the deed by personally acknowledging and delivering it, it will be a legal and valid instrument."

[42] Wright v. Dannah, 2 Camp. 203; Bird v. Boulter, *supra;* Sharman v. Brandt, L. R. 6 Q. B. 720.

[43] Cobb v. Judge, 43 Mich. 290; Harkins v. Murphy, 51 Tex. Civ. App. 568. See also Kelly v. Herb, 147 Pa. 563, where a statutory requirement that a pleading be signed by the party or his attorney was held to mean his attorney at law and not his attorney in fact.

III.

JOINT PRINCIPALS.

§ 182. One person as agent for several.—What has thus far been said has contemplated the case wherein one person only—natural or artificial—was to be the principal, but other cases may arise wherein a number of persons are interested as principal or principals. Such cases may present a variety of aspects. Thus it may happen that each of a number of persons in no wise related and having neither community nor conflict of interest may chance to appoint the same person as his agent, as where a number of owners of goods consign them for sale to the same factor, or a large number of clients employ the same attorney or broker. Such cases present usually no peculiar aspects. On the other hand, a number of persons having related or similar or identical interests in the same subject matter may be involved, and the questions will be, for example, whether they can appoint or have appointed one person to represent them as their agent; whether all must unite in appointing or whether one can appoint for all; whether all must expressly assent to the appointment; and how, if such an agent be appointed, he shall execute his authority.

With respect of the question of capacity there can ordinarily be little difficulty, the general rule that whatever one may lawfully do in person he can lawfully do by agent applying as well to a number of persons as to one. How the agent is to be appointed, whether one has implied power to appoint for all, and how the authority when conferred shall be executed, are questions of more difficulty.

1. Appointment by Scveral Principals.

§ 183. Usually all must unite in appointing.—Where several persons having common interests desire to be represented by an agent, it is, in general, true that one of such persons has no implied power to appoint an agent for all and that all must unite in making the appointment. Each may appoint for himself or all unitedly may appoint for all, but one has no implied power to appoint for another or for all. The fact that the parties have common or similar interests or that they may be already associated or related makes ordinarily no difference in the application of the rule. The case of the partnership, immediately to be considered, is the most conspicuous if not the only exception.

§ 184. ——— Must contemplate a joint power.—In order, moreover, to the creation of a really joint power it is essential that the

parties shall contemplate an execution which shall bind them all jointly: the mere fact that several individually appoint the same agent is not enough; for in such a case, in the absence of anything indicating a contrary intention, the authority conferred by each will be deemed to be limited to the separate individual business of each principal.[44]

§ 185. Partners.—It is one of the fundamental principles in the law of partnership, that, within the scope of the partnership business, each partner is the agent of all the other partners for the transaction of the partnership affairs, and his acts are the acts of all. The nature of the partnership business may be such as to make the employment of agents and servants necessary or proper, and the employment of them may be the usual and contemplated method of prosecuting the firm's business, and fall within this implied agency of each partner. His appointment of an agent, therefore, within these limits, is an appointment by all, and the acts of the agent are the acts of all.[45]

§ 186. Joint tenants and tenants in common.—In the case of cotenants, on the other hand, there is no implied authority in each to act for all so as to bind them personally,[46] and the act of one, or the appointment of an agent by one will, therefore, bind that one only.[47] All may, of course, join in the appointment or subsequently assent to it, and thus make the agent the agent of them all.[48]

[44] Harris v. Johnston, 54 Minn. 177, 40 Am. St. Rep. 312.

As to a duty to account to each of several principals severally, see Graham v. Cummings, 208 Pa. 516, enforcing such a duty.

As to apportioning liability, see Schick v. Warren Mtg. Co., 86 Kan. 812.

[45] Carley v. Jenkins, 46 Vt. 721; Coons v. Renick, 11 Tex. 134, 60 Am. Dec. 230; Banner Tobacco Co. v. Jenison, 48 Mich. 459; Harvey v. McAdams, 32 Mich. 472; Wheatley v. Tutt, 4 Kan. 240; Charles v. Eshleman, 5 Colo. 107; Clark v. Slate Valley R. Co., 136 Pa. 408, 10 L. R. A. 238; Beckham v. Drake, 9 M. & W. 79. See *ante*, § 132.

The agent of a partnership is not the agent of the partners individually, but of the partnership as a whole. Johnston v. Brown, 18 La. Ann. 330; Deakin v. Underwood, 37 Minn. 98, 5 Am. St. R. 827.

[46] Tuttle v. Campbell, 74 Mich. 652, 16 Am. St. R. 652; James v. Darby, 100 Fed. 224; City of St. Louis v. Laclede Gas L. Co., 96 Mo. 197, 9 Am. St. R. 334; Omaha Refining Co. v. Tabor, 13 Colo. 41, 16 Am. St. R. 185, 5 L. R. A. 236; Merritt v. Kewanee, 175 Ill. 537; Baker v. Willard, 171 Mass. 220, 68 Am. St. R. 445, 40 L. R. A. 754; Morrison v. Clark, 89 Me. 103, 56 Am. St. R. 395; Lipscomb v. Watrous, 3 D. C. App. 1; Charleston, etc., R. Co. v. Leech, 33 S. Car. 175, 26 Am. St. R. 667; Union Hosiery Co. v. Hodgson, 72 N. H. 427; Metzger v. Huntington, 139 Ind. 501; Blackledge v. Davis, 129 Iowa, 592; Walker v. Marion, 143 Mich. 27; Lee v. Livingston, 143 Mich. 203; Anderson v. Northrop, 44 Fla. 472. Same of tenants by entireties. Murphy v. Lewis, 76 N. J. L. 141. But see Williamson v. Moore, 10 Idaho, 749.

[47] Perminter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177; Keay v. Fenwick, 1 C. P. Div. 745; Corlies v. Cumming, 6 Cow. (N. Y.) 181; Noe v. Christie, 51 N. Y. 270.

[48] Keay v. Fenwick, *supra;* Lyons

§ 187. Associations, clubs, societies and committees.—The case of the voluntary unincorporated association, club, society or committee presents similar questions. May one or more members, less than the entire number, bind all or appoint agents whose acts shall be deemed to be the acts of all? Are the members jointly liable as principals upon contracts purporting to be made in their behalf in carrying out the enterprises which they undertake? Two classes of cases arise in connection with such contracts. One of these is where it is sought to charge the entire membership as principals in dealings had with a smaller number alleged to have been the agents of all. The other is where it is attempted to hold this smaller number—the alleged agents in the former class—directly responsible as principals usually upon the ground that they had assumed to act for a principal having no legal existence. It is with the former class only that it is here proposed to deal, the latter being reserved for subsequent consideration.[49]

In the first place it may be observed that it is now quite generally settled that such organizations, not being organized to carry on business for pecuniary profit, are not partnerships[50] and that the members are not liable as partners,[51] but that their liability is to be determined upon the rules of principal and agent.[52] The principle which applies here is the familiar one that no person can be charged upon a contract alleged to have been made upon his responsibility, unless it can be shown that to the making of that contract upon his responsibility, he has given his express or implied assent.[53] Without such as-

v. Pyatt, 51 N. J. Eq. 60. All may acquiesce in the act of one as their agent so as to make his act their act. Clute v. Clute, 197 N. Y. 439, 134 Am. St. R. 891, 27 L. R. A. (N. S.) 146; Ellis v. Snyder, 83 Kan. 638, 32 L. R. A. (N. S.) 253.

But the joint owner who is authorized agent must act within the scope of the authority conferred. Gillham v. Walker, 135 Ala. 459.

[49] For cases of the other class, see *post*, Book IV, Chap. III.

[50] McCabe v. Goodfellow, 133 N. Y. 89, 17 L. R. A. 204; Ostrom v. Greene, 161 N. Y. 353; Ash v. Guie, 97 Penn. St. 493, 39 Am. Rep. 818; Burt v. Lathrop, 52 Mich. 106; Flemyng v. Hector, 2 M. & W. 172; Caldicott v. Griffiths, 8 Exch. 898; Todd v. Emly, 7 M. & W. 427, s. c. 8 M. & W. 505; Wise v. Perpetual Trustee Co., [1903] App. Cas. 139; Lafond v. Deems, 81 N. Y. 514; Waller v. Thomas, 4 Daly, 551, 42 How. Pr. (N. Y.) 337; Ferris v. Thaw, 5 Mo. App. 279; Richmond v. Judy, 6 Mo. App. 465; Edgerly v. Gardner, 9 Neb. 130; Austin v. Thompson, 45 N. H. 113; Woodward v. Cowing, 41 Me. 9, 66 Am. Dec. 211; Ehrmantraut v. Robinson, 52 Minn. 333; Teed v. Parsons, 202 Ill. 455.

[51] Lewis v. Tilton, 64 Iowa, 220, 52 Am. Rep. 436, and cases cited in foregoing note.

[52] Flemyng v. Hector, *supra;* Todd v. Emly, *supra*, and cases cited in following note.

[53] Devoss v. Gray, 22 Ohio St. 169; Newell v. Borden, 128 Mass. 31; Volger v. Ray, 131 Mass. 439; Ash v. Guie, *supra;* Ray v. Powers, 134 Mass. 22; Ridgely v. Dobson, 3 Watts & S. (Penn.) 118; Lewis v. Tilton, *supra;* Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505; Burt v. Lathrop, 52

sent, therefore, no power arises merely from the existence of the association which will justify one or some of the members in pledging the credit of the others.[54]

§ 188. ——— How assent may be given.—This assent may be expressed in a variety of ways, and at one of several times. It may have been given in advance by consenting to be bound by all contracts of a certain kind that may be made in the future; it may be given contemporaneously with the making of the contract; and it may also be inferred from a subsequent ratification.

Thus where it is a part of the scheme or purpose of the organization as provided by its articles of association, charter, constitution or by-laws, that certain contracts or obligations in behalf and upon the credit of the organization, may be entered into, either upon the vote of a majority or at the discretion of a committee or officer, or upon any other lawful contingency or event, every person who becomes a member, by so doing impliedly consents, in advance, to be bound by any contract or obligation of the kind contemplated, entered into under the circumstances prescribed.[55]

Where, however, there is no such undertaking to abide by the action of the majority,[56] or to be bound by contracts entered into by the committee or officers, those only who authorize the making of the contract will be bound. Hence if there be a division of opinion and the con-

Mich. 106; Rice v. Peninsular Club, 52 Mich. 87; Flemyng v. Hector, 2 M. & W. 172; Sproat v. Porter, 9 Mass. 300; Males v. Murray, 23 Ohio Cir. Ct. R. 396.

[54] McCabe v. Goodfellow, *supra;* Flemyng v. Hector, *supra;* Todd v. Emly, *supra;* Caldicott v. Griffiths, *supra;* Ash v. Guie, *supra;* Devoss v. Gray, *supra; In re* St. James' Club, 2 De G., M. & G. 383; Wood v. Finch, 2 F. & F. 447; Bailey v. Macaulay, 19 L. J. Q. B. 73; Wise v. Perpetual Trustee Co., [1903] App. Cas. 139; Murray v. Walker, 83 Iowa, 202; First Nat. Bank v. Rector, 59 Neb. 77; Willis v. Greiner (Tex. Civ. App.), 26 S. W. 858; Sheehy v. Blake, 72 Wis. 411, s. c. 77 Wis. 394, 9 L. R. A. 564, and other cases cited in preceding notes.

[55] Todd v. Emly, 7 M. & W. 427; Cockerell v. Aucompte, 2 Com. B. (N. S.) 440; Flemyng v. Hector, 2 M. & W. 172; Devoss v. Gray, *supra.*

Thus the members of a co-operative association which carries on a store are liable for goods purchased by the manager chosen by the members. Davison v. Holden, 55 Conn. 103, 3 Am. St. R. 40. So also Bennett v. Lathrop, 71 Conn. 613, 71 Am. St. R. 222.

[56] Where a voluntary association is formed under rules, or a constitution and by-laws and funds are contributed for the purposes prescribed by such constitution, etc., the funds cannot be appropriated to any different purpose by a majority unless that power is given by the constitution, or unless such majority has power by the terms of the constitution, etc., to alter or amend it. Kalbitzer v. Goodhue, 52 W. Va. 435.

However much a majority may control acts *within* the prescribed purpose, they have no power to *extend* or *alter* the agreed purpose. See Brown v. Stoerkel, 74 Mich. 269, 8

tract is authorized by a majority only, the majority only can be held responsible.[57]

But though a member at the time dissents, yet if he subsequently concurs or acquiesces in the making of the contract, he will be bound in the same manner as though his assent had been previously given.[58]

§ 189. ——— Liability may be limited to funds.—It is entirely possible that both as to other members and third persons, the liability of the members of such an association may, either expressly or by implication, be limited to the fund contributed or agreed to be contributed for its purposes, unless there is something to indicate that they have assented to a wider liability. In the case of the ordinary club, for example, having fixed initiation fees and regular dues, it must be assumed in the ordinary case that the liability of a member is to be limited to the amount so agreed to be contributed, and mere membership or acquiescence in the ordinary affairs of the club cannot be deemed evidence of an assent to be bound beyond this limit. His liability, moreover, for what had been done during his membership would ordinarily cease with the termination of his membership and the payment of his dues for that period. In order to charge him with a personal liability beyond this, something evidencing an assent to be bound in that manner would be required.[59]

It is also entirely possible in other cases than those of clubs that credit was given to funds to be raised, and that no personal liability was to rest upon any member of the association, committee or group.

L. R. A. 430; Mason v. Finch, 28 Mich. 282; Abels v. McKeen, 18 N. J. Eq. 462.

But where no such rules or constitution have been adopted, it is held that the general rules of parliamentary law apply, and that a majority duly acting, may control. Ostrom v. Greene, 161 N. Y. 353.

[57] Todd v. Emly, *supra*.

[58] Heath v. Goslin, *supra;* Eichbaum v. Irons, 6 W. & S. (Pa.) 67, 40 Am. Dec. 540.

[59] Wise v. Perpetual Trustee Co., [1903] App. Cas. 139; Flemyng v. Hector, 2 M. & W. 172; *In re* St. James Club, 2 D. M. & G. 383.

In Wise v. Perpetual Trustee Co., *supra*, it is said: "Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognized."

In this case it was held that a member was not liable to contribute for the indemnity of those who had incurred a personal liability in renting the clubhouse, he having already paid all that was due by the terms of membership.

Materials are not infrequently furnished and services rendered upon this basis, and where this was the understanding, individuals can not be held liable unless there be some other evidence than membership reasonably warranting the conclusion that a personal liability was contemplated.[60]

§ 190. ——— **Illustrations.**—In a leading case upon this subject, it was sought to hold certain members of an unincorporated club liable for work done and goods supplied to the club upon the order of a standing committee appointed by the club. It appeared that the club, which was one organized for the purpose of furnishing refreshments and entertainment to its members, had adopted certain rules by which each member was to pay admission and annual fees, and was also to pay daily for his accommodations at the club. A committee was appointed to manage the affairs of the club, but it appeared that the rules of the club gave the committee no authority to pledge the personal credit of the members. The plaintiffs attempted to hold the defendants personally responsible by virtue of their membership only, and offered no evidence that they had ever expressly or impliedly assented to the making of the particular contract sued upon. But the court held that in the absence of such evidence, the defendants were not liable and that mere membership in the club was not sufficient.[61] So, where an action was brought to charge certain members of an unincorporated religious society for services performed in building a church edifice, it was held that even if it were to be assumed that the defend-

[60] Thus in Riffe v. Proctor, 99 Mo. App. 601, it was held that the minister of an unincorporated church society could not recover his salary of the members personally, it being the well understood scheme at the time of his employment that the salary of the minister was to be raised by voluntary subscriptions.

So also where a newspaper published as the organ of a political party was to be maintained by funds contributed, workmen who furnished service knowing the situation have no personal claim against those who were managing the enterprise. Hosman v. Kinneally, 43 Misc. 76, s. c. 45 Misc. 411; Lightbourn v. Walsh, 97 App. Div. 187.

In Clark v. O'Rourke, 111 Mich. 108, 66 Am. St. R. 389, it was recognized that such an arrangement *might* be made but it was held that there was not sufficient evidence that it had been made to justify submitting it to the jury. See also Weatherford, etc., R. Co. v. Granger, 86 Tex. 350.

[61] Flemyng v. Hector, 2 M. & W. 172; and this case was followed in the similar case of Todd v. Emly, 7 M. & W. 427, s. c. 8 *Id.* 505.

In Flemyng v. Hector, Alderson, B., said: "This question turns simply on the authority which the parties who made the contract had to pledge the credit of the defendants to the plaintiffs. Taking it that the committee have made the contract, and that they are by the rules of the society authorized to manage the affairs of the club, it may follow from that that the defendants have given authority to the committee to discharge the contract out of the funds

ants were members because it was alleged that they were deacons of the church, still their liability as principals would not follow, because a member of an unincorporated religious society cannot be held personally responsible for the debts of the society unless it be shown that in some way he had sanctioned or acquiesced in their creation.[62]

So at a meeting of a voluntary unincorporated association organized for the purpose of encouraging the breeding and exhibition of fowls, a premium list for an exhibition to be given was adopted. An action in equity was afterwards brought to compel the defendants, as members, to contribute their proportion of the expenses incurred in holding the exhibition and paying the premiums. But the court held that mere membership would not bind a member for any further payment than the initiation fee and annual assessment, and that only such members as participated in the vote to hold the exhibition and award the premiums or as assented to be bound by such vote, would be bound thereby. It therefore became a question of fact whether any or all of the defendants so participated or assented. In determining the question of such participation or assent, the testimony of those present was admissible and the formal record of the meeting was not the only means of proof, unless made so by some rule or regulation of the association.[63]

§ 191. ——— **Assent inferred from conduct.**—This assent need not always be declared in express terms. It may be, and often is, in

in their hands; but it is contended on the part of the committee that they had a right to pledge the personal credit of the members, and therefore to make these defendants liable. I think they have not. When I come to look at the rules of the club, which are to be the guide by which we are to act, and which constitute the only authority the committee had, I do not find anything to lead me to the conclusion that the authority of the committee extended to the right of pledging the personal liability of any of the members of it; on the contrary, I find the members of the club carefully provided a fund, which was to be collected before they became members of the club, and having collected that fund and provided it, the committee are to manage it. Then what is it the committee are to manage? Why, the fund so provided, and to manage the club upon those terms. If that be so, the committee are not authorized to pledge the credit of individual members; and if they do deal on credit, it is their own affair, done on the faith of the money in their hands, which would enable them to pay their accounts." So also *In re* St. James' Club, 2 De G., M. & G. 383. See also Caldicott v. Griffiths, 8 Exch. 898; Wood v. Finch, 2 F. & F. 447; Bailey v. Macaulay, 19 L. J. Q. B. 73; Wise v. Perpetual Trustee Co., [1903] App. Cas. 139, 72 L. J. P. C. 31.

[62] Devoss v. Gray, 22 Ohio St. 159.

[63] Ray v. Powers, 134 Mass. 22. Where there was evidence that a college class, at a class meeting, voted to publish a classbook, the members who either voted or assented to the vote may be held personally liable for the expense, to one who printed it, under a contract with that member of the class who was elected "business manager of the publication." Willcox v Arnold, 162 Mass. 577.

this, as in other cases, inferred from the conduct of the parties. Thus a school-board had for years employed and paid the plaintiff as a teacher. The president of the board employed her for another year and she performed the service, but not being paid in full, she brought suit against the board for the balance. Some of the defendants objected that they had never authorized the president to make the contract, but the court said: "There is ample (evidence) in the case to submit to the jury from which the knowledge and co-operation of all of the defendants may be justly inferred. They were the acting board intrusted with the management of the school. They had for years been employing and paying this woman. They knew that she was continuing to teach and being paid out of the funds. They had not withdrawn from their self-imposed office as a managing board." [64]

So certain members of a committee were held personally liable for a public dinner ordered by the committee, upon the ground that, though they opposed the resolution while it was under consideration, they had at last submitted to the majority and made the resolution their own.[65]

And, generally, if, with knowledge of the facts, the members acquiesce, or fail reasonably to dissent, and, *a fortiori*, if, with such knowledge, they take the benefits of the act, they may fairly be deemed to have ratified and approved it.[66]

§ 192. ——— **The rules stated.**—It is believed that the following rules embrace the authorities upon this subject:

1. That mere membership in such an association, society, club or committee does not make the member personally liable upon contracts purporting to be made on its behalf, unless there is something in the charter, by-laws or articles of association authorizing the pledging of the credit of the association, to which he is presumed to have assented

[64] Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505.

[65] Eichbaum v. Irons, 6 Watts & S. (Penn.) 67, 40 Am. Dec. 540. In this case, Chief Justice Gibson said: "Every member present assents beforehand to whatever the majority may do, and becomes a party to acts done, it may be, directly against his will. If he would escape responsibility for them, he ought to protest and throw up his membership on the spot, and there was no evidence that any of the defendants did so. On the contrary they all remained till the meeting was dissolved and the order given." It is evident, however, that the chief justice did not mean to be understood as holding that liability attached to the mere fact of membership or that the defendants could be bound without their assent, but that the assent of the defendants was to be inferred from their conduct. In another part of the opinion he says: "Did the defendants then concur in the order given for the dinner in question? If they did not, the plaintiff cannot recover."

[66] As where the making of the contract was reported at a meeting of the members and no dissent was expressed. Stikeman v. Flack, 58 N. Y. App. Div. 277. And where a lodge moved into and occupied for many years and paid the rent of premises

by becoming a member, and then only in those cases where the contract is within the limits there prescribed.

2. That except in the case last mentioned, the member can only be made liable upon proof of his express or implied assent to the contract; but this may be shown either by his previous consent or his subsequent adoption or by his acquiescence in an established course of dealing.

§ 193. Inchoate corporations.—A corporation is not responsible for acts performed or contracts entered into before its organization by its promoters or other persons assuming to bind it in advance.[67] Having as yet no corporate existence it is, of course, incapable of entering into contracts, or appointing officers or agents. When its organization is effected, however, it may expressly or impliedly become a party to a previous contract by novation; it may make a present contract by now accepting an outstanding offer made before the corporation was organized; or it may, it is said, by what is loosely termed adoption adopt and assume the responsibility of such acts or contracts, if within its corporate powers, and thus make them the valid obligations of the corporation. Such an assumption it is said may, as in other cases, be implied where the corporation, with knowledge of the facts, appropriates to itself the benefits and advantages derived from the act or contract of the promoters, for "it cannot take the benefit of the contract, without performing that part of it which the projectors undertook that it should perform."[68] This, however, is a matter to be more fully discussed in a later section.[69]

rented by the officers. Ehrmanntraut v. Robinson, 52 Minn. 333. See also Sheehy v. Blake, 72 Wis. 411, 77 Wis. 394, 9 L. R. A. 564, where the court held that members of an unincorporated religious society were personally bound by acquiescence for the salary of their minister.

[67] Morawetz on Corporations, § 547; McArthur v. Times Printing Co., 48 Minn. 319, 31 Am. St. R. 653; Pratt v. Oshkosh Match Co., 89 Wis. 406; Paxton Cattle Co. v. First Nat. Bank, 21 Neb. 621, 59 Am. Rep. 852; Bell's Gap R. Co. v. Christy, 79 Penn. St. 54, 21 Am. Rep. 39; Rockford, etc., R. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; New York, etc., R. R. Co. v. Ketchum, 27 Conn. 170; Weatherford, etc., R. Co. v. Granger, 86 Tex. 350, 40 Am. St. R. 837; St. Johns Mfg. Co. v. Munger, 106 Mich. 90, 58 Am. St. R. 468, 29 L. R. A. 63; Buffington v. Bardon, 86 Wis. 635; Pitts v. Steele Merc. Co., 75 Mo. App. 221; Hill v. Gould, 129 Mo. 106; Bash v. Culver Min. Co., 7 Wash. 122; Franklin Fire Ins. Co. v. Hart, 31 Md. 60; Western Screw Co v. Cousley, 72 Ill. 531.

[68] Bell's Gap R. R. Co. v. Christy, *supra;* Rockford, etc., R. R. Co. v. Sage, *supra;* Western Screw Co. v. Cousley, *supra;* Pratt v. Oshkosh Match Co., *supra;* McArthur v. Times Printing Co., *supra;* Buffington v. Bardon, *supra;* Stanton v. New York, etc., R. Co., 59 Conn. 272, 21 Am. St. R. 110; Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 26 L. R. A. 544, and note; Bridgeport Electric Co. v. Meader, 72 Fed. 115; Farmers' Bank v. Smith, 105 Ky. 816, 88 Am. St. R. 341. See 16 Am. L. Rev. 357 and 671.

[69] See *post*, §§ 380–383.

2. Execution in Behalf of Joint Principals.

§ 194. Authority usually to be executed in behalf of all jointly.—Where two or more persons thus unite in the appointment of an agent, the authority so conferred upon him is usually to be exercised only in behalf and in the name of all jointly and with reference to property or other subjects which they own jointly or in which they have a joint interest.[70] A power of attorney to convey lands,—an instrument subject always to strict interpretation—given by two or more joint owners is, therefore, usually to be deemed limited in its operation to lands in which the donors of the power have a joint interest and does not authorize the conveyance of the separate property of one of them only.[71]

But this rule is not inflexible and the circumstances may indicate a contrary purpose. The nature of the interests of the grantors or their relations to each other may make a different conclusion permissible. Thus if the parties have distinct or severable interests a power to convey, not limited by its terms, may be deemed sufficient to authorize a conveyance either jointly with the interests of others or separately.[72]

IV.

JOINT AGENTS.

§ 195. Authority to several agents.—Much of that which was said respecting joint principals is, *mutatis mutandis,* applicable here. One person may appoint a great many agents not only as of course where their duties relate to different subjects, but also frequently where, though severally appointed and authorized, their powers and duties may relate to the same subject. Thus, for example, as will be seen, a person having property to sell may ordinarily authorize a number of brokers to endeavor to find a purchaser,[73] and may appoint them at different times, for different periods and upon different terms. These, however, are not the cases here to be referred to. Instead of thus con-

[70] Authority given by several separately to the same agent must, in the absence of anything showing a contrary intention, be construed as relating to the separate individual business of his respective principal and as not justifying the making of a joint obligation. Harris v. Johnston, 54 Minn. 177, 40 Am. St. R. 312.

[71] Gilbert v. How, 45 Minn. 121, 22 Am. St. R. 724; Dodge v. Hopkins, 14 Wis. 630. Where two of four joint owners give joint power to the other two, they must unite in the execution. Separate sales will convey their own interests only. Smith v. Glover, 50 Minn. 58.

[72] Holladay v. Daily, 86 U. S. (19 Wall.) 606, 22 L. Ed. 187.

[73] Tinges v. Moale, 25 Md. 480, 90 Am. Dec. 73; Ahern v. Baker, 34 Minn. 98; Minto v. Moore, 1 Ala. App. 556.

ferring a several authority upon a number, the principal may confer the authority as a unit upon two or more agents jointly, and the nature of the powers and duties in such a case and the method of executing such an authority require special consideration.

§ 196. Legal effect of appointing joint agents.—Where the principal thus confers authority upon two or more agents jointly, the ordinary effect is to put those agents in the same attitude in which a single agent would be placed. As said in one case,[74] "If a principal employs several agents to transact jointly a particular piece of business, he is equally responsible for the conduct of each and all of them while acting within the limit and scope of their power, as completely so as he would be for the conduct of a single agent upon whom the whole authority had been conferred. He cannot shift or avoid this responsibility by the multiplication of his agents. It is also clear that the corresponding responsibility of each of the several joint agents to the principal for the faithful discharge of their duties, is as complete and perfect as in the case of a single agency; and any prejudice to the principal arising from fraud, misconduct or negligence of either of them would afford ground for redress from the party guilty of the wrong."

§ 197. ——— Notice to one—Liability of one for acts of others.—Upon the ground that the duty of communicating to the principal knowledge coming to the agent rests alike upon each member of such a joint agency, it is held that notice to one of them is to be deemed notice to the principal;[75] and this is doubtless true wherever his relation to the subject matter is such as to impose a duty upon him of an individual character.

So, from the standpoint of their liability to the principal, it is said in a recent case,[76] "It is familiar law that where two or more persons undertake to execute a private agency together, they are jointly liable each for the acts of the other; nor is it any defence that one of them wholly transacted the business with the knowledge of the principal. Each is liable for the whole, if they jointly undertake the agency, notwithstanding an agreement between themselves to the contrary, or that one shall have the profits." But this would not be true of mere fellow-agents or co-agents who had not jointly undertaken to perform the service.[77]

§ 198. Private joint agency must usually be executed by all.—The most important distinction relating to this subject, however, is that

[74] Nelson, C. J., in Bank of U. S. v. Davis, 2 Hill (N. Y.), 451.

[75] Bank of U. S. v. Davis, 2 Hill (N. Y.), 451.

[76] Milwaukee Harvester Co. v. Finnegan, 43 Minn. 183.

[77] Sergeant v. Emlen, 141 Pa. 580.

respecting the method of execution dependent upon whether the agency is public or private in its character. Where authority is conferred upon two or more agents to represent their principal in the transaction of business of a private nature, it may well be presumed ordinarily that it was so conferred upon them all from considerations of a personal nature and in order to derive the benefit of their combined experience, discretion or ability.[78]

It is, therefore, the general rule that such an agency will be presumed to be joint, and it can be performed by the agents only jointly unless an intent appears that it may be otherwise executed.[79] If, how-

[78] Commonwealth v. Commissioners, 9 Watts (Penn.), 470.

[79] Robbins v. Horgan, 192 Mass. 443; Cedar Rapids, etc., R. R. Co. v. Stewart, 25 Iowa, 115; Kupfer v. Augusta, 12 Mass. 185; Caldwell v. Harrison, 11 Ala. 755; Loeb v. Drakeford, 75 Ala. 464; Soens v. Racine, 10 Wis. 271; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Rogers v. Cruger, 7 Johns. (N. Y.) 557; Damon v. Granby, 2 Pick. (Mass.) 345; Sutton v. Cole, 3 *Id.* 232; Woolsey v. Tompkins, 23 Wend. (N. Y.) 324; Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180; Scott v. Detroit, etc., Society, 1 Doug. (Mich.) 119; Low v. Perkins, 10 Vt. 532, 33 Am. Dec. 217; Towne v. Jaquith, 6 Mass. 46; Heard v. March, 12 Cush. (Mass.) 580; Hawley v. Keeler, 53 N. Y. 114; Johnston v. Bingham, 9 W. & S. (Penn.) 56; Smith v. Glover, 50 Minn. 58; Rundle v. Cutting, 18 Colo. 337.

So in the case of arbitrators: Moore v. Ewing, Coxe (N. J.), 144, 1 Am. Dec. 195; Blin v. Hay, 2 Tyler (Vt.), 304, 4 Am. Dec. 738; Green v. Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; Patterson v. Leavitt, 4 Conn. 50, 10 Am. Dec. 98; Wilder v. Ranney, 95 N. Y. 7; Brennan v. Willson, 71 N. Y. 502; Penn v. Evans, 28 La. Ann. 576.

One of several joint agents cannot delegate to the others his authority to act. Loeb v. Drakeford, *supra;* White v. Davidson, *supra.*

"It is well settled," says Andrews, J., in Hawley v. Keeler, *supra*, "as a general doctrine in the law of agency, that when an authority to act in a matter of a private nature is conferred by the principal upon more than one person, all must act in the execution of the power. This is the construction which the law puts upon the power, following the supposed intention of the parties, and there must, ordinarily be a joint execution of the agency. The authority may be conferred in such terms as to authorize a several execution, or an execution by a majority or other number; and in the absence of express words it may have been exercised under such circumstances as will justify the inference that the principal intended that less than the whole number might act; in which case he would be bound to those who had acted upon such inference. The general rule that a joint execution must be had of an authority given to several, has been made to yield for the benefit of trade and to meet supposed necessities, in contracts made by one of several joint owners of ships, and in case of sales made by one of two factors, of goods consigned to them for sale."

Not all collective appointments joint. "And" may mean "or."—It seems quite clear that the *mere* fact that a number of agents are authorized conjunctively does not necessarily lead to the conclusion that the authority is joint. The context or the circumstances may show that *and* merely means *or*. If I say or write that A and B and C and D, etc., are all my agents authorized to do acts

ever, it is shown, by the instrument conferring the power or otherwise, that it was originally the intention that a part might execute it, or if the principal has subsequently waived the necessity or has so conducted himself as to lead reasonably to the inference that a joint execution would not be insisted upon, and that less than all may validly exercise the power, such an execution will be sufficient.[80] Where the agency is joint or several, it must, it is said, be executed by all or one, and not by an intermediate number, but this rule gives way when an intention that it may be so exercised clearly appears.[81] Where, how-

of a certain sort, this may mean—and perhaps usually would mean—no more than that any one of them is agent to do any act of the class. Suppose that a large dealer by one act or instrument appoints a considerable number of agents, who are however expected to act in different places or in different fields; the mere fact that they are united in appointment does not necessarily make them joint without the rule. For illustration: A surety company by power of attorney appoints "R. S. M. and A. W. M. and E. P. H" attorneys in fact for the company to sign bonds. It also declares that it is the intention of the instrument to authorize and empower "the said R. S. M. and A. W. M. *or* E. P. H. to sign the name of said company." A bond is issued signed in the name of the company by "A. W. M., agent." The court construes the power as an appointment severally, and not jointly, or even as requiring action by R. S. M. and also by either A. W. M., or E. P. H. United States Fidelity & Guar. Co. v. Ettenheimer, 70 Neb. 144, 113 Am. St. R. 783.

[80] Cedar Rapids, etc., R. R. Co. v. Stewart, 25 Iowa, 115, where the instrument expressly authorized execution by a majority. Hawley v. Keeler, 53 N. Y. 114, where execution by less than all was long acquiesced in. Where one of two joint agents assigned his interest to the others, and the latter for seven months acted alone to the principal's knowledge and without objection, the principal's assent was inferred. Albany Land Co. v. Rickel, 162 Ind. 222. When usage will justify, see Godfrey v. Saunders, 3 Wils. 94; Willet v. Chambers, Cowp. 814.

[81] Guthrie v. Armstrong, 5 B. & Ald. 628. In this case, by a power of attorney the principal authorized fifteen persons "jointly and separately for him and in his name to sign and underwrite all such policies of insurance as they or any of them should jointly and separately think proper." A policy was executed by four of these persons and a recovery had upon it. J. Williams moved to enter a non-suit. He relied upon Viner's Abridgement, title *Authority* B. pl. 7, and Com. Dig. *Attorney* C. 11. "And in Co. Litt. 181, b., it is stated, 'If a charter of feoffment be made, and a letter of attorney to four or three jointly or severally to deliver seizin, two cannot make livery because it is neither by the four or three jointly nor any of them severally.' Here the power is to fifteen jointly or severally and it is neither executed by the whole jointly nor by one of them severally. The latter words 'or any of them' only apply to the persons who are to exercise the discretion, but they have no reference to the authority itself." Abbott, C. J., said: "The law undoubtedly is as stated by Mr. Williams, but we are not disposed to extend the rule further. Whenever a case exactly similar to those cited shall occur, the court will feel itself bound by them. But in this case we ought to look at the whole instrument; and if we do so, there is no doubt what the mean-

ever, the authority is conferred upon a partnership, it may be executed by one of the partners.[82]

Where the agency is clearly joint, the death or disability of one of the agents terminates the agency unless it be coupled with an interest in the survivors.[83]

§ 199. Public agency may be executed by a majority.—Where, however, the agency is created by law or is public in its nature, and requires the exercise of deliberation, discretion or judgment, the rule is otherwise. Here while all of the agents or officers (unless the law makes a less number a quorum) must be present to deliberate, or what is usually regarded as the same thing [84] must be duly notified and have an opportunity to be present, yet, unless the law clearly requires the joint action of all of them,[85] it is well settled that a majority of them, where the number is such as to admit of a majority,[86] if present may act and their act will be deemed to be the act of the body.[87]

ing of it is. Here a power is given to fifteen persons jointly and severally to execute such policies as they or any of them shall jointly or severally think proper. The true construction of this is, as it seems to me, that the power is given to all or any of them to sign such policies, as all or any of them should think proper. The argument is that the latter words only apply to the persons who are to exercise the discretion. That would have been quite correct if those had been different from prsons entrusted with the power. But they are the same: these latter words therefore control the meaning of the former and the verdict is right."

[82] Deakin v. Underwood, 37 Minn. 98; Frost v. Cattle Co., 81 Tex. 505, 26 Am. St. R. 831; McCulloch Land & Cattle Co. v. Whitefort, 21 Tex. Civ. App. 314; McLaughlin v. Wheeler, 1 S. Dak. 497.

[83] Salisbury v. Brisbane, 61 N. Y. 617; Boone v. Clark, 3 Cranch (U. S. C. C.), 389; Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180.

[84] Notice and a fair opportunity to attend are usually regarded as equivalent to attendance, though not all of the cases have recognized the distinction. See Williams v. School District, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; Horton v. Garrison, 23 Barb. (N. Y.) 176; First Nat. Bank v. Mt. Tabor, 52 Vt. 87, 36 Am. Rep. 734.

[85] See First Nat. Bank v. Mt. Tabor, *supra;* People v. Coghill, 47 Cal. 361; Powell v. Tuttle, 3 N. Y. 396.

[86] Where the number is such as not to admit of a majority, as where there are only two, the concurrence of both is indispensable; though it is said that if one should die or become disabled the other might act alone except in the case of officers, exercising powers of a judicial nature. Downing v. Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223.

[87] See the subject more fully considered in Mechem on Public Officers. See also McCready v. Guardians of the Poor, 9 Serg. & R. (Penn.) 94, 11 Am. Dec. 667; Scott v. Detroit, etc., Society, 1 Doug. (Mich.) 119; Jewett v. Alton, 7 N. H. 253; Caldwell v. Harrison, 11 Ala. 755; Soens v. Racine, 10 Wis. 271; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; First National Bank v. Mount Tabor, 52 Vt. 87, 36 Am. Rep. 734; Kingsbury v. School District, 12 Metc. (Mass.) 99; Cooley v. O'Connor, 12 Wall. (U. S.) 391, 20 L. Ed. 446; Baltimore Turnpike, Case of, 5 Binn. (Penn.) 481; Louk v. Woods, 15 Ill. 256; Jefferson County v. Slagle, 66

The rule which generally applies to these cases was well stated by Chief Justice Shaw, as follows: "Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting in the manner prescribed by law, if so prescribed; or by the rules and regulations of the body itself, if there be any; otherwise, if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection that all the members do not attend, if there be a quorum." [88]

§ 200. ——— Committees — Boards — Directors — Majority of quorum.—This rule permitting action by a majority is constantly applied to county, township and city boards, and to general and special committees and commissions exercising public functions.[89] It is applied also in the case of boards of directors of private corporations and to committees representing such corporations.[90]

Where a majority may thus lawfully meet and constitute a quorum a majority of that majority, though actually less than a majority of the whole number, may usually determine the action.[91]

Penn. St. 202; Austin v. Helms, 65 N. C. 560; People v. Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Williams v. School District, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; Leavenworth, etc., R. Co. v. Meyer, 58 Kan. 305; McNeil v. Chamber of Commerce, 154 Mass. 277, 13 L. R. A. 559; Withnell v. Gartham, 6 T. R. 388; Grindley v. Barker, 1 B. & P. 229.

[88] In Williams v. School District, *supra*.

[89] See cases cited in preceding section; Damon v. Granby, 2 Pick. (Mass.) 345; Sprague v. Bailey, 19 Pick. 436; George v. School District, 6 Metc. (Mass.) 497.

[90] See McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 13 L. R. A. 559.

[91] See Morawetz on Corporations, § 531; Cook on Corp. § 713a; McNeil v. Chamber of Commerce, *supra;* Wells v. Rubber Co., 19 N. J. Eq. 402; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207.

CHAPTER V

OF THE APPOINTMENT AND AUTHORIZATION OF AGENTS BY THE PRINCIPAL AND THE EVIDENCE THEREOF

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§ 201. Purpose of this chapter.—Having now seen who may be principal and agent, and for what purposes agency may be created, it is next in order to consider, I. The different methods by which agency may be created; and, II. By what evidence its existence may be established.

Appointment and authorization are often used as synonymous terms, but though the two acts are often coincident, they are not necessarily either identical or coincident. The appointment, in the sense of designation and agreement, may take place at one time, while the authority may be conferred, enlarged or diminished at another time.

§ 202. Questions not here considered.—Before taking up that discussion, it will be desirable to eliminate certain questions which are not within the scope fixed for this work. It is the purpose here to confine attention to what may be termed agency by appointment or authority by the direct act or omission of the parties. Therefore—

§ 203. ——— Authority created by law, independently of the act of the parties, in the few cases in which that may exist, is not a matter here to be considered. As has been already suggested, there are a few cases in which authority, or, more properly speaking, power, is conferred by law in certain cases. Thus an unpaid vendor of goods has a power of sale of the goods under certain circumstances.[1] A pledgee has a power of sale, expressly conferred usually in formal contracts of pledge, but not dependent upon that.[2] A married woman, whose husband does not supply her, has, as has been already seen, a limited power to buy necessaries upon her husband's credit, which prevails notwithstanding his dissent.[3] A minor child is sometimes said to have a somewhat similar power.[4] The authority of a ship master is sometimes said to be legally conferred, though it probably rests upon a presumption of actual authority to act in an emergency. None of these cases, except the last, is a question of agency at all, or within the scope of the present work, and will not be considered further than they already have been.

§ 204. ——— Authority resulting from the relation of the parties.—Reference is sometimes made to authority resulting merely

[1] See 2 Mechem on Sales, § 1621 *et seq.*

[2] See Jones on Pledges (2d Ed.), § 602.

[3] See *ante*, § 161.

Statutory Agency of Husband.—In a number of states statutes have made the husband a statutory manager of his wife's separate estate. See Sencerbox v. First National Bank, 14 Idaho, 95; Dority v. Dority, 30 Tex. Civ. App. 216, affirmed 96 Tex. 215; Owens v. New York Land Co. (Tex. Civ. App.), 32 S. W. 1057; Gross v. Pigg, 73 Miss. 286; Ross v. Baldwin, 65 Miss. 570.

[4] See *ante*, § 156.

from the relation of the parties. As a general rule, there is no such authority whatever. The conspicuous if not the only exception is that of partnership. Here each partner is the agent of his copartner within the scope of the business, unless some other arrangement has been made. But, as has been seen, no authority in either spouse results merely from the marriage relation. The wife's authority to buy necessaries, which is the strongest case, depends upon the condition of the husband's failure to supply her. So of parent and child. In the case of the less intimate relations, brother, uncle, cousin, co-tenant, and the like, there is no trace of authority resulting merely from the relation. All of these persons may be given authority, but it must be given as in other cases and is not inherent.

§ 205. ——— Authority by necessity.—As has already been pointed out, it is sometimes said that authority may arise from necessity—*ex necessitate*. This, however, is a most vague and unsatisfactory expression. It often refers simply to the so-called authority created by law or to liability enforced *quasi ex contractu*, as in the case of the married woman who may buy necessaries upon her husband's credit, when he has failed to supply her, even though he dissents.[5] It is often used also in a more accurate sense to refer to cases of unexpected necessity, or, more properly speaking, of sudden emergency. Speaking generally, necessity alone confers authority upon no one. Coupled, however, with an existing relation of some sort, and, here, with a relation of principal and agent or master and servant, necessity or emergency not infrequently plays an important part. It is important to observe, however, that here it is ordinarily an unexpected necessity or a sudden and unforeseen emergency. So far as the expected and foreseeable necessities are concerned, it will ordinarily be presumed that the principal or master takes those into account, and makes such provision for them as he desires; the unexpected ones, on the other hand, he cannot usually provide for. An unforeseen emergency may, according to the circumstances, affect situations in a variety of ways: It may increase the duty of care or it may diminish it; it may relieve the agent from the duty of strict compliance with instructions,[6] or it may conceivably only serve to make such compliance more imperative; it may reasonably enlarge an existing authority sufficiently to meet the emergency, or it may operate to restrict it, where it cannot reasonably be expected that the principal could have intended that so wide an

[5] It is in this sense, of course, that it is used in such expressions as that of Pollock, C. B., in Johnston v. Sumner, 3 H. & N. 261.

[6] This subject is discussed later, Book IV, Chapter II, under *Duty of Agent to Obey Instructions*.

authority as that given should continue to be exercised in the new circumstances.[7]

It is important also to keep in mind, that, since it is the principal's purposes and plans that are to be subserved in the ordinary case, he is the one to decide, where possible, how the emergency is to be met; and it is therefore a just and proper rule which limits the inference of authority from an emergency to the case in which the principal cannot be consulted.[8]

It will not fail to be observed also that the authority which arises from necessity or emergency, in the sense in which it is now being discussed, is an authority by implied appointment by the principal, and not merely an authority given by law regardless of his act or implied consent.[9]

§ 206. Subject here considered is appointment and authorization of agents and not the creation or existence of other relations from which some authority may result. It is in this view, that the proposed classification as to *methods* and *evidence* was suggested, and it is in this view that the discussion proceeds.

§ 207. What considerations involved.—As has been pointed out in an earlier section, the matter of the appointment of an agent ordinarily involves at least two persons—the principal and the proposed agent. While it is true that there may be exceptional cases—like those of master and slave or parent and child—where the proposed principal may be in a position to coerce the proposed agent, the ordinary situation is different, and the proposed principal must not only be ready to become such, but the proposed agent must also be willing to accept. Before an actual agency can exist, therefore, in the ordinary case the principal must not only appoint but the agent must accept.

Under ordinary circumstances, probably, where an agency is contemplated, the proposed principal takes the initiative. He selects the agent, appoints him, and sends him forth to act. On the other hand, the one who becomes agent may take the initiative, and seek the appointment.

More than this also is possible. The question of the creation of the agency may first arise, not between the principal and agent, but be-

[7] This subject is more fully discussed in Book II, Chapter I, on *The Nature and Extent of the Authority.*

[8] See preceding reference. It is also discussed in various other places.

[9] Thus, Marshall, J., in Evans v. Crawford County Ins. Co., 130 Wis. 189, 118 Am. St. R. 1009, 9 L. R. A. (N. S.) 485, takes pains to point out that the authority of the wife which he refers to as one *ex necessitate* is not one which arises from the marriage relation but from "a presumption of appointment."

tween the principal and third persons or between third persons and the proposed agent. The principal may arrange with a third person that he will or shall appoint the agent; and the third person may arrange with the proposed agent that if he becomes such, the third person will deal with him, or the proposed agent may agree with the third person that he will secure an appointment as agent.

§ 208. Use of persons as instrumentalities but not as agents—Acts done in the presence of the principal and by his direction.—Before taking up the methods of appointing agents, moreover, it may be advisable to point out that where the question is, not the appointment of an agent, but the adoption and use of an instrumentality, the ordinary rules respecting the former subject do not apply. Thus where a person, about to perform a certain act, himself determines upon all of the elements of it which essentially belong to it, he may avail himself of any mechanical or ministerial agency which may be convenient in giving physical form or manifestation to the act. Human instrumentalities may be employed for this purpose as well as inanimate ones.[10] If I

[10] This principle was applied, for example, in the following cases involving the signing or execution of the instrument named in the parenthesis. Lewis v. Watson, 98 Ala. 479, 39 Am. St. Rep. 82, 22 L. R. A. 297 (sheriff's deed); Clark v. Latham, 25 Ark. 16 (writ of attachment); Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84 (mortgage); Pierce v. Dekle, 61 Fla. 390, 25 A. & E. Ann. Cas. 1355 (subscription list); Ellis v. Francis, 9 Ga. 325 (constable's return of *nulla bona on fi. fa.*); Reinhart v. Miller, 22 Ga. 402, 68 Am. Dec. 506 (marriage contract); Flemister v. State, 48 Ga. 170 (due bill); Cunningham v. Lamar, 51 Ga. 574 (garnishment bond); Brown v. Colquitt, 73 Ga. 59, 54 Am. Rep. 867 (criminal recognizance); Wyatt v. Walton Guano Co., 114 Ga. 375 (promissory note); Hawes v. Glover, 126 Ga. 305 (mortgage); Handyside v. Cameron, 21 Ill. 588, 74 Am. Dec. 119 (promissory note); Henderson v. Barbee, 6 Blackf. (Ind.) 26 (note); Croy v. Busenbark, 72 Ind. 48 (recognizance); Nye v. Lowry, 82 Ind. 316 (deed); Kennedy v. Graham, 9 Ind. App. 624 (note); Crumrine v. Crumrine, 14 Ind. App. 641, 43 N. E. 322 (note); State v. Holmes, 56 Iowa, 588, 41 Am. Rep. 121 (order adjourning court); Currier v. Clark, 145 Iowa, 613 (mortgage); Irvin v. Thompson, 4 Bibb (Ky.), 295 (power of attorney); Meyer v. King, 29 La. Ann. 567 (contract); Frost v. Deering, 21 Me. 156 (release of dower); Bird v. Decker, 64 Me. 550 (mortgage deed); Lovejoy v. Richardson, 68 Me. 386 (deed); Gardner v. Gardner, 5 Cush. (59 Mass.) 483, 52 Am. Dec. 740 (deed); Finnegan v. Lucy, 157 Mass. 439 (statutory notice by wife to refuse sale of liquor to husband); Williams v. Woods, 16 Md. 220 (memorandum of contract, signed for vendor by clerk of his broker); Just v. Wise Township, 42 Mich. 573 (commissioners' order on treasurer); Johnson v. Van Velsor, 43 Mich. 208 (deed); Eggleston v. Wagner, 46 Mich. 610 (contract); Hotchkiss v. Cutting, 14 Minn. 537 (summons); Watkins v. McDonald (Miss.), 41 So. 376 (appointment of substituted trustees); State v. Carlisle, 57 Mo. 102 (deposition); Porter v. Paving Co., 214 Mo. 1 (ordinance); Bigler v. Baker, 40 Neb. 325, 24 L. R. A. 255 (contract); *In re* Creighton, 88 Neb. 107 (certification

wish to sign my name to a document, I may use a pen, a typewriter, a rubber stamp, or the hand of a third person indifferently. Inasmuch as, in such a case, I furnish the consciousness, the volition—the will—and cause the act to be done under my immediate direction and control, it is my act whether I employ an inanimate tool to make the visible mark or an animate one. Such a tool so used is not an agent, and the rules governing the appointment of agents do not apply to its use. Hence, the rule, of quite wide application, is, that acts of a merely mechanical or ministerial nature, done by one person in the presence and by the direction or assent of another and as a part of some larger act which the latter is then engaged in performing, are as valid as if done by the latter in person. This rule applies, as will be seen, even though the act is one—like the signing of a written instrument or even an instrument under seal—which if really done by the agent himself

of record); Lord v. Lord, 58 N. H. 7, 42 Am. Rep. 565 (attestation of will); Mutual Life Ins. Co. v. Brown, 30 N. J. Eq. 193, aff'd 32 N. J. Eq. 809 (power of attorney); Thomas v. Spencer (N. J.), 42 Atl. 275 (pledge of mortgage); Mackay v. Bloodgood, 9 Johns. (N. Y.) 285 (partnership name to arbitration bond); People v. Smith, 20 Johns. 63 (filling in blanks on summons); Mallon v. Story, 2 E. D. Smith (N. Y.), 331 (contract); Harris v. Story, 2 E. D. Smith (N. Y.), 363 (contract); Fichthorn v. Boyer, 5 Watts, 159, 30 Am. Dec. 300 (firm name to arbitration bond); Fitzpatrick v. Engard, 175 Pa. 393 (contract); Haven v. Hobbs, 1 Vt. 238, 18 Am. Dec. 678 (note); Jesse v. Parker, 6 Gratt. (Va.) 57, 52 Am. Dec. 102 (will and attestation); Will of Jenkins, 43 Wis. 610 (will); Mariner v. Wiens, 137 Wis. 637 (contract under seal); Ball v. Dunsterville, 4 T. R. 313 (seal on bill of sale); King v. Longnor, 1 Nev. & M. 576, s. c. 4 Barn. & Adol. 647 (indenture of apprenticeship); Hudson v. Revett, 5 Bing. 368 (blanks filled in, in deed for creditors).

Who may make the signature.—Ordinarily any person may be used to make the signature; but, in making the memorandum under the statute of frauds, it has been held that the agent must be some third person, and cannot be the other contracting party (Wright v. Dannah, 2 Camp. 203); and in Clough v. Clough, 73 Me. 487, 40 Am. Rep. 386, it was said that a deed, signed by the grantee for the grantor in the presence of the latter and at his request, was not well executed.

Burden of proof.—The fact that the execution was in the immediate presence of the principal must be affirmatively established by the party who relies on the rule, that it is the act of the principal, as an excuse for the absence of a written or sealed power of attorney. A mere direction to the agent is not sufficient, but the presence must be proved, not merely inferred "from any coincidence between the date of the deed and the acknowledgment of the principal that it was executed by his attorney." Videau v. Griffin, 21 Cal. 389.

What meant by "in the presence" of the principal.—This is a question which has not been very much discussed, but probably any case which would satisfy the requirements for the attestation of wills would be sufficient for this purpose.

In Mackay v. Bloodgood, 9 Johns. 285, a partner saw and approved the deed and was "about the store" at the time of its execution, upon which it

would require authorization in as solemn a form as the instrument itself.

It is not easy to see why this rule should not have a wider application, and include any specific act mechanically performed by the direction of the principal, even though not done in his presence. The reasons ordinarily given would include such an act. The rule, however, has not been so extended.

With such distinctions in mind, we may proceed to consider—

I.

HOW AN AGENT MAY BE APPOINTED AND AUTHORIZED.

§ 209. Two persons involved here.—It will be obvious that the consideration of this question ordinarily involves two aspects: 1. What must be done on the part of the principal; and 2. What must be done on the part of the agent. Of these in their order.

1. On the Part of the Principal.

§ 210. Only by the act of the principal.—Except in the few cases already mentioned—which have no further relation to the subject matter of this treatise—in which the law creates or confers authority, or it may result from some relation in which the parties stand, it is the invariable rule that authority to act as agent can arise only at the will

was held that the jury were justified in finding that he was present.

So where a sister directed her brother through the closed door of her room to sign her marriage contract, and he signed it in the yard at the gate post, it was held that it was not error to instruct the jury that she need not see the signing and the direction to her brother need not be given within hearing of the witnesses of the signing, in order to make it her act rather than an act by her agent. Reinhart v. Miller, 22 Ga. 402.

Where five bonds had been signed and the sixth was then signed before the blanks were filled in so that the obligor could leave in a hurry, it was held that his act in "signing the bond, and directing the sheriff to fill it up in a particular way, and his leaving, under the facts shown in the record, is equivalent to his being present when the bond was filled out," so that the jury were justified in finding it to be his bond. Brown v. Colquitt, 73 Ga. 59.

In State v. Holmes, 56 Iowa, 588, 41 Am. Rep. 121, it was held that an order to adjourn court, telegraphed by the judge, was still his written order, and "by means of the wire and instruments . . . and the operator, the judge wrote the telegram which was delivered to the clerk."

Sufficiency of the signature.—These cases are complicated by statutes and rules of construction requiring that "when the written signature of a person is required by law, it shall always be the proper handwriting of such person, or, in case he is unable to write, his proper mark." For instance it was held in Chapman v. Limerick, 56 Me. 390, that a warrant calling a town meeting, signed in the presence of the constable at his direction, was invalid because in the

and by the act of the principal.[11] Except in those cases, the law never simply presumes that authority exists: its existence is always a fact to be proved by tracing it to some act of the person alleged to have created and conferred it.

And not only must the agent be appointed through the act of the principal, but it must also be by his personal act, except where he has expressly or by implication authorized some one else to appoint agents or servants for him.

§ 211. The method to be pursued.—While it is thus true that authority to act as agent can usually arise only at the will and by the act of the principal, that will and act may find expression in a great variety of ways. Usually, no particular method or form of expression

case of public officials the personal act and handwriting of the officers must be essential. So in Ferguson v. Monroe County, 71 Miss. 524, signatures on a local option petition were ruled out unless in the actual handwriting of the voter. But in Finnegan v. Lucy, 157 Mass. 489, it was held that the statute did not apply to ordinary signatures and a notice not to sell the husband liquor, under a statute requiring the signature of the wife, was held sufficient when signed by another in her presence. There are other cases accepting this where the signature of a public official is required, as indicated in other cases cited, *supra*, and in Porter v. Boyd Paving Co., 214 Mo. 1, it was held after a very thorough discussion, that the signature of the mayor, as required by statute for the validity of an ordinance, might be written by another in his presence, and that the statute requiring "proper handwriting" or inability to write did not apply.

Method of expressing direction or assent.—No particular way of authorizing the signature is required, and any act or conduct signifying intent would probably be sufficient. For instance in Gardner v. Gardner, 5 Cush. (59 Mass.) 483, 52 Am. Dec. 740, the mother assented by nodding her head to her daughter's offer to sign the deed for her. So in Thomas v. Spencer (N. J.), 42 Atl. 275, where the attorney asked his client, a somewhat illiterate woman, if he should sign the pledge of a mortgage, and she nodded her head, it was held that he was authorized. In Jesse v. Parker, 6 Gratt. (Va.) 57, 52 Am. Dec. 102, the attesting witnesses denied giving any direction, merely standing by with knowledge that their names were being signed, although the agent testified that he had been verbally authorized. Upon this evidence, the verdict of the jury was upheld, finding that the will had been duly executed and attested. Statutes often require that a testator's signature be made by his "express direction." But this is much more strict than the requirement of the common law, as indicated by these words of Gibson, C. J., in Greenough v. Greenough, 11 Pa. St. 489, 51 Am. Dec. 567, "As signing by the testator's assent would have been good at the common law, the statute was enacted, not to authorize it, but to regulate the evidence of it by requiring more than a wink or a nod, or a word not less ambiguous . . ."

[11] Pole v. Leask, 33 L. J. Eq. 155, 28 Beav. 562; Stringham v. St. Nicholas Ins. Co., 4 Abb. App. Dec. (N. Y.) 315; McGoldrick v. Willits, 52 N. Y. 612; Roberge v. Monheimer, 21 Misc. 491; Graves v. Horton, 38 Minn. 66; Chicago, etc., Organ Co. v. Rishforth, 24 Ohio Cir. Ct. R. & 14 Ohio Cir. D. 660.

is essential, and the range of possible forms is ordinarily as wide as the domain of human action. Thus, an agent may, in a given case, be appointed by written instrument or by word of mouth. His appointment may be implied from the conduct of the parties and that conduct may often be active or inactive, and consciously or perhaps unconsciously directed to that end. The authority need not be previously conferred, but its lack may be supplied by subsequent approval or adoption.

Notwithstanding the fact that in the ordinary case the law does not insist upon any particular form and concerns itself rather with the fact than with the method, there are two classes of cases—one arising under the rules of the common law and the other under statutes—in which the authority *must* be conferred in a particular way. These are: 1. Cases wherein an instrument under seal is to be executed; and, 2. Cases wherein some statute, usually the statute of frauds, expressly requires the authority to be conferred by writing. These two classes of cases will be considered first.

a. Authority to Execute Instruments Under Seal.

§ 212. Such authority must be conferred by instrument under seal.—It was the settled rule of the common law, and as such it still prevails, where not changed by statute, that authority to execute an instrument necessarily under seal could be conferred only by an act as solemn in its form as that of the act which was to be performed, and hence that it could be conferred only by an instrument which was itself under seal.[12] But while this rule is firmly established it is highly tech-

[12] Co. Litt. 48b; Combe's Case, 9 Coke, 75, 77; Harrison v. Jackson, 7 T. R. 207; Berkeley v. Hardy, 5 B. & C. 355, s. c. 8 D. & R. 102; Elliott v. Stocks, 67 Ala. 336; Watson v. Sherman, 84 Ill. 263; Johnson v. Dodge, 17 Ill. 433; Peabody v. Hoard, 46 Ill. 242; Harshaw v. McKesson, 65 N. C. 688; Rowe v. Ware, 30 Ga. 278; Maus v. Worthing, 3 Scam. (Ill.) 26; Rhode v. Louthain, 8 Blackf. (Ind.) 413; Reed v. Van-Ostrand, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; Wells v. Evans, 20 Wend. (N. Y.) 251; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Heath v. Nutter, 50 Me. 378; Hanford v. McNair, 9 Wend. (N. Y.) 54; Damon v. Granby, 2 Pick. (Mass.) 345; Banorgee v. Hovey, 5 Mass. 11, 4 Am. Dec. 17; Cooper v. Rankin, 5 Binn. (Penn.) 613; Gordon v. Bulkeley, 14 Serg. & R. (Penn.) 331; Stetson v. Patten, 2 Greenl. (Me.) 358, 11 Am. Dec. 111; Drumright v. Philpot, 16 Ga. 424, 60 Am. Dec. 738; Graham v. Holt, 3 Iredell's (N. Car.) Law, 300, 40 Am. Dec. 408; Humphreys v. Finch, 97 N. C. 303, 2 Am. St. R. 293; Overman v. Atkinson, 102 Ga. 750; Lobdell v. Mason, 71 Miss. 937; Paine v. Tucker, 21 Me. 138, 38 Am. Dec. 255; Williams v. Crutcher, 5 How. (Miss.) 71, 35 Am. Dec. 422; Wheeler v. Nevins, 34 Me. 54; Baker v. Freeman, 35 Me. 485;

nical in its nature and confessedly stands upon very narrow ground. The whole theory of the solemnity of a seal is totally unsuited to the business methods of the present day and the constant tendency of courts and legislatures is to ignore the distinctions formerly founded upon its use.[13]

The rule, moreover, only applies to instruments which are deeds in fact; and does not apply to an instrument not a deed but by legislation given the *effect* of a deed.[14]

§ 213. ——— Authority to fill blanks in deeds and bonds.—Following the rule laid down in the preceding section, and as a necessary consequence of it, it is held in many cases that authority to fill blanks

Shuetze v. Bailey, 40 Mo. 69; Smith v. Perry, 5 Dutcher (N. J.), 74; Gage v. Gage, 30 N. H. 420; Spurr v. Trimble, 1 A. K. Marsh. (Ky.) 278; McMurtry v. Brown, 6 Neb. 368; Adams v. Power, 52 Miss. 828; McNaughten v. Partridge, 11 Ohio, 223; Smith v. Dickinson, 6 Hump. (Tenn.) 261; Mitchell v. Sproul, 5 J. J. Marsh. (Ky.) 264; McMurtry v. Frank, 4 T. B. Monr. (Ky.) 39; Long v. Hartwell, 5 Vroom (N. J.), 116; Platt v. McCullough, 1 McLean (U. S. C. C.), 69.

Other formalities.—In some states, by statute, a power of attorney to execute a conveyance of land must have the same formalities, such as acknowledgment, witnesses, etc., which would be required in the conveyance. Thus Butterfield v. Beall, 3 Ind. 203; Oatman v. Fowler, 43 Vt. 462. But in other states this is only necessary to entitle the power of attorney to record. See Montgomery v. Dorion, 6 N. H. 254; Tyrrell v. O'Connor, 56 N. J. Eq. 448. Some cases state the former to be the general rule. Heath v. Nutter, *supra;* Gage v. Gage, *supra;* Clark v. Graham, 19 U. S. (6 Wheat.) 577, 5 L. Ed. 334.

Recording.—Statutes in some states also require the power of attorney to be recorded (Oatman v. Fowler, 43 Vt. 462), often "with the deed" (Rosenthal v. Ruffin, 60 Md. 324), but, unless required by statute, it is not essential to validity. Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Delano v. Jacoby, 96 Cal. 275; Tyrrell v. O'Connor, 56 N. J. Eq. 448.

Oral admission of sealed authority.—The requirement of an authority under seal cannot be satisfied by an oral admission or acknowledgment by the principal that there was such an authority existing. Paine v. Tucker, 21 Me. 138, 38 Am. Dec. 255.

Presumption of valid power in case of ancient deeds.—In the case of ancient deeds, purporting to have been executed by an attorney in fact, a valid power will often be presumed to have existed. Reuter v. Stuckart, 181 Ill. 529; Doe v. Phelps, 9 Johns. (N. Y.) 169; Doe v. Campbell, 10 Johns. 475; Robinson v. Craig, 1 Hill (S. C.), 389.

[13] "In modern times," says Champlin, J., in Barton v. Gray, 57 Mich. p. 634, "the attaching of a seal to a signature is not regarded with that reverence which was formerly the case, and when the legislature enacted that a seal or wafer was unnecessary, but that a scroll or other device should be sufficient, the solemnity attending the execution of such contract vanished; and when the legislature further provided that no instrument should be held invalid for want of a seal, and it became under the statute mere prima facie evidence of consideration, the affixing of seals, except to instruments required by law to be under seal, became of no practical importance."

[14] *In re* Whitley Partners, 32 Ch. Div. 337.

in deeds and bonds, essential to be filled, can be conferred only by an instrument under seal.[15] This rule, however, like the other, has met with much disapproval in modern times, and though, if the English cases be included, it may perhaps still be said to be the general rule, there has been manifested in the more recent American cases a strong dispostion to disregard it as based upon what has now become a meaningless technicality.[16] To the extent that statutory enactments have dispensed with the necessity of a seal or have robbed it of its former significance, the rule itself must be regarded as without foundation.

§ 214. ——— **Estoppel.**—Even though the rule might otherwise prevail, the principal may by his conduct estop himself from relying upon it. Thus where a grantor signs and seals a deed or bond, leaving unfilled blanks, and gives it to an agent with parol authority to fill the blanks and deliver it, and the agent fills the blanks as authorized and delivers it to an innocent grantee for value and without notice that the agent thus acted without adequate authority, it is held that the

[15] United States v. Nelson, 2 Brock. 64; Williams v. Crutcher, 5 How. (Miss.) 71, 35 Am. Dec. 422; Davenport v. Sleight, 2 Dev. & Bat. (N. C.) L. 381, 31 Am. Dec. 420; Humphreys v. Finch, 97 N. C. 303, 2 Am. St. R. 293; Blacknall v. Parish, 6 Jones (N. C.), Eq. 70; State v. Boring, 15 Ohio, 507; Lund v. Thackery, 18 S. Dak. 113; Ingram v. Little, 14 Ga. 173, 58 Am. Dec. 549; Burns v. Lynde, 6 Allen (Mass.), 305; Preston v. Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153; Wunderlin v. Cadogan, 50 Cal. 613; Adamson v. Hartman, 40 Ark. 58; Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266; Hibblewhite v. McMorine, 6 M. & W. 200.

[16] Thus it is held "that parol authority is sufficient to authorize the filling of a blank in a sealed instrument and that such authority may be given in any way by which it might be given in case of an unsealed instrument." State v. Young, 28 Minn. 551; Drury v. Foster, 2 Wall. (U. S.) 24, 17 L. Ed. 780; Cribben v. Deal, 21 Oreg. 211, 28 Am. St. R. 746; Palacios v. Brasher, 18 Colo. 593, 36 Am. St. R. 305; Lafferty v. Lafferty, 42 W. Va. 783; Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470; Field v. Stagg, 52 Mo. 534, 14 Am. Rep. 435; Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486; Schintz v. McManamy, 33 Wis. 299; Thummel v. Holden, 149 Mo. 677; Forster v. Moore, 79 Hun, 472, aff'd 156 N. Y. 666; Otis v. Browning, 59 Mo. App. 326. See also South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535; Wiley v. Moor, 17 S. & R. (Penn.) 438, 17 Am. Dec. 696; Commercial Bank v. Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Wooley v. Constant, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246; *Ex parte* Decker, 6 Cow. (N. Y.) 60; *Ex parte* Kerwin, 8 *Id.* 118; Humphreys v. Guillow, 13 N. H. 385, 38 Am. Dec. 499; Gibbs v. Frost, 4 Ala. 720; Richmond Mfg. Co. v. Davis, 7 Blackf. (Ind.) 412; Boardman v. Gore, 1 Stew. (Ala.) 517, 18 Am. Dec. 73; Camden Bank v. Hall, 14 N. J. L. 583.

In Einstein v. Holladay-Klotz Land & Lumber Co., 132 Mo. App. 82, it was held that the deed could lawfully be delivered in blank to the grantee with authority to him to fill in either his own name or that of any other person he might select, relying upon Thummel v. Holden, 149 Mo. 677, *supra*. This doctrine is criticised in 8 Columbia L. Review, 662.

grantor will be estopped from asserting, as against such grantee, that the agent's authority was insufficient.[17]

And even though the agent fills the blank in a manner not authorized, there may nevertheless be cases in which the principal should be held bound to any person entitled to rely upon it and who in good faith has relied upon it in ignorance of the facts and under such circumstances that he will now be prejudiced if the instrument be held invalid. Thus where the sureties upon a probate bond signed and delivered it in blank to the principal in the bond, with the understanding that it was to be filled out with a certain sum, but he filled it with a larger sum (apparently required by the probate judge) and filed it in the probate office, it was held that persons entitled to rely upon it as an authorized bond could recover upon it.[18] The court, by Holmes, J., said, "We are of opinion that, when a bond such as this is intrusted to the principal for his use, to fill it up and deliver it, the possibility of his being required by the probate judge to insert a penal sum larger than the surety directed, and of his doing so, is so obvious and so near, that the surety must be held to take the risk of his principal's conduct, and is bound by the instrument as delivered, although delivered in disobedience of orders, if, as here, the obligee has no notice, from the face of the bond or otherwise, of the breach of orders."

The same rule has been applied in the case of official bonds, fair upon their face, but claimed to have been filled and delivered in a manner not authorized.

§ 215. ——— How when seal superfluous.—But the common law rule is generally held to apply only to instruments *necessarily* under seal, and hence if a seal was not essential to the validity of the instrument executed by the agent, its presence will ordinarily be treated as a mere redundancy, and if the agent's authority to execute it, or to fill blanks in it, if it were without seal, was ample, the seal will be disregarded, and the instrument will stand as a simple contract.[19]

[17] McCleerey v. Wakefield, 76 Iowa, 529, 2 L. R. A. 529; Ragsdale v. Robinson, 48 Tex. 379; Palacios v. Brasher, 18 Colo. 593, 36 Am. St. R. 305; Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470; Phelps v. Sullivan, 140 Mass. 36, 54 Am. Rep. 442; Field v. Stagg, 52 Mo. 534, 14 Am. Rep. 435; Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486; Ormsby v. Johnson, 24 S. Dak. 494.

[18] White v. Duggan, 140 Mass. 18, 54 Am. Rep. 437. In the case of official bonds see, for example, City of Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 182; Taylor County v. King, 73 Iowa, 153, 5 Am. St. R. 666; Rose v. Douglass Township, 52 Kan. 451, 39 Am. St. R. 354; McCormick v. Bay City, 23 Mich. 457; State v. Potter, 63 Mo. 212, 21 Am. Rep. 440; Belden v. Hurlbut, 94 Wis. 562, 37 L. R. A. 853. See also Humphreys v. Finch, 97 N. C. 303, 2 Am. St. R. 293.

[19] Wagoner v. Watts, 44 N. J. L. 126; Long v. Hartwell, 34 N. J. L. 116; Mor-

A few cases, however, decline to make this distinction.[20]

It would, moreover, seem not to be tenable in any case in which, though the instrument might be valid without a seal, in some other circumstances, it is now counted or relied upon in such a manner as to demand a *deed* to uphold it.[21]

§ 216. ——— How when instrument executed in presence of principal and by his direction.—So, even though the instrument to be executed is necessarily under seal, yet, in accordance with a principle already referred to, if the instrument be executed in the presence of the principal and by his direction or assent it is sufficient.[22]

The reason given for this rule is that "if the grantor's name is written by the hand of another, in his presence and by his direction, it is his act, and the signature, in point of principle, is as actually his as though he had performed the physical act of making it." [23]

This rule quite generally prevails, and it extends to the filling of blanks in deeds and other instruments when done under like circum-

row v. Higgins, 29 Ala. 448; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Wood v. Auburn, etc., R. Co., 8 N. Y. 160; Wood v. Wise, 153 N. Y. App. Div. 223; Dickerman v. Ashton, 21 Minn. 538; Thomas v. Joslin, 30 Minn. 388; Adams v. Power, 52 Miss. 828; Nichols v. Haines, 98 Fed. 692; Marshall v. Rugg, 6 Wyo. 270, 33 L. R. A. 679; McIntosh v. Hodges, 110 Mich. 319; Bless v. Jenkins, 129 Mo. 647, Purcell v. Potter, Anthon (N. Y.) N. P. 310; Tapley v. Butterfield, 42 Mass. 515, 35 Am. Dec. 374; Piercy v. Hedrick, 2 W. Va. 458, 98 Am. Dec. 774.

The same rule would apply to the filling of immaterial blanks in a sealed instrument. Vose v. Dolan, 108 Mass. 155, 11 Am. Rep. 331.

Where one had good oral authority to sell a chattel the fact that he made an unauthorized bill of sale under seal did not affect the passage of the title. Osborne v. Horner, 33 N. C. 359.

[20] Rowe v. Ware, 30 Ga. 278; Overman v. Atkinson, 102 Ga. 750; Hayes v. Atlanta, 1 Ga. App. 25; Dalton Buggy Co. v. Wood, 7 Ga. App. 477; Wheeler v. Nevins, 34 Me. 54; Baker v. Freeman, 35 Me. 485; Cummins v. Cassily, 44 Ky. (5 B. Mon.) 74.

[21] See Baker v. Freeman, *supra*, an action of covenant.

[22] Gardner v. Gardner, 5 Cush. 483, 52 Am. Dec. 741; Currier v. Clark, 145 Iowa, 613; Johnson v. Van Velsor, 43 Mich. 208; Harshaw v. McKesson, 65 N. C. 688; Croy v. Busenbark, 72 Ind. 48; Ball v. Dunsterville, 4 T. R. 313; King v. Longnor, 1 Nev. & M. 576; s. c. 4 Barn. & Adol. 647; Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Jansen v. McCahill, 22 Cal. 565; Mutual Ben. L. Ins. Co. v. Brown, 30 N. J. Eq. 193; Mackay v. Bloodgood, 9 Johns. (N. Y.) 285; McMurtry v. Brown, 6 Neb. 368.

Where an attorney, who has prepared a paper for execution by an illiterate woman, asks her if he shall sign it for her and she nods her head, it is sufficient authority. Thomas v. Spencer (N. J.), 42 Atl. 275.

The doctrine of the text seems to be denied where the signature *purported* to have been made by an agent. Semple v. Morrison, 7 T. B. Mon. (Ky.) 298—where the alleged principal was an infant.

[23] *Ante*, § 208; Mutual Benefit L. Ins. Co. v. Brown, 30 N. J. Eq. 193.

stances.[24] In Kentucky, however, it is denied effect under the statute of that state governing the execution of contracts of suretyship [25] though often in language applicable to any case. It will be obvious that these are not cases of agency, in the ordinary sense, at all.

§ 217. ——— How when principal adopts deed prepared by another.—Upon somewhat similar grounds, it has been held that one may adopt and make his own a deed signed in his name by another without any previous authority. Thus where a deed of land was signed with the name of the grantor (in this case it was signed by the grantee in the presence and by the direction of the grantor) and was then personally acknowledged and delivered by the grantor, it was held that the deed was valid as the deed of the latter. Said the court: "If one acknowledges and delivers a deed which has his name and seal affixed to it, the deed is valid, no matter by whom the name and seal were affixed, no matter whether with or without the grantor's consent. The acknowledgment and delivery are acts of recognition and adoption so distinct and emphatic that they will preclude the grantor from afterward denying that the signing and sealing were also his acts. They are his by adoption. * * * By taking the instrument in this incomplete condition and completing it, the grantor makes it his deed in all its particulars. He adopts the signature and the seal the same as he does the habendum and the covenants which are inserted by the printer of the blank. The deed is not sustained on the ground of ratification but adoption. Ratification applies to agency. No question of agency arises in this class of cases. The validity of the deed cannot rest upon the ground of agency or ratification. If such were the case the authority or ratification would have to be by instrument under seal; for authority or ratification must be of as high a character as the act to be performed or ratified. * * * No matter by whom the signing and sealing were performed, nor whether with or without the grantor's consent. By completing the instrument he adopts what had previously been done to it, and makes it his in all particulars." [26]

[24] Hudson v. Revett, 5 Bing. 368; McMurtry v. Brown, 6 Neb. 368; Ball v. Dunsterville, 4 T. R. 313; Mackay v. Bloodgood, 9 Johns. (N. Y.) 285; People v. Smith, 20 Johns. 62; Brown v. Colquitt, 73 Ga. 59, 54 Am. R. 867.

[25] Billington v. Commonwealth, 79 Ky. 400; Dickson v. Luman, 93 Ky. 614; Wilson v. Linville, 96 Ky. 50; Ragan v. Chenault, 78 Ky. 545.

[26] Clough v. Clough, 73 Me. 487, 40 Am. Rep. 386. Upon substantially the same grounds proceeds the case of Rhode v. Louthain, 8 Blackf. (Ind.) 413, in which a bond which had been executed in the defendant's name by agent without sealed authority was shown to the principal signed and sealed and he said that it was all right. By so saying he was held to have adopted the signature and the

§ 218. ——— Instrument not good as deed may sometimes be effective as contract.—So there may be cases in which, although the instrument may not be valid as a deed, because of the lack of proper authority in the agent to execute it, it may nevertheless be operative as a written contract if as such it would be within the agent's authority. Thus where the principal sent out an agent to sell land, giving him a deed having the name of the grantee and the amount of the consideration in blank, and the agent sold the land and filled in the blanks and delivered the deed, it was held that the instrument, although invalid as a deed, because the agent's authority was merely parol, yet constituted a good contract for the conveyance of the land, which would be specifically enforced in equity. The court said: "We think that there can be no doubt that the instrument which for reasons above stated could not operate as a deed, may be regarded as a contract put in writing. It is in truth a written contract more than ordinarily complete, both in form and substance, and the only question admitting of any sort of doubt is, whether it has been signed by the defendant or by any legally authorized agent. We are of opinion that it cannot be considered as a contract with the plaintiff signed by the defendant himself, independently of any act of his agent, because, when the defendant put his name and seal to it, no such contract had been made. But we think, that in legal effect, it was signed for him, and in his name by his properly constituted agent. The failure of the agent to make the instrument operate as the deed of his principal did not prevent him from causing it to operate as the simple contract of his principal." [27]

§ 219. Appointment by corporations.—It was the doctrine of the common law that a corporation could contract only by deed under its corporate seal, and that its appointment of an agent could be made only in the same manner. This doctrine, however, is now quite uni-

seal and the bond as his own. So in Hudson v. Revett, 5 Bing. (Eng.) 368, where a deed was completed after signature, Holroyd, J., was sustained, having told the jury, "if in such a case there was that which amounted to a redelivery, and showed that the party meant the deed should be acted on, . . . the deed would be his in its altered state." See to the same effect: Nye v. Lowry, 82 Ind. 316; Currier v. Clark, 145 Iowa, 613; Reed v. Cedar Rapids, 138 Iowa, 365; Nickerson v. Buck, 12 Cush. (66 Mass.) 332; Just v. Township of Wise, 42 Mich. 573.

As to the effect of the adoption of an unsigned deed see American Sav. Bank v. Helgesen, 67 Wash. 572 (overruling same case, 64 Wash. 54). *Held*, not good.

[27] Blacknall v. Parish, 6 Jones Eq. (N. C.) 70, 78 Am. Dec. 239; Godsey v. Standifer, 31 Ky. L. R. 44, 101 S. W. 921; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Heinlein v. Martin, 53 Cal. 321; Tilton v. Cofield, 2 Colo. 392; Joseph v. Fisher, 122 Ind. 399; Dickerman v. Ashton, 21 Minn. 538; Lobdell v. Mason, 71 Miss. 937 (a lease).

versally abandoned, both in England and in this country, and, in the absence of contrary provisions in its constating instruments or in the laws of the state, a corporation may confer authority upon an agent for the performance of any act within the scope of its corporate powers by unsealed writing or by parol; and such authority may also be implied, as in other cases, from the acquiescence of the corporation or from its adoption or recognition of the act, or the corporation may be estopped to deny its existence.[28]

§ 220. ——— To execute deed of corporate realty.—And it is not necessary that the authority of the agent even to execute a deed of the corporate real estate should be under seal. The authority to convey may be conferred by a vote of the trustees or other managing officers,[29] and authority to convey carries with it authority to execute suitable

[28] Burrill v. Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Nobleboro v. Clark, 68 Me. 87, 28 Am. Rep. 22; Alabama, etc., R. Co. v. South, etc., R. Co., 84 Ala. 570, 5 Am. St. Rep. 401; Williams v. Fresno Canal Co., 96 Cal. 14, 31 Am. St. Rep. 172; San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 29 L. R. A. 839; Fitch v. Mill Co., 80 Me. 34; Scofield v. Parlin & Orendorff Co., 61 Fed. Rep. 804; Detroit v. Jackson, 1 Doug. (Mich.) 106; Jhons v. People, 25 Mich. 499; Taymouth v. Koehler, 35 Mich. 26; Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. Ed. 552; Yarborough v. Bank of England, 16 East, 6; Ross v. City of Madison, 1 Ind. 281, 48 Am. Dec. 361; Rockford, etc., R. R. Co. v. Wilcox, 66 Ill. 417; Kiley v. Forsee, 57 Mo. 390; Smiley v. Mayor, 6 Heisk. (Tenn.) 604; Gowen Marble Co. v. Tarrant, 73 Ill. 608; Maine Stage Co. v. Longley, 14 Me. 444; Peterson v. Mayor, 17 N. Y. 449. See also Sariol v. McDonald Co., 127 App. Div. 648; Kelly Co. v. Barber Co., 136 App. Div. 22; Warren v. Ocean Ins. Co., 16 Me. 439, 33 Am. Dec. 674; Southgate v. Atlantic & Pacific R. R. Co., 61 Mo. 89; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365, 82 Am. Dec. 520; Columbia, etc., Co. v. Vancouver, etc., Co., 32 Ore. 532; Hamm v. Drew, 83 Tex. 77; Shea Realty Corp. v. Page, 111 Va. 490; Culver v. Pocono Spring, etc., Co., 206 Pa. 481; St. Claire v. Rutledge, 115 Wis. 583, 95 Am. St. R. 964.

No formal record is indispensable. Robinson Reduction Co. v. Johnson, 10 Colo. App. 135; Jones v. Stoddart, 8 Idaho, 210; President Min. Co. v. Coquard, 40 Mo. App. 40; Washington Times Co. v. Wilder, 12 D. C. App. 62; Brown v. British Amer. Mtg. Co., 86 Miss. 388. See also Turner v. Kingston Lumber & Mfg. Co., 106 Tenn. 1; Smith v. Bank of New England, 72 N. H. 4.

[29] Burrill v. Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; per Hosmer, Ch. J., in Savings Bank v. Davis, 8 Conn. 191; Nobleboro v. Clark, 68 Me. 87, 28 Am. Rep. 22; Marr v. Given, 23 Me. 55; Fitch v. Steam Mill Co., 80 Me. 34; Cook v. Kuhn, 1 Neb. 472. Although it is often said that there must be formal meetings and votes (Standifer v. Swann, 78 Ala. 88, *e. g.*), there is much authority for the proposition that the informal consent of all those authorized to act in the matter will suffice. Jordan v. Collins, 107 Ala. 572; National State Bank v. Sandford Co., 157 Ind. 10; Morisette v. Howard, 62 Kan. 463; Sherman v. Fitch, 98 Mass. 59; Horton v. Long, 2 Wash. 435, 26 Am. St. R. 867, etc. But this is a question in the law of Corporations and not of Agency.

and proper instruments for that purpose, and to affix the corporate seal to an instrument requiring it.[30] The same rule extends to municipal and *quasi* municipal corporations.[31]

b. Authority Required by Statute to be in Writing.

§ 221. Common law rules do not require written authority.—Except in the cases already considered wherein the common law required authority to be conferred by an instrument under seal which must of course also be in writing, there is no general rule of the common law making authority in writing essential. There are, of course, very many cases in which it is highly desirable as matter of evidence, to prevent mistake, to secure accuracy, or to enforce limitations, that the authority shall be conferred by instrument in writing, and in most important cases writing is resorted to; but as a matter of law it is not essential.

§ 222. Statutes often require it, especially for selling or leasing land—English Statute of Frauds.—The danger resulting from relying upon word of mouth in certain cases relating to estates in land early led to the enactment of statutes requiring authority for a few purposes to be conferred by writing. Thus section one of the English statute of frauds, of 29 Charles II, declares that "All leases, estates, interests of freehold * * * made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized *by writing*, shall have the force and effect of leases or estates at will only," etc. So in section three it is provided that "No leases, estates or interests either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall * * * be assigned, granted or surrendered unless it be by deed or

[30] Burrill v. Nahant Bank, *supra;* Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; People v. Boring, 8 Cal. 407; Hemstreet v. Burdick, 90 Ill. 444.

[31] Thus it appeared by the records of the meeting that the inhabitants of a town at a legal town meeting chose H "agent to settle with the railroad company and sell the balance of the town landing if he thinks it will be for the interest of the town to do so, and to settle all other matters with the railroad company;" and it was held that by this vote, H had authority to sell the town landing and to execute a proper deed of conveyance thereof in behalf of the town. Nobleboro v. Clark, 68 Me. 87, 28 Am. Rep. 22. See also Ross v. City of Madison, 1 Ind. 281, 48 Am. Dec. 361.

note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized *by writing*, or by act and operation of law." In the fourth and seventeenth sections, however, the legislature contented itself with requiring simply that the agent be "lawfully authorized" without adding "by writing."

§ 223. ——— American statutes—Authority respecting lands.—The English statute either in form or substance has been reproduced in many of the American states. Thus the statute in Michigan declares that "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized *by writing*." And "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized *by writing*." Statutes substantially similar though with more or less variation as to the period of the lease, are found in Alabama, California, Colorado, Illinois, Minnesota, Montana, Nebraska, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, and other states. In Missouri the statute is a close copy of the original.

Not all of the states, however, have such statutes. Thus, Wisconsin, for example, while it has a statute identical with the first section quoted above from Michigan, omits the words "by writing" at the close of the second one. Indiana, Iowa, Ohio, Texas and West Virginia do the same. The Kansas statute omits the second clause and the exception as to leases in the first. Mississippi requires only that the memorandum of the contract be signed by the party to be charged or by an agent lawfully authorized and does not have the further requirement that the agent's authority be in writing.

New Jersey requires that any interest in lands, and any leases be made in writing and, if through an agent, by an agent authorized in writing, but of the contract for the sale of lands says only that it must be in writing signed by the party to be charged or by an agent lawfully authorized. Substantially the same is the statute in Arkansas.

There are various distinctions in other states which it is not prac-

ticable to reproduce here. The statute in each case must be consulted, whenever the general question arises.[32]

§ 224. ——— Acknowledging or recording power.—Unless the statute requires it, it is not essential (though highly desirable and proper as a matter of evidence) that the written authority shall be either acknowledged or recorded,[33] but in several states acknowledgment and record are required by statute.[34]

§ 225. Statutes requiring written authority in other cases—Suretyship—Written instruments.—The policy of the law may extend the requirement of written authority to other cases. Thus, in Kentucky it is enacted that "No person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing, signed by the principal." [35]

So in California,[36] North [37] and South Dakota [38] and Montana,[39] authority to execute instruments required to be in writing, *e. g.*, a promissory note, can be conferred only by authority in writing. In Georgia the authority of an attorney in fact to make an appeal must be in writing and filed in court.[40]

[32] Where the statute thus requires written authority, authority granted for some other purpose cannot be enlarged or extended by parol so as to include one of the purposes named in the statute. Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 84 Am. St. R. 927; Shea v. Seelig, 89 Mo. App. 146.

A contract with an agent to find a purchaser of land is not a contract for the creation of an estate or interest in land, or of a trust or power over or concerning land within the meaning of such a statute. See *post*, § 233.

Even although the authority be not in writing, there may be such acts of part performance, and the like, as to make the contract specifically enforceable as though made by the principal without writing. Rovelsky v. Scheuer, 114 Ala. 419.

[33] Tyrrell v. O'Connor, 56 N. J. Eq. 448; Valentine v. Piper, 39 Mass. 85, 33 Am. Dec. 715; Rownd v. Davidson, 113 La. 1047.

[34] See Bourne v. Campbell, 21 R. I. 490, and Godsey v. Standifer, 31 Ky. L. R. 44.

[35] See Kentucky Statutes, 1899, § 482; Simpson v. Commonwealth, 89 Ky. 412; Bramel v. Byron (Ky.), 43 S. W. 695, 19 Ky. L. Rep. 1440. It is not enough under this statute that the act be done in the presence and by the direction of the principal. Billington v. Com., 79 Ky. 400; Com. v. Belt, 21 Ky. L. R. 339, 51 S. W. 431; Dickson v. Luman, 93 Ky. 614; Wilson v. Linville, 96 Ky. 50; Ragan v. Chenault, 78 Ky. 545. See also Wallace v. McCollough, 1 Rich. Eq. (S. Car.) 426.

[36] Civil Code, § 2309; Seymour v. Oelrichs, 156 Cal. 782, 134 Am. St. Rep. 154.

[37] Civil Code, § 4314.

[38] Civil Code, § 1667. See Ballou v. Carter, — S. Dak. —, 187 N. W. 603; Lund v. Thackeray, 18 S. Dak. 113, and Dal v. Fischer, 20 S. Dak. 426.

[39] Civil Code, § 3085; Case v. Kramer, 34 Montana, 142.

[40] Civil Code, § 4457.

§ 226. Employments for more than one year.—Under the fourth section of the statute of frauds, and the subdivision thereof relating to "any agreement that is not to be performed within the space of one year from the making thereof," a contract of employment which is not to be performed within one year, and with it any authority to act as agent by virtue of it, may fail unless there be some note or memorandum thereof in writing, and signed by the party to be charged thereby.[41]

§ 227. What writing sufficient when writing required.—Even in those cases in which the authority is, by the statute, required to be conferred by writing, it need not, except when the instrument to be executed is under seal, be by a formal or a sealed writing.[42] It may

[41] Eikelman v. Perdew, 140 Cal. 687; Dietrich v. Hoefelmeir, 128 Mich. 145. See also Buckley v. Buckley, 9 Nev. 378.

But a contract for an entirely indefinite time of service or for a certain service which may well be completed within one year is not within the statute. Neal v. Parker, 98 Md. 254; Vocke v. Peters, 58 Ill. App. 338. The same is true of a contract for a season, which may or may not close within one year from the time that the contract is made. Bank v. Finnell, 133 Cal. 475; DeLand v. Hall, 134 Mich. 381. The fact that death within one year may complete a contract to give support for life, or to refrain from a certain business for life, has been held in some jurisdictions, to make such a contract not within this section of the statute. Doyle v. Dixon, 97 Mass. 208, 93 Am. Dec. 80; Peters v. Westborough, 36 Mass. (19 Pick.) 864, 81 Am. Dec. 142; Lyon v. King, 52 Mass. (11 Metc.) 411, 45 Am. Dec. 219; Hill v. Jamieson, 16 Ind. 125, 79 Am. Dec. 414.

The same rule has been applied to cases of a contract for services for a time which would extend beyond one year from the time of making the contract. Smith v. Conlin, 26 N. Y. Supreme Ct. (19 Hun) 234; Blake v. Voight, 134 N. Y. 69, 30 Am. St. R. 622. In this case the plaintiff had in November entered into an agreement with the defendant to serve as the defendant's agent for one year from the first of December, but with an option to either one to terminate the contract six months after December the first. The defendant pleaded the Statute of Frauds. The contract was held not to be within the prohibition of the statute. See *contra*, however, Biest v. Versteeg Shoe Co., 97 Mo. App. 137. In this case the plaintiff had on February 5, 1900, made a written contract with the defendant to serve as travelling sales agent for the defendant for one year to begin with April 1, 1900. By the terms of the contract Biest was given an option to terminate it on October 1, 1900, by giving notice by August 1, 1900. The defendant relies upon the fact that the contract was on its face incomplete and did not show what was to be the plaintiff's territory and upon the Statute of Frauds. The court allowed the Statute of Frauds to defeat the plaintiff's recovery for breach of this contract.

This case was approved in the late case of Wagniere v. Dunnell, 29 R. I. 580, 17 Ann. Cas. 205, where other cases are cited. The late English case of Hanau v. Ehrlich, [1912] App. Cas. 39, Ann. Cas. 1912, B, 730, also adopts the same view.

[42] Baird v. Loescher, 9 Cal. App. 65. But a written memorandum referring to an oral agreement and not incorporating its terms is not sufficient compliance with a statute which requires that a contract be in writing. Zimmerman v. Zehendner, 164 Ind.

be conferred by letter,[43] or by telegram,[44] or by any other informal document.

c. In other Cases Authority may be Conferred by Words or Conduct.

§ 228. No formal method required.—Except in the cases already considered of instruments under seal and statutes expressly requiring written authority, no formal or particular method is necessary to confer authority for the doing of any act lawful to be done by agent.[45] While written instruments or express words or formal procedure may at times be desirable, they are not necessary, and parol authority will suffice.

§ 229. By parol—To sell or lease lands.—Thus, except in those states [46] in which the statutes expressly require the authority to be in

466, 3 Ann. Cas. 655. See Keith v. Smith, 46 Wash. 131, 13 Ann. Cas. 975; Phillips v. Jones, 39 Ind. App. 626.

New Jersey has held under its statute requiring that the broker must have written authority, if he is to recover commissions, that a writing acknowledging the broker's authority, after he has in fact performed, is without consideration, and will not give broker action for commission for services. See Alpern v. Klein, 76 N. J. L. 53.

[43] Thus where the owner of land in Kansas City wrote from Chicago, where he resided, to his agent in Kansas City, "I leave the sale of the lots pretty much with you; if the party, or any one is willing to pay sixty dollars a foot, one-third cash, and the balance in one and two years, interest seven per cent. per annum, and pay commission of sale, I think I am willing to have you make out a deed, and I will perfect it, hold till then"—it was held that this authorized the agent to make a contract binding upon the owner for a present sale of the lots. Smith v. Allen, 86 Mo. 178, citing Stewart v. Wood, 63 Mo. 256; Lyon v. Pollock, 99 U. S. 668, 25 L. Ed. 265; Johnson v. Dodge, 17 Ill. 441; Lawrence v. Taylor, 5 Hill (N. Y.), 107; Hawkins v. Chace, 19 Pick. (Mass.) 502. In Lyon v. Pollock, cited by the court, A wrote to C at San Antonio, Texas, "I wish you to manage my property as you would your own. If a good opportunity offers to sell everything I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate." It was held that C was thereby authorized to contract for the sale of the real estate but not to convey it. See also Brown v. Eaton, 21 Minn. 409; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Vermont Marble Co. v. Mead, —— Vt. ——, 80 Atl. 852; Isphording v. Wolf, 36 Ind. App. 250; Paris v. Johnson, 155 Ala. 403; Holliday v. McWilliams, 76 Neb. 324; Bradley & Co. v. Bower, 5 Neb. (Unoff.) 542; Stadleman v. Fitzgerald, 14 Neb. 290.

Where the statute requires that an agent to sell land or to find a purchaser for land shall be authorized by writing, a letter informally giving that authority will suffice. Longstreth v. Korb, 64 N. J. L. 112; Getzelsohn v. Donnelly, 50 N. Y. Misc. 164; Holbrook-Blackwelder Co. v. Hartman, 128 Mo. App. 228; Baird v. Loescher, 9 Cal. App. 65.

[44] Godwin v. Francis, L. R. 5 C. P. 295; Butman v. Butman, 213 Ill. 104.

[45] Story on Agency, § 47; Ewell's Evans' Agency, 24.

[46] As in Alabama, California, Colorado, Illinois, Michigan, Minnesota,

writing, an agent may be authorized by parol to make a valid contract for the sale [47] or the leasing [48] of his principal's lands. Where the statute excepts leases for not more than a certain period, leases within that period may be executed without authority in writing.[49] But it has been said that parol authority to thus charge a principal's realty ought to be express and clearly established.[50]

§ 230. ——— To purchase land.—And so, in the ordinary case, authority merely to purchase land need not be conferred by writing in order to make it enforceable against the vendor, unless some statute expressly requires it.[51] Where, however, the question is whether an

Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island and West Virginia.

[47] Heard v. Pilley, 4 Ch. App. Cases, 548; Morrow v. Higgins, 29 Ala. 448; Rutenberg v. Main, 47 Cal. 213; Jacobson v. Hendricks, 83 Conn. 120 (dictum); Brandon v. Pritchett, 126 Ga. 286, 7 Ann. Cas. 1093; Johnson v. Dodge, 17 Ill. 433; Taylor v. Merrill, 55 Ill. 52; Watson v. Sherman, 84 Ill. 263; Rottman v. Wasson, 3 Kan. 552; Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; Whitworth v. Pool, 29 Ky. L. R. 1104, 96 S. W. 880; Lawson v. Williams (Ky.), 115 S. W. 730; Hawkins v. Chace, 19 Pick. (Mass.) 502; Ulen v. Kittredge, 7 Mass. 233; Brown v. Eaton, 21 Minn. 409; Dickerman v. Ashton, 21 Minn. 538; Curtis v. Blair, 26 Miss. 309, 59 Am. Dec. 257; Riley v. Minor, 29 Mo. 439; Cobban v. Hecklen, 27 Mont. 245; Tyrrell v. O'Connor, 56 N. J. Eq. 448; Lawrence v. Taylor, 5 Hill (N. Y.), 107; McWhorter v. McMahon, 10 Paige (N. Y.), 386; Champlin v. Parish, 11 Paige (N. Y.), 405; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Moody v. Smith, 70 N. Y. 598; Combes v. Adams, 150 N. C. 64; Huffman v. Cartwright, 44 Tex. 296; Donnell v. Currie, — Tex. Civ. App. —, 131 S. W. 88; Mustard v. Big Creek Devel. Co., 69 W. Va. 713; Dodge v. Hopkins, 14 Wis. 630; Smith v. Armstrong, 24 Wis. 446; Tufts v. Brace, 103 Wis. 341; Brown v. Griswold, 109 Wis. 275; Kreutzer v. Lynch, 122 Wis. 474 (to give an option). See also Robinson v. Hathaway, 2 Ohio Dec. (Repr.) 581, and Koehler v. Hunt, 8 Ohio Dec. (Repr.) 404.

[48] Lake v. Campbell, 18 Ill. 106; McComb v. Wright, 4 Johns. Ch. (N. Y.) 659.

[49] See McIntosh v. Hodges, 110 Mich. 319; Williams v. Mershon, 57 N. J. L. 242; Griffin v. Baust, 26 N. Y. App. Div. 553; Bourne v. Campbell, 21 R. I. 490; Marshall v. Rugg, 6 Wyo. 270, 33 L. R. A. 679.

[50] Union Mutual Life Ins. Co. v. Masten, 3 Fed. 881; Bosseau v. O'Brien, 4 Biss. (U. S. Cir. C.) 395; Malone v. McCullough, 15 Colo. 460; O'Reilly v. Keim, 54 N. J. Eq. 418; Degginger v. Martin, 48 Wash. 1; Lauer v. Bandow, 43 Wis. 556, 28 Am. Rep. 571; Challoner v. Bouck, 56 Wis. 652; Gilmour v. Simon, 15 Manitoba, 205.

[51] It is enough usually that the statute is satisfied as to the party to be charged. Harper v. Goldschmidt, 156 Cal. 245, 134 Am. St. R. 124, 28 L. R. A. (N. S.) 689; Ullsperger v. Meyer, 217 Ill. 262, 2 L. R. A. (N. S.) 221, 3 A. & E. Ann. Cas. 1032; Wiley v. Hellen, 83 Kan. 544; Davis v. Martin, 146 N. C. 281; Flegel v. Dowling, 54 Ore. 40, 135 Am. St. R. 812, 19 A. & E. Ann. Cas. 1159; Kean v. Landrum, 72 S. C. 556; Wharton v. Tolbert, 84 S. C. 197; LeVine v. Whitehouse, 37 Utah, 260, 24 A. & E. Ann. Cas. 407; Armstrong v. Maryland Coal Co., 67 W. Va. 589; Pain v.

agent, so authorized, who has bought the land but refuses to recognize his principal's rights therein, can be charged as a trustee or otherwise, other considerations which involve the statute may arise.[52]

§ 231. ——— **To deliver deed.**—So, notwithstanding the conflict concerning the execution or completion of deeds, it seems to be agreed that authority to deliver a deed may be conferred by parol.[53]

§ 232. ——— **To demand and collect rents.**—So further, parol authority is sufficient to authorize a person to act as agent for a lessor in the collection of rent or in demanding its payment.[54]

§ 233. ——— **To find purchaser for land—Employment of broker.** Even where, under the statute, authority to make a contract for the actual sale of land is required to be by writing, the ordinary employment of a real estate broker or other person "to sell," *i. e.* to find a purchaser for lands is not by such statutes required to be by writing.[55] Such employments, as will be seen,[56] are not usually deemed to authorize the execution of a binding contract of sale.

Flynn, 10 Vict. L. R. 131; Lundy v. Gardner, 2 Ont. W. R. 1104.

[52] This question is considered under the head of *Loyalty* in Book IV, Chapter II.

[53] See White v. Duggan, 140 Mass. 18, 54 Am. Rep. 437; Lafferty v. Lafferty, 42 W. Va. 783.

[54] Sheets v. Selden, 2 Wall. (U. S.) 177, 17 L. Ed. 822; Ledwith v. Merritt, 74 App. Div. 64, affirmed without opinion 174 N. Y. 512.

[55] Waterman v. Stephens, 71 Mich. 104; Hannan v. Prentis, 124 Mich. 417; Abbott v. Hunt, 129 N. C. 403; Carsten v. McReavy, 1 Wash. 359; Monfort v. McDonough, 20 Wash. 710; Gerhart v. Peck, 42 Mo. App. 644; Forsythe v. Albright, 149 Mo. App. 515; Rice v. Ruhlman, 68 Mo. App. 503; Johnson v. Haywood, 74 Neb. 157, 5 L. R. A. (N. S.) 112; Griffith v. Woolworth, 28 Neb. 715; Forrester v. Evatt, 90 Ark. 301; Fox v. Starr, 106 Ill. App. 273; Hancock v. Dodge, 85 Miss. 228; Kepner v. Ford, 16 N. Dak. 50; Willson v. Clark, 35 Tex. Civ. App. 92; Friedman v. Suttle, 10 Ariz. 57, 9 L. R. A. (N. S.) 933 (in which Czarnowski v. Holland, 5 Ariz. 119, which had held the authority of an agent to purchase or sell real estate for compensation must be in writing, was overruled). Watson v. Brightwell, 60 Ga. 212; Monroe v. Snow, 131 Ill. 126; Fischer v. Bell, 91 Ind. 243; Fiero v. Fiero, 52 Barb. 283; McLaughlin v. Wheeler, 1 S. D. 497. See also White v. Curry, 89 U. C. Q. B. 569; Flegel v. Dowling, 54 Ore. 40, 135 Am. St. R. 812, 19 A. & E. Ann. Cas. 1159.

The same doctrine has been said to apply, where the thing to be sold is a lease of lands. Campbell v. Galloway, 148 Ind. 440.

Where the services have been fully performed and accepted by the principal, the principal cannot defeat the agent's right to commission by showing that the agent was without written authority. Huff v. Hardwick, 19 Colo. App. 416; Trowbridge v. Wetherbee, 93 Mass. (11 Allen) 361; Snyder v. Wolford, 33 Minn. 175, 53 Am. Rep. 22; Lesley v. Rosson, 39 Miss. 368, 77 Am. Dec. 679; Carr v. Leavitt, 54 Mich. 540; Benjamin v. Zell, 100 Pac. 33; Bradford v. Laffey, 11 Hawaii, 463.

[56] See Malone v. McCullough, 15 Colo. 460. Compare Rosenbaum v. Belson, [1900] 2 Ch. 267; Chick v. Bridges, 56 Ore. 1; Purkey v. Harding, 23 S. D. 632; Ross v. Craven, 84 Neb. 520; Lawson v. King, 56 Wash. 15.

In a few states, however, as in California, Indiana, Nebraska and New Jersey special statutes or special provisions of general statutes require either that the authority of the broker shall be by writing or that a written contract shall exist between the principal and the broker.[57]

§ 234. ——— To grant licenses respecting lands—Selling standing timber.—Where the rights or the privileges which the agent is authorized to grant or transfer do not amount to an estate or interest in the land, the authority need not ordinarily be conferred by writing. So in a state where the sale of standing timber was the sale of an in-

[57] *California*, Civ. Code 1906, § 1624, 6, declares that an agreement employing or authorizing an agent to purchase or sell real estate shall be invalid unless it be in writing signed by the party to be charged or his agent thereunto lawfully authorized by writing. See Toomy v. Dunphy, 86 Cal. 639; Platt v. Butcher, 112 Cal. 634; Jamison v. Hyde, 141 Cal. 109, citing other California cases. Kennedy v. Merickel, 8 Cal. App. 378.

New York Penal Code, § 640d, and *Missouri* Laws of 1903, p. 161, or Rev. Stat. 1909, § 4634, made it a misdemeanor for any person to sell or offer to sell any land without the written authority of the owner. But in Fisher Co. v. Woods, 187 N. Y. 90, and in Woolley v. Mears, 226 Mo. 41, 136 Am. St. R. 637, these statutes were declared unconstitutional upon the ground that they went beyond reasonable regulation of a business.

Indiana, Session Laws 1901, p. 504, Burns' 1901 Compiled Stat. § 6629a, provides that no contract employing a person to find a purchaser for real estate shall be valid unless the same shall be in writing, signed by the owner of the real estate or his legally appointed and duly qualified representative. See Zimmerman v. Zehendner, 164 Ind. 466; Phillips v. Jones, 39 Ind. App. 626.

New Jersey, Statute of Frauds § 10, provides that no agent selling or exchanging land shall be entitled to commission unless the authority is in writing. See Somers v. Wescoat, 66 N. J. L. 551.

Nebraska, Act of 1897, ch. 57, compiled Statutes 1909, § 482, provides that every contract between the owner of land and any broker or agent employed to sell the land shall be void unless the contract is in writing and subscribed by both the broker and the owner, describe the land to be sold and state the compensation to be allowed by the owner for the sale. See Covey v. Henry, 71 Neb. 118.

Oregon. See Chick v. Bridges, 56 Ore. 1, Ann. Cas. 1912, B, 1293.

Washington provides that an agreement authorizing or employing an agent to sell or purchase land shall be void unless there be a note or memorandum in writing signed by the party to be charged or his agent lawfully authorized. Remington & Ballinger's General Statutes 1910, § 5289, and see McCrea v. Ogden, 50 Wash. 495, s. c. 54 Wash. 521.

While the Washington and the California statutes are substantially alike, the California court, Toomy v. Dunphy, *supra*, has held that what is necessary is written employment or authorization of the agent and that the writing need not state the fact that the employment is for compensation, while the Washington court has held (Foote v. Robbins, 50 Wash. 277) that the written memorandum must specify the compensation and its amount. Indiana has interpreted her statute in the same way that Washington has hers. See cases *supra*.

terest in lands, and required to be in writing, with written authority in any agent who should make such a contract, an agent authorized by parol to make a contract for sale of standing timber was held to have adequate authority to give a license to cut timber, and his attempted parol contract of sale was held good as a parol license.[58] So in a state where the sale of standing timber is not regarded as the sale of an interest in land, the authority of an agent to make such a sale may be by parol or inferred from the circumstances.[59]

§ 235. ——— To subscribe for stock.—In the absence of a statute prescribing some other method, authority to an agent to subscribe for corporate stock may be given by parol.[60]

§ 236. ——— To execute written instruments not under seal.—And so, except in those cases in which the authority is by some statute required to be in writing,[61] and except where the instrument to be executed is necessarily under seal, authority may be conferred by parol to execute bills, notes and all other contracts in writing.[62]

Under this rule authority may be conferred without writing to ex-

[58] Antrim Iron Co. v. Anderson, 140 Mich. 702, 112 Am. St. R. 434.

[59] Columbia Land & Min. Co. v. Tinsley, 22 Ky. L. R. 1082, 60 S. W. 10.

[60] *In re* Whitley Partners, Limited, 32 Chan. Div. 337; Ingersoll, etc., Co. v. McCarthy, 16 U. C. Q. B. 162; and an unauthorized subscription may be ratified and made binding by conduct. Musgrave v. Morrison, 54 Md. 161; Miss. & Tenn. Ry. Co. v. Harris, 36 Miss. 17; Higgins v. State, 7 Ind. 549; McHose & Co. v. Wheeler & Co., 45 Pa. St. 32; McCully v. Railroad Co., 32 Pa. St. 25; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; McClelland v. Whiteley, 11 Biss. 444.

[61] In California authority to execute an instrument required to be in writing can be conferred only by writing. Civil Code § 2309; Alta Silver Min. Co. v. Alta Placer Co., 78 Cal. 629. So in North Dakota, § 4314, South Dakota § 1667, and Montana § 3085.

[62] There seems to be an impression, easily acquired, but with difficulty removed, that, because authority for the execution of instruments under seal must be conferred by an instrument under seal, authority for the execution of instruments in writing must be conferred by writing. This, however, unless made so by statute, is not true. Except in the cases already referred to, authority for the execution of written instruments may be conferred without writing. Authority for the execution of negotiable instruments is no exception, though such an authority is not easily implied. See Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; New England Marine Ins. Co. v. DeWolf, 8 Pick. (Mass.) 56; Shaw v. Hudd, 8 Pick. (Mass.) 9; Small v. Owings, 1 Md. Ch. 363; Welch v. Hoover, 5 Cranch (U. S. C. C.), 444; Webb v. Browning, 14 Mo. 354; Wagoner v. Watts, 44 N. J. L. 126; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Fountain v. Bookstaver, 141 Ill. 461; Connor v. Hodges, 7 Ga. App. 153; Fordyce v. Seaver, 74 Ark. 395.

ecute affidavits,[63] notices, petitions,[64] assignments,[65] bills of sale and mortgages of chattels,[66] the memorandum required by the fourth or the seventeenth section of the statute of frauds,[67] and the like.[68]

§ 237. ——— To fill blanks in written instruments.—In furtherance of the same rule, also, the kind of authority which will justify the making of the entire instrument may also suffice for completing, filling blanks in, or otherwise giving final form and effect to instruments in writing (but not under seal) that is to say, a merely oral authority may suffice.

One out of many instances of this sort, is the common case of the transfer of certificates of stock. These are usually signed in blank (sometimes, but unnecessarily, under seal) and are delivered to the transferee with an express or implied authority in him or any subsequent lawful holder to fill in the blanks and cause a transfer to be made upon the books of the corporation.[69]

§ 238. ——— To buy and sell goods.—Authority to buy or to sell goods may be conferred without writing.[70] The seventeenth section of the Statute of Frauds did not, nor do the modern statutes as a rule, require that the agent referred to therein should be "lawfully authorized *by writing*" as was required in some other sections.

§ 239. ——— To "accept and receive" under Statute of Frauds.—Authority to an agent to accept and receive the goods or some portion

[63] Cook v. Buchanan, 86 Ga. 760.

[64] Tibbetts v. West, etc., Street Ry. Co., 153 Ill. 147.

[65] Of mortgage: Moreland v. Houghton, 94 Mich. 548; of a cause of action: Dingley v. McDonald, 124 Cal. 90.

[66] Cohen v. Oliver, 9 Tex. Civ. App. 35; McKee v. Coffin, 66 Tex. 304; Gouldy v. Metcalf, 75 Tex. 455, 16 Am. St. R. 912; Hirsh & Co. v Beverly, 125 Ga. 657.

[67] Moore v. Taylor, 81 Md. 644; O'Reilly v. Kelm, 54 N. J. Eq. 418; Roehl v. Haumesser, 114 Ind. 311; Kennedy v. Ehlen, 31 W. Va. 540.

[68] A proposition to allow redemption from a mortgage sale need not be authorized by writing. Morrow v. Jones, 41 Neb. 867. The signing of the roll of members and the bidding in of a loan in a building and loan association may be done by an agent, without authority in writing. Kirklin v. Atlas Sav. & L. Ass'n, 107 Ga. 313. An agent may waive a mechanic's lien by the verbal authority of his principal. Hughes v. Lansing, 34 Ore. 118, 75 Am. St. R. 574. Or make a parol release of an equity to have a mortgage corrected so as to cover more land. Packard v. Delfel, 9 Wash. 562.

[69] See McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 231; Walker v. Detroit Transit Ry., 47 Mich. 338; Andrews v. Worcester, etc., R. Co., 159 Mass. 64; Pennsylvania R. Co.'s Appeal, 86 Pa. 80.

[70] See Wiger v. Carr, 131 Wis. 584, 11 L. R. A. (N. S.) 650, 11 A. & E. Ann. Cas. 998.

of them in order to satisfy the requirements of the seventeenth section of the Statute of Frauds may also be conferred without writing.[71]

So where an oral acceptance of a written offer to sell lands would be sufficient if made by the offeree in person, an acceptance by his agent authorized without writing, is held to be sufficient.[72]

§ 240. Authority may be partly written and partly oral.—Where the authority is not required to be in writing, it may be partly written and partly oral. It may be found in several instruments or several acts or both. It may have been conferred at different times. The written part may enlarge, restrict or supersede the oral, or *vice versa*. The latest declaration of the principal's intention will ordinarily control; so far as it is inconsistent with the former declaration, or is evidently intended to displace it, it must govern.[73] Where the principal has evidently intended a written declaration, though not necessary, to be the final repository of his authorization, it will exclude evidence of prior or contemporaneous oral authority.

§ 241. Authority need not be express—Authority by implication.—The authority, moreover, need not be *expressly* conferred. In the great majority of the cases it is informally conferred, or is presumed from the acts and conduct of the principal.[74] A large portion of the transactions of the modern business world is carried on by simple and informal means. A word or look or gesture often suffices to give assent to great undertakings or to set in motion the complicated machinery of commerce.[75] Little, often, is said or written, but that little carries with it a train of legal consequences no less certain and definite

[71] Alexander v. Oneida County, 76 Wis. 56.

[72] Fowler v. Fowler, 204 Ill. 82; Le Vine v. Whitehouse, 37 Utah, 260, 24 A. & E. Ann. Cas. 407. See also Briggs v. Chamberlain, 47 Colo. 382, 135 Am. St. R. 223; Rathbun v. McLay, 76 Conn. 308; Kean v. Landrum, 72 S. C. 556; Ehrmanntraut v. Robinson, 52 Minn. 333 (agent to accept a lease).

[73] See McLaughlin v. Wheeler, 1 S. Dak. 497.

[74] See Dull v. Dumbauld, 7 Kan. App. 376; Nutting v. Elevated Ry. Co., 21 App. Div. 72; Roberson v. Clevenger, 111 Mo. App. 622; Reynolds v. Railway Co., 114 Mo. App. 670; Phillips v. Geiser Mfg. Co., 129 Mo. App. 396; Lindquist v. Dickson, 98 Minn. 369, 6 L. R. A. (N. S.) 729; Gambrill v. Brown Hotel Co., 11 Colo. App. 529; Burnell v. Morrison, 46 Colo. 533; Fail v. Western Union Co., 80 S. C. 207; Leonard v. Omstead, 141 Iowa, 485; Fielder v. Camp Construction Co., 63 W. Va. 459; Brandt v. Krogh, 14 Cal. App. 39; Anglo-California Bank v. Cerf, 147 Cal. 393; Lafayette Ry. Co. v. Tucker, 124 Ala. 514.

[75] A forcible illustration of this may be seen upon any Board of Trade, where according to local usage or fixed rule, a nod or the holding up of one or more fingers, serves to give assent to the making of a sale and the specifying of the quantity. So the nod of a purchaser at an auction is sufficient to effect a purchase and to authorize the entering of his name upon the memorandum of the sale.

than if the whole were included in the spoken or written words. Hence it is that in many cases the existence of an agency is implied or presumed from the words or conduct of the parties, although the creation of an agency was not within their immediate contemplation.

§ 242. Conferring certain powers by the creation of others—Incidental powers.—It must also be kept in mind that one method of conferring powers may be by the granting of others to which the former may in some manner be deemed incidental or appurtenant. Thus the authority of the agent is not necessarily to be deemed to be confined to the doing of the main act authorized. Every delegation of power carries with it, by implication, unless the contrary is declared, the authority to do all those incidental acts, naturally and ordinarily done in such a case, which are reasonably necessary and proper to carry into effect the main power so conferred. The principal may, of course, expressly refuse to extend these incidental powers even though he thereby makes the authority impossible of execution; but this is not to be presumed, and the authority will be deemed to include them unless the contrary is brought to the knowledge of the persons with whom the agent deals.[76]

§ 243. ——— Customary powers.—It is also to be assumed, unless the contrary is declared, that the principal intends that the authority shall be executed in accordance with the customs which prevail in transactions of that sort; and the main power will therefore be deemed to include the authority to do all those incidental acts which are customarily done by such an agent at that time and place, unless the contrary is made known to the persons with whom the agent deals.[77] Many illustrations of this rule will be seen hereafter, conspicuous among them, for example, being the case of the agent authorized to sell a chattel and who is thereby deemed to be authorized to give warranties of quality if such warranties are usually given upon similar sales of chattels of that sort.

§ 244. ——— Powers established by the course of business.—The authority of the agent may thus not only include incidental powers and customary powers,—embracing therein, of course, such powers as are usually incident to a certain kind of business—but it may also include powers incident to the business of the particular principal as

[76] See Watts v. Howard, 70 Minn. 122; Murphy v. Columbus Bld. Co., 155 Mo. App. 649.

[77] See Pickert v. Marston, 68 Wis. 465, 60 Am. Rep. 876; Hibbard v. Peek, 75 Wis. 619; Corbett v. Underwood, 83 Ill. 324, 25 Am. Rep. 392; Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; Fritz v. Chicago Ele. Co., 136 Iowa, 699; Hopkins v. Armour, 8 Ga. App. 442.

he actually conducts it—which may include powers not ordinarily incident to it. Whatever powers, therefore, the given principal may, by his course of conduct, by his general methods of dealing, by his long continued acquiescence or tacit approval, have in fact attached either to the given agent or to such an agent as he is, are to be deemed to exist when that agent proceeds to do similar acts with persons ignorant of any actual limitations put upon this authority.[78] It is not essential in this case (unlike the case of estoppel to be hereafter considered) that the person dealing with the agent shall at the time have known of and relied upon the facts creating the authority [79] any more than it

[78] Thus in Martin v. Webb, 110 U. S. 7, 28 L. Ed. 49, in speaking of the powers actually exercised by the cashier of a particular bank, it is said that the authority "may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations." See also Gale v. Chase Nat. Bank, 104 Fed. 214; Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 51 Am. St. R. 721; Corn Exchange Bank v. American Dock & Trust Co., 149 N. Y. 174; Corn Exchange Bank v. American Dock & Trust Co., 163 N. Y. 332; Welch v. Manufacturing Co., 55 S. C. 568; Blowers v. Ry. Co., 74 S. C. 221.

[79] Thus in Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, where it appeared that there had grown up and continued for years a usage on the part of one Heilpern and his predecessors as bookkeeper and cashier of the mill company to endorse with a rubber stamp and deposit or get cashed checks drawn upon defendant, although the instructions when the account was opened were that only the treasurer should so endorse, it was said: "And because one dealing with an agent may show actual authority in him,—that is, such authority as the principal in fact intended to vest in the agent, although such intention is to be shown by acts and conduct, rather than by express words—without showing that he (the person dealing with the agent) knew when he dealt with him of the acts and conduct from which the intention is to be implied, it was competent for defendant to show the course and manner of conducting business in the office of plaintiff, so far as the bookkeepers and cashier had charge of it. The officers of plaintiff testified that Heilpern had no authority to transfer the checks and receive the money, and that they never knew of the bookkeeper and cashier doing so with plaintiff's checks. But the jury were not bound to their testimony. Such a manner of conducting the business in the office might have been proved as would have justified the jury in finding that the officers must have known of the custom of the bookkeeper and cashier in regard to checks; and had that been found, and that it was acquiesced in by plaintiff,

is in any other case: if it in fact exists he may avail himself of it in the same way that a person who at the time really relied, for example, upon the incompetent assertions of the agent may afterwards show that custom justified the power though he was then ignorant of the custom.[80]

When the authority takes on these characteristics it becomes a case of actual rather than mere ostensible or apparent authority; and it is general as to all persons dealing with the agent rather than confined to the equities of a particular person.

§ 245. ——— Powers resulting from estoppel—Holding out as agent.—Moreover, even where it cannot be shown that a given power has become generally established by the course of the business, as stated in the preceding section, it may still appear that a particular person has been led by the principal's conduct to believe that the authority existed. In such cases the doctrine of estoppel is constantly applied, and the principal will not be permitted to deny that which by his words or conduct he has asserted if such denial would prejudice an innocent third person who has reasonably relied upon such words or conduct.[81]

The methods by which this assertion of authority may be made are infinite, but the question does not depend upon particular method but upon its tendency reasonably to lead to the inference of authority.

Estoppel is always a matter personal to the individual asserting it and he must therefore show that he was misled by the appearances relied upon.[82] It is not enough that he might have been, or that some one else was, so misled.[83] It must also appear that he had reasonable

the intention to vest authority might have been implied." See also Campbell v. Upton, 66 App. Div. 434, aff'd 171 N. Y. 644, when the facts were not known to the plaintiff.

[80] Mr. Ewart is of the contrary opinion. See Article in 16 Harvard Law Review, p. 186. But see 13 Green Bag, 50; 15 Harv. Law Rev. 324. See also Article by Mr. E. B. Whitney in 3 Columbia Law Review, 395.

[81] See cases cited in following section.

[82] See Lewis v. Brown, 39 Tex. Civ. App. 139; First Nat. Bank v. Farmers', etc., Bank, 56 Neb. 149; First Nat. Bank v. Omaha Nat. Bank, 59 Neb. 192; Hazeltine v. Miller, 44 Me. 177.

[83] The elements necessary to establish "putative or apparent agency" *i. e.*, agency by estoppel are acts justifying belief in the agency and reliance thereon by the other consistently with ordinary care and prudence. Domasek v. Kluck, 113 Wis. 336; McDermott v. Jackson, 97 Wis. 64, 102 Wis. 419.

Plaintiff must show that he believed in it, to satisfy the definition of the California code. Goslíner v. Grangers' Bank, 124 Cal. 225.

Ostensible agency under the California code cannot be shown by facts of which the party attempting to es-

cause to believe that the authority existed; mere belief without cause, or belief in the face of facts that should have put him on his guard is not enough.[84]

§ 246. ——— General rule.—Gathering together all of these elements, it may be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity; or has knowingly and without dissent permitted such other to act as his agent in that capacity; or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity;—whether it be in a single transaction or in a series of transactions—his authority to such other to so act for him in that capacity will be conclusively presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority.[85]

tablish it had no knowledge. Rodgers v. Peckham, 120 Cal. 238; Harris v. San Diego, etc., Co., 87 Cal. 526.

So, generally to establish authority by estoppel. Schoenhofer Brewing Co. v. Wengler, 57 Ill. App. 184; Maxey v. Heckethorn, 44 Ill. 437; Rawson v. Curtis, 19 Ill. 456; Hefferman v. Boteler, 87 Mo. App. 316; Hackett v. Van Frank, 105 Mo. App. 384; Joy v. Vance, 104 Mich. 97.

[84] Winkelmann v. Brickert, 102 Wis. 50; Ladd v. Grand Isle, 67 Vt. 172.

[85] See Johnson v. Hurley, 115 Mo. 513; Bush Grocery Co. v. Conely, 61 Fla. 131; Haubelt v. Mill Co., 77 Mo. App. 672; Johnston v. Investment Co., 46 Neb. 480; Holt v. Schneider, 57 Neb. 523; Faulkner v. Simms, 68 Neb. 295; Standley v. Clay, etc., Co., 68 Neb. 332; Lebanon Bank v. Blanke, 2 Neb. (Unoff.) 403; Blanke Co. v. Trade Ex. Co., 5 Neb. (Unoff.) 358; Blanke Co. v. Rees Co., 70 Neb. 510; Trollinger v. Fleer, 157 N. C. 81; Midland Savings Ass'n v. Sutton, 30 Okla. 448; Pursley v. Morrison, 7 Ind. 356, 63 Am. Dec. 424; Hooe v. Oxley, 1 Wash. (Va.) 19, 1 Am. Dec. 425; Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634; Hubbard v. Tenbrook (1889), 124 Pa. 291, 2 L. R. A. 833; Union Stock Yard Co. v. Mallory, 157 Ill. 554, 48 Am. St. Rep. 341; Eagle Bank v. Smith, 5 Conn. 71, 13 Am. Dec. 37; Lyell v. Sanbourn, 2 Mich. 109; Thompson v. Bell, 10 Exch. 10; Commonwealth v. Holmes, 119 Mass. 195; Croy v. Busenbark, 72 Ind. 48; Meyer v. King, 29 La. Ann. 567; Thurber v. Anderson, 88 Ill. 167; Fay v. Richmond, 43 Vt. 25; Keyes & Co. v. Tea Co., 81 Vt. 420; Weaver v. Ogletree, 39 Ga. 586; Rimmey v. Getterman, 63 Md. 424; Sorrell v. Brewster, 1 Mich. 373; Grover & Baker Sew. Mach. Co. v. Polhemus, 34 Mich. 247; Connecticut Mut. L. Ins. Co. v. Pulte, 45 Mich. 113; Marx v. King, 162 Mich. 253; McBroon v. Cheboygan Co., 162 Mich. 323; Brockelbank v. Sugrue, 5 C. & P. 21; Savings Fund Society v. Savings Bank, 36 Penn. St. 498, 78 Am. Dec. 390; Farmers' Bank v. Butchers' Bank, 16 N. Y. 145; Kiley v. Forsee, 57 Mo. 390; Kelsey v. National Bank, 69

§ 247. Intention to create agency.—Authority is not dependent upon proof of a conscious intention to confer it. Here as elsewhere if parties intentionally do certain acts and the legal effect of those acts is the creation of authority, the authority will exist, even though the parties did not actually contemplate that result.[86]

§ 248. Names not controlling.—Here, as elsewhere, too, the question of agency or not, is not dependent upon names or labels. As has been seen in earlier sections, parties may call that agency which is not, and give some other name to that which is really agency. Where the latter is the case, the ordinary consequences of agency will ensue,[87] unless there be some contract fixing another basis of liability, or some conditions working an estoppel against setting up the facts. Where

Penn. St. 426; St. Louis, etc., Co. v. Parker, 59 Ill. 23; Vicksburg, etc., R. R. Co. v. Ragsdale, 54 Miss. 200; Summerville v. Hannibal, etc., R. R. Co., 62 Mo. 391; Walsh v. Pierce, 12 Vt. 130; Chicago, etc., Ry. Co. v. James, 22 Wis. 194; Rice v. Groffmann, 56 Mo. 434; Columbia Bridge Co. v. Geisse, 38 N. J. L. 39; Bronson v. Chappell, 12 Wall. (U. S.) 681, 20 L. Ed. 436; Fitzgerald Co. v. Farmers' Co., 3 Ga. App. 212; Grant v. Humerick, 123 Iowa, 571; Alabama, etc., R. Co. v. South, etc., R. Co., 84 Ala. 570, 5 Am. St. Rep. 401; Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. App. 415; Haner v. Furuya, 39 Wash. 122; Ruane v. Murray, 26 Pa. Super. Ct. 187; Dysart v. Ry. Co., 122 Fed. 228; Brown v. Brown, 96 Ark. 456.

In Johnston v. Investment Co., *supra*, it was said: "Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and with the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act; and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." Approved: General Cartage Co. v. Cox, 74 Ohio St. 284, 113 Am. St. Rep. 959; Harrison v. Legore, 109 Iowa, 618.

Tort cases.—The rule extends also to actions of tort based upon acts done in reliance upon the holding out. Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 52 L. R. A. 429.

[86] "The intention of the parties, it is true, must control; but that intention is to be gathered from what was actually done or agreed by the parties, not from what they may have privately meant or supposed they meant. Agency or not is a question of law to be determined by the relations of the parties as they in fact exist under their agreements or acts. If relations exist which will constitute an agency, it will be an agency whether the parties understood it to be or not. Their private intention will not affect it." Bradstreet Co. v. Gill, 72 Tex. 115, 13 Am. St. Rep. 768, 2 L. R. A. 405.

A land owner who signs a contract for the sale of land, without reading it, when brought to him by his agent for signature, is bound by powers therein conferred upon the purchaser. Liska v. Lodge, 112 Mich. 635.

[87] See for example Petteway v. McIntyre, 131 N. C. 432, where documents called leases were said by the court to create agency as matter of law.

the former is the case, no agency will result,[88] unless there is something to preclude an inquiry into the actual situation.

§ 249. When principal's act becomes effective.—It is difficult, if not impossible, to lay down any general rule by which to determine when the principal's act of appointment or authorization becomes complete and effective. If it be done by any single and specific act, it must be complete when that act is done.[89] If it be a matter of inference from facts and circumstances, it can only be said that it is complete when the inference of appointment or authorization may and has been legally drawn.

2. On the Part of the Agent.

§ 250. In general.—Having now seen what is necessary to be done on the principal's part to create the agency, it is next essential to see what the agent must do. Here quite a different situation is at once apparent. The common law rule that an authority, in certain cases, must be conferred by instrument under seal did not require that the agent accept the agency by an instrument under seal, or in any other particular manner. The statutes requiring written authority for various purposes contain no provision as to the manner in which the agent shall accept the agency. The field is therefore open for the application of the general principles of the law.

§ 251. Agent must be notified of appointment.—Notice to the agent of the fact of his appointment must obviously, in the ordinary case, be given,[90] in order to affect him, at least. It is, of course, entirely possible that, so far as the liability of the principal to third persons is concerned, a principal may incur obligations to other parties

[88] See Associate Alumni v. General Seminary, 26 App. Div. 144 (163 N. Y. 417) where the parties used the words "agents" and "agency" merely in the sense of an instrumentality by which a common purpose was to be furthered, and not in the ordinary legal sense.

[89] In Satterthwaite v. Goodyear, 137 N. C. 302, where authorization was based upon a document sent by mail, the court said it bound the principal from the date of the mailing.

[90] In Ruggles v. American Cent. Ins. Co., 114 N. Y. 415, 11 Am. St. R. 674, negotiations for the appointment of an insurance agent were opened on October 11, by a letter to the agent, in which his territory was outlined as it is proposed to be "if your appointment is confirmed;" on the 13th a formal appointment was mailed to the agent, which did not reach him until the 20th; on the 16th the agent made the contract of insurance in question; on the 19th the property was burned. *Held*, that the agent's authority, which was accepted, dated from the mailing of the letter containing the appointment.

upon the basis that he has appointed, or will appoint, a certain person as his agent, even though the latter be entirely ignorant of that fact.[91]

If the question arises as between the principal and the agent, and particularly if any contract is relied upon between them, notice to the agent and an opportunity to accept the appointment, is indispensable. As between third persons and the agent, notice to the agent and an opportunity to accept or reject, are necessary to make him an agent; though he may, as will be seen, incur obligations to third persons in many cases by undertaking to deal with them as an agent, though he may, in fact, have no color of authority.

§ 252. Agent must accept appointment.—And not only must the agent be notified in the ordinary case, but he must also, to actually make him an agent, accept the appointment.[92] He may, of course, make himself liable to the principal or to third persons by affording the ordinary external evidence of acceptance, though his actual intention was otherwise.[93]

As between third persons and the principal there may, as seen in the preceding section, be cases in which third persons might acquire rights against the principal based upon his assertion that he had ap-

[91] See Barr v. Lapsley, 1 Wheat. (U. S.) 151, 4 L. Ed. 58, cited in a following section.

[92] *Acceptance required.*—In prosecution for embezzlement, there must be proof that defendant accepted the agency. State v. Foster, 1 Pen. (Del.) 289, 2 Pen. 111.

There is no proof of agency where though it appeared that a person was named as agent in a power of attorney, he refused to accept or act under it. Beebe v. De Baun, 8 Ark. 510.

In an action by the principal against the agent, the burden of proving acceptance is upon the principal. McCoy v. Weber, 38 La. Ann. 418, relying upon R. C. C. 2990.

Where the principal is seeking to charge the agent as a trustee, he must show acceptance. Amber Petroleum Co. v. Breech (Tex. Civ. App.), 111 S. W. 668.

In an action by the agent against the principal, the agent must show that he accepted the principal's offer. McDonald v. Boeing, 43 Mich. 394, 38 Am. Rep. 199.

Making a note payable at a bank cannot make the bank the agent of the payee to receive payment unless the officers are disposed to accept the agency; hence, no agency if they refuse. Pease v. Warren, 29 Mich. 9, 18 Am. Rep. 58.

[93] One who leads another reasonably to suppose that he is accepting the agency cannot escape its consequences, though he used no express words and carefully avoided any express acceptance. Wright v. Rankin, 18 Grant (U. C.), Ch. 625. The mere understanding or belief of the principal is not enough, there must be something from which it can fairly be said that the agent undertook the service. Vickery v. Lanier, 58 Ky. (1 Metc.) 133. See also Amber Petroleum Co. v. Breech (Tex. Civ. App.), 111 S. W. 668. Agent may be estopped by his conduct to deny the agency (Siers v. Wiseman, 58 W. Va. 340); or by his recitals in deeds, etc. Walters v. Bray (Tex. Civ. App.), 70 S. W. 443.

pointed or would appoint the agent; but no rights against the principal would arise out of dealings with such an agent, after the third persons had been informed that the supposed agent had not accepted or would not accept the appointment.[94]

As between the agent and third persons, the same considerations would ordinarily apply as in the corresponding cases mentioned in the preceding section.

§ 253. ——— How acceptance established.—In the ordinary case, unless required by the terms of the authorization, no particular method of acceptance is necessary. As said in one case, "To constitute one an agent there must be consent on the part of the agent either expressed by words or inferable from something done."[95] As against himself, at least, there could not ordinarily be better evidence than that the agent had actually undertaken to perform.[96]

Where a bilateral contract by mutual promises is sought to be established, notice to the principal of the agent's acceptance would ordinarily be necessary;[97] but where the offer of the principal may be accepted by the doing of the act proposed, no other notice of acceptance than performance and notice thereof within a reasonable time would be required, unless made necessary by the terms of the offer.[98]

[94] See Barr v. Lapsley, 1 Wheat. (U. S.) 151, 4 L. Ed. 58. Here the alleged principals had informed the other party with whom they were negotiating that he might conclude the matter with one McCoun, saying "to this effect we shall direct Mr. McCoun, to whom we propose to write by the next mail." As matter of fact, they never wrote to McCoun. When the other party approached McCoun, he disclaimed all knowledge or authority in the matter, and declined to act. *Held*, that the other party, in view of McCoun's disclaimer was not justified in proceeding upon the supposition that McCoun was agent.

By accepting the agent becomes bound to act according to the terms of the appointment and not according to his own discretion. McClanahan v. Breeding, 172 Ind. 457, 466.

[95] First National Bank v. Free, 67 Iowa, 11.

[96] George v. Sandel, 18 La. Ann. 535; Roberts v. Ogilby, 9 Price, 269.

[97] Lamb v. Prettyman, 33 Pa. Super. 190. Entering upon performance with the knowledge and consent of the principal would be sufficient notice here. Brown v. Smith, 113 Mo. App. 59; Veale v. Green, 105 Mo. App. 182; Smith v. Williams, 128 Mo. App. 479.

[98] Lamb v. Prettyman, *supra;* Arnold v. National Bank, 126 Wis. 362, 3 L. R. A. (N. S.) 580. Where a factor is given an order for the purchase of goods, his failure to give notice of the acceptance of the order will not discharge the principal where the order is complied with and notice of that fact is given, within a reasonable time. Parkhill v. Imlay, 15 Wend. (N. Y.) 431. To same effect: Garvey v. Scott, 9 Ill. App. 19.

But see *In re* Consort Deep Level Gold Mines, [1897] 1 Ch. 575, where an offer of an underwriter to subscribe for a certain number of shares "or such less number as may be accepted by you" and in the event of his failure to do so authorizing the

II.

EVIDENCE OF APPOINTMENT AND AUTHORIZATION.

§ 254. Purpose of this subdivision.—Some illustrations have already been given of the nature of the evidence that may be competent upon the question whether an agency exists or not, and many others will hereafter appear. But it is necessary to consider here a few of the general rules which apply to this branch of the subject.

§ 255. Authority must be proved—Burden of proof.—In the first place it is to be recalled that, except in the few cases already referred to wherein the law confers authority, the law itself makes no presumption of agency: it is always a fact to be proved; and the person who alleges it has the burden of proving it by a preponderance of the evidence.[99]

§ 256. Authority under seal or in writing.—In the next place it is to be observed that where the law requires that the authority shall be conferred only in a certain way, as by instrument under seal or by instrument in writing, no other form of authorization will suffice, and the evidence tendered must be adequate to establish that the form required was adopted.

So though authority in writing was not required, it may appear that the parties nevertheless in the particular case have reduced it to writing, and when this appears the mode of proof may be affected accordingly.

§ 257. Written authority must be produced—When.—Where the authority appears to have been conferred by a power of attorney or other written instrument, and where, from the nature of the case, the

other party to subscribe for them in his name, was held to require notice of acceptance. Notice of acceptance is necessary where that is one of the terms of the offer. Conklin v. Cabanne, 9 Mo. App. 579.

Where a written appointment of plaintiff, a corporation, as an agent contained no express language respecting acceptance, but was signed by the corporation, the court said: "The signature of plaintiff's name to that paper was obviously for the purpose of acceptance. The presumption is that such signing was done for some purpose, and no other is apparent. If an acceptance, it bound the plaintiff to perform any acts on its part necessarily implied either from those things which defendants were bound to do or from the situation created by the contract." W. G. Taylor Co. v. Bannerman, 120 Wis. 189.

[99] Stratton v. Todd, 82 Me. 149; Castner v. Richardson, 18 Colo. 496; Schmidt v. Shaver, 196 Ill. 108, 89 Am. St. Rep. 250; Jones v. Mansfield Lum. & Merc. Co., 97 Ark. 643; Midland Savings Ass'n v. Sutton, 30 Okla. 448.

authority must be in writing, the writing is, of course, the best evidence of its contents and of the existence, nature and extent of the agency; and in any case in which any question concerning the authority as so conferred is directly involved, the writing, in accordance with familiar rules, must be produced or its absence accounted for.[1]

§ 258. Collateral inquiry.—But where the fact of the agency is only collaterally or incidentally involved, it may be proved by the acts, declarations or conduct of the parties as in other cases, although it was conferred by written instrument.[2]

§ 259. ——— Unnecessary writing.—And where the law does not require the authority to be conferred by writing, though in the given case writing was resorted to, a third person attempting to prove the agency, against either the principal or the agent, cannot be required to produce the writing, or account for its absence; but may show the existence of the agency by any competent evidence, which is within his reach, as by conduct, admissions, course of dealing, holding out and the like.[3] And even if the writing be produced, it will not necessarily

[1] Elliott v. Stocks, 67 Ala. 336; McNeill v. Arnold, 17 Ark. 154, 177; Lee v. Agricultural Ins. Co., 79 Iowa, 379; Neal v. Patten, 40 Ga. 363; Columbia Bridge Co. v. Geisse, 38 N. J. L. 39; Emery v. King, 64 N. J. L. 529; Somers v. Wescoat, 66 N. J. L. 551; Schlitz Brewing Co. v. Grimmon, 28 Nev. 235; Langbein v. Tongue, 25 Misc. 757. See also McCreery v. Garvin, 39 S. C. 375; Thompson v. Green River Power Co., 154 N. C. 13; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611.

[2] Columbia Bridge Co. v. Geisse, *supra*.

[3] What these methods of proof by conduct, etc., are, will appear in the following sections.

The same rule prevails in the analogous case of partnership; it is not necessary for the creditor to produce the articles or even to prove an actual partnership *inter sese*. See Griffin v. Stoddard, 12 Ala. 783; Rogers v. Suttle, 19 Ill. App. 163; Henshaw v. Root, 60 Ind. 220; Bryer v. Weston, 16 Me. 261; Campbell v. Hood, 6 Mo. 211.

In Walsh v. Pierce, 12 Vt. 130, Redfield, J., says: "The agency claimed is not of a character which might not as well be created by mere words or acts as by writing. In such cases it is well settled that the agency may be proved by 1st, *direct* evidence of agency. In this case if the authority was in writing, it must be produced and proved. 2 Stark. Ev. (6 Ed.) 31; Johnson v. Mason, 1 Esp. 89; Coore v. Callaway, ib. 115. In the present case, *perhaps*, if the plaintiffs had relied solely upon an authority conferred upon the agent by writing, they should either have produced the writing or accounted for its absence. But, 2, this agency may be proved by the habit and course of dealings between the parties. And, where one man suffers another to carry on business upon his credit, he is bound, I take it, to the fullest extent by all his contracts within the apparent scope of that business, without regard to the terms of the particular contract of agency, unless brought home to those with whom the agent has dealings, and in that

be conclusive: the principal will be bound to third persons by the authority as he has caused it to appear even though that be different from or greater than the authority created by the written instrument.[4]

§ 260. In other cases authority may be proved by parol—By any competent witness.—It has already been seen that, except in the cases wherein the common law requires authority under seal or some statute requires authority in writing, no particular method of authorizing is necessary; and, except in those cases, no particular method of proving the authority need be resorted to. Any competent witness having knowledge of the facts may be called,[5] or any lawful mode of proof be adopted.[6] The evidence offered need not be of the same nature as the act of authorization except in the cases referred to in the preceding sections. Thus the authority may have been conferred by express word of mouth and be proved by evidence of recognition; it may have been conferred informally but proved by evidence of an express admission.

§ 261. By informal writings—By conduct—By facts and circumstances.—The existence of agency is a fact, and like other facts may be proved by any evidence, traceable to the alleged principal, and hav-

case it is for the defendant to show their limitation to be short of the apparent extent of the business."

In Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15, it is said: "Although the plaintiffs below had constituted N., their agent by virtue of a power of attorney in writing, yet it was competent for the defendants, who were strangers to that instrument, to give parol proof of such agency. A stranger may prove a partnership by the acts and admissions of the partners, although written articles of partnership may exist between them. The same principle is applicable in cases of agency." To same effect: Curtis v. Ingham, 2 Vt. 287.

[4] Thus in Rawson v. Curtiss, 19 Ill. 456, 477, it is said: "If the principal by his declarations or conduct towards the parties dealing with such agent has authorized the opinion that he had in fact given more extensive powers to him than were conferred in terms by the writing, the principal ought to be and would be bound by the acts of such agent in his negotiations with such persons at least to the extent of the authority which such declarations and conduct have fairly led them to believe did exist."

[5] "The relation of principal and agent is a condition of which anyone having personal knowledge may testify." Ruthven v. Clarke, 109 Iowa, 25; Huesinkveld v. St. Paul Ins. Co., 106 Iowa, 229; Lough v. Davis, 35 Wash. 449.

Where it is sought to show the agency of the local operator of a telegraph company, testimony of a witness that he knew the office, was frequently there, and had seen the alleged agent there regularly, receiving, transmitting and delivering messages for the company, makes a *prima facie* case. Markley v. Western Union Tel. Co., 144 Iowa, 105, 138 Am. St. Rep. 263.

[6] Kansas Loan & Trust Co. v. Love, 45 Kan. 127; Rice, etc., Co. v. Bank, 185 Ill. 422.

ing a legal tendency to establish it.[7] Informal writings of the alleged principal, his letters, telegrams, book-entries, and the like are clearly admissible.[8] But it need not be proved by written instruments (except in the cases already mentioned) or by express or formal oral language. The agency may be shown by conduct, by the relations and situation of the parties, by acts and declarations, by matters of omission as well as of commission, and, generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy.[9] Many illustrations of these rules have already been given in the earlier sections of

[7] Thus in Hill v. Helton, 80 Ala. 528, it is said: "Agency, like any other controvertible fact, may be proved by circumstances. It may be inferred from previous employment in similar acts or transactions; or from acts of such nature, and so continuous, as to furnish a reasonable basis of inference, that they were known to the principal, and that he would not have allowed the agent so to act unless authorized. In such cases, the acts or transactions are admissible to prove agency. But in order to be relevant, the alleged principal must in some way, directly or indirectly, be connected with the circumstances. The agent must have assumed to represent the principal, and to have performed the acts in his name and on his behalf."

[8] Letters purporting to come from the principal and received by the agent in due course of mail in reply to letters sent by him addressed to the principal are admissible. Peycke v. Shinn, 76 Neb. 364. See also Burnell v. Morrison, 46 Colo. 533.

Letters may be sufficient to establish agency, but, when they are relied upon, it must appear either from their face or when read in connection with the surrounding circumstances, that agency was intended. Uniontown Grocery Co. v. Dawson, 68 W. Va. 332.

[9] Bergtholdt v. Porter Bros. Co., 114 Cal. 681; Tennessee River Transp. Co. v. Kavanaugh, 101 Ala. 1; Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. App. 223; Jesson v. Texas L. Co., 3 Tex. Civ. App. 25; Dull v. Dumbauld, 7 Kan. App. 376; *In re* Zinke, 90 Hun (N. Y.), 127; Mitchum v. Dunlap, 98 Mo. 418; Ferneau v. Whitford, 39 Mo. App. 311; Castner v. Richardson, 18 Colo. 496; Silver Mt. Mine Co. v. Anderson, 51 Colo. 298; Gambrill v. Brown Hotel Co., 11 Colo. App. 529; Bull v. Duncan, 9 Kan. App. 887; Werth v. Ollis, 61 Mo. App. 401; Ames-Brooks Co. v. Aetna Ins. Co., 83 Minn. 346; Indiana, etc., Ry. Co. v. Adamson, 114 Ind. 282; Bonner v. Lisenby, 86 Mo. App. 666; Watkins v. Edgar, 77 Mo. App. 148; Minneapolis Threshing Mach. Co. v. Humphrey, 27 Okla. 694.

In Sheanon v. Pacific Mut. L. Ins. Co., 83 Wis. 507, where an insured person had been accidentally shot in the spine causing paralysis and practically complete helplessness, the beneficial acts of his brother, who was the only friend or acquaintance present, in making proofs of loss and endeavoring to secure a settlement, done with such acquiescence and consent as the insured in his helpless condition was able to give, were held to have been done with the insured's authority. It "need not be express, but might be implied from the uncontradicted evidence as to the circumstances, and showing the deplorable situation of the assured."

this chapter and many more will appear in various places as the discussion proceeds.

For the purpose of making this proof, a wide range may often be properly given to the testimony, provided that that which is offered has a real probative tendency toward the main question in issue. It is, however, not enough that the testimony offered tends to prove something: to be competent, it must legitimately tend to prove that the alleged agent had been authorized to act as such, in the transaction in question, for the alleged principal. As will be seen in a later section, the question whether testimony offered has any legal tendency to prove authority, is usually a question for the court; whether the evidence admitted does prove authority is for the jury.

§ 262. By proof of agency on other occasions.—As has been seen, evidence of agency in a given case may sometimes be supplied by proof of agency on other occasions. Whether this is true or not, in a given case, depends upon a great variety of circumstances. The act in question may be so closely connected in time or character with the one proved as to leave no room for doubt. It may appear that the act in question and the one proved are parts of the same transaction or series of transactions. The acts proved may show a course of dealing of which the act in question is seen to be a part. This kind of evidence is strengthened as the acts proved increase in number, in likeness and in contiguity.

On the other hand, where the acts are unlike, where they are few in number, where they are separated by long periods of time, where they have no necessary relation to each other, the evidence is very slight or wanting altogether. The fact that a person was, perhaps formally and expressly, appointed an agent for a particular purpose on one occasion furnishes often very slight evidence indeed that he was agent for even a like purpose on a different occasion:[10] while the fact that he was thus agent at one time for one purpose furnishes usually no evidence at all that he was agent at another time for an entirely different purpose.[11] So many contingencies may intervene, so many

[10] Owens v. Hughes (Tex. Civ. App.), 71 S. W. 783; Rice v. James, 193 Mass. 458.

In Nourse v. Jennings, 180 Mass. 592, where the question was as to the authority of one Ball to make an agreement respecting the mortgaging of plaintiff's property, the court said: "The fact that plaintiff had mortgaged her dwelling house on two previous occasions to raise money to assist Ball, coupled with the fact that the arrangements for those loans for Ball's benefit were conducted by Ball, did not clothe Ball with an apparent authority to enter into agreements in behalf of the plaintiff for additional incumbrances on her property."

[11] Duryea v. Vosburgh, 121 N. Y. 57; Molt v. Baumann, 65 N. Y. App. Div. 445; Green v. Hinkley, 52 Iowa,

changes of purpose, of ownership, of relation, of confidence, that to deduce authority in the one case from evidence of its existence in another, becomes usually, as is said in one case, a mere "matter of guesswork," and is "too shadowy entirely to support the inference of agency in this particular transaction." [12]

§ 263. By acquiescence in, or recognition of, similar acts.—So evidence of agency is also often found in the fact that the alleged principal has acquiesced in, recognized or adopted similar acts done on other occasions by the assumed agent [13] (and the considerations will be similar to those dealt with in the preceding section). Where the

633; Graves v. Horton, 38 Minn. 66; Stevenson v. Hoy, 43 Pa. 191; Stewart v. Rounds, 7 Ont. App. 515; Stratton v. Todd, 82 Me. 149; Hazeltine v. Miller, 44 Me. 177.

The fact that a person acted as agent in procuring a loan will not alone warrant the assumption that he was, a year later, agent to pay it. Ballard v. Nye, 138 Cal. 588.

Fact that one was agent to sell goods furnishes no evidence that he was later authorized to collect the price (Collins v. Crews, 3 Ga. App. 238), and many other cases cited in the chapter upon *Construction of Authorities*.

Fact that one was agent to loan money is not evidence that he was later authorized to receive or collect payments upon it (Trull v. Hammond, 71 Minn. 172), and many other cases cited in the chapter above referred to.

Fact that agent was authorized at one time to collect money does not justify the inference that he was later authorized to make contracts involving its expenditure. Hazeltine v. Miller, 44 Me. 177.

Fact that one was authorized to buy coal for use in a boiler upon the principal's premises, does not justify an inference that he was authorized to make contracts for disposing of steam from the boiler. Union Hosiery Co. v. Hodgson, 72 N. H. 427.

[12] Duryea v. Vosburgh, *supra*.

[13] Lytle v. Bank of Dothan, 121 Ala. 215; Tennessee River Transp. Co. v. Kavanaugh, 101 Ala. 1; Columbia Mill Co. v. National Bank, 52 Minn. 224; Wheeler v. Benton, 67 Minn. 293; Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. App. 223; Bartley v. Rhodes (Tex. Civ. App.), 33 S. W. 604; First Nat. Bank v. Ridpath, 47 Neb. 96; Fruit Dispatch Co. v. Gilinsky, 84 Neb. 821; Sariol v. McDonald, 127 App. Div. 648; Ladenberg v. Beal-Doyle Dry Goods Co., 83 Ark. 440; Leipner v. MacLean, 8 Com. L. R. (Austr.) 306.

In Wheeler v. Benton, *supra*, it is said that "a long course of dealing by an agent for his principal, during which his acts have never been questioned or in any manner repudiated by the latter, will, as a general rule, raise a presumption that the agent had actual authority to do what is done by him in line with such course of dealing."

(But not if, in the previous cases, the agent acted for himself. Williams v. Stearns, 59 Ohio St. 28.)

This rule applies as well to corporate principals as to any other. Tennessee River Transp. Co. v. Kavanaugh, *supra;* Pullman Palace Car Co. v. Nelson, *supra*.

The acts relied upon must also be acts having some constructive tendency and some probative force. Agency is not to be inferred from the doing of acts of a wholly indifferent and inconsequential sort, having no more tendency to prove agency than any other relation. See Burson v. Bogart, 18 Colo. App. 449.

acts so adopted are so closely connected as to constitute a course of dealing, or to establish a custom, there can usually be but little difficulty; neither can there be where the acts are so numerous or so closely related as to reasonably lead to no other conclusion than that of a general agency for the doing of acts of that character.[14]

They must also be substantially similar to the act in question. No inference can ordinarily be drawn of authority to do one act merely from previous acquiescence in doing dissimilar acts. Stevenson v. Hoy, 43 Pa. 191.

[14] In Valiquette v. Clark Bros. Min. Co., 83 Vt. 538, 138 Am. St. R. 1104, 34 L. R. A. (N. S.) 440, defendant's agent, without authority, had, between April 15th and May 25th, drawn three drafts on defendant, two for $75 each and one for $150, to the order of the plaintiff, and these drafts defendant had paid. Plaintiff was a hotel-keeper and the agent was staying at the hotel while engaged in soliciting trade for defendant. The drafts were drawn partly to pay the agents bills at the hotel and partly for cash which plaintiff advanced to the agent. The agent claimed to be interested in the defendant corporation. Defendant had written to the agent protesting against his drawing drafts and after payment of the third one notified him that it would, under no circumstances, pay any more. It gave no notice to the plaintiff of the agent's lack of authority. On June 15th the agent drew a fourth draft for $250 to the order of plaintiff which plaintiff cashed as before, applying part upon the agent's bill and giving him the balance in cash. This draft when sent forward as before, the defendant refused to pay, and this action is to recover the amount. *Held*, that defendant's payment of the first three drafts, without objection so far as the plaintiff was aware, was sufficient evidence of a general power in the agent to draw such drafts, and that the defendant was liable upon the one in question. The court distinguished this case from those where but one or two acts had been recognized, upon the ground that here there were repeated acts of the same sort acquiesced in by the defendant. One judge dissented. The court relied largely upon Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219, where it was proved that one D. whose acceptance was in question, "was the general agent of the defendants, and that he was in the habit of accepting bills, which the company afterwards paid, under the like circumstances;" Weed v. Carpenter, 4 Wend. (N. Y.) 219, where defendant had for three or four years recognized notes made in his name by another without authority; Barber v. Gingell, 3 Espinasse 60, where it was proved that the defendant had in fact paid "several bills" drawn like the one in suit; Lytle v. Bank of Dothan, 121 Ala. 215, where it was said that the giving of "other notes" [it does not appear how many] by the agent at about the time that those in controversy were given, and defendant's subsequent recognition of their validity, were circumstances competent to be shown in evidence "though they may have been of slight weight as bearing on the execution or ratification of plaintiff's notes;" Bryan v. Jackson, 4 Conn. 288, where, the fact that a father had paid a bill for various articles furnished to his son by the plaintiff "without objecting to the same or giving any notice to the plaintiff not to trust his son any further," was held sufficient to charge him for further like articles furnished to the son by the plaintiff; Watkins v. Vince, 2 Stark. 368,

But where the acts of acquiescence relied upon are few in number, or separated by long periods of time, different considerations arise, and the probative force of the circumstances may be very weak or entirely lacking. Where all that can be shown is recognition of or acquiescence in the performance of a single similar act, the question is still more difficult. That act may have been remote in time, the circumstances may have altered and its recognition on that occasion may have been under protest and coupled with efforts to prevent its repeti-

where in order to charge a father upon a guarantee signed in his name by his son, it was proved "that he had signed for his father in three or four instances, and that he had accepted bills for him;" Gibson v. Hunter, 2 H. Bl. 288, where on a bill alleged to have been drawn by an agent to a fictitious person, the majority of the court held it competent to prove that many other bills drawn in the same way by the agent had been accepted by the principal, though there was nothing to show that he knew the payees to be fictitious. The court distinguished Bank of Deer Lodge v. Hope Mining Co., 3 Mont. 146, 35 Am. Rep. 458, on the ground that there had been but *one* previous act, though the court there said it would have been different if "repeated acts" like the one in question had been shown. Also Cook v. Baldwin, 120 Mass. 317, 21 Am. Rep. 517; Paige v. Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; and some others: Hix v. Eastern Steamship Co., 107 Me. 357, where agency to ship horses and agree upon the terms of shipment was held to be sufficiently shown by the fact that the same person had made "several prior shipments" in the same way and his authority had never been repudiated or questioned.

But in Groneweg v. Kusworm, 75 Iowa, 237, evidence that plaintiff had cashed a draft drawn by an agent upon his principal to the plaintiff's order, in order, as the agent stated, to procure traveling expenses; that this draft was paid apparently without objection; that four or five weeks later he cashed another which was also paid, was held to furnish no evidence upon which the principal could be held upon another similar draft drawn about six weeks later and not paid, the agent in the meantime having been discharged by the principal.

In Baudouine v. Grimes, 64 Iowa, 370, a traveling salesman had twice obtained defendant's indorsement of a draft of $100 drawn, as he said, upon his principal to procure traveling expenses. These drafts were paid. Some time later [the case does not show how long] and after he had in fact been discharged by the principal, the same agent again procured defendant's indorsement of a draft for $400, again said to be for traveling expenses. This draft the principal refused to pay. In an action by the principal for the price of goods sold to defendant, he attempted to counter-claim the amount of this draft. *Held*, that he could not do so. Court said it was matter "of great doubt" whether the payment of first two drafts was any evidence of authority to draw the third one; that the third one was so large that it ought to have aroused inquiry; but that, as defendant relied upon an express or implied agreement that plaintiff would reimburse defendant, and as the agent had never held himself out as being authorized to do more than draw upon his principal, —and not to procure an accommodation endorser—there could be no recovery for the amount.

tion. On the other hand, it may have been so recent, and so coupled with unequivocal acknowledgment of a continuing authority as to leave no room for question. Inferring a general or a continuing authority, however, from a single act of adoption or recognition, is usually subject to all of the dangers which attend, in other cases, upon attempts to generalize from a single instance;[15] and ought not to be indulged in except in cases showing a clear recognition of the authority.[16]

[15] Authority not usually inferable from a single act. Tennessee River Transp. Co. v. Kavanaugh, 101 Ala. 1; Duryea v. Vosburgh, 121 N. Y. 57; Stewart v. Rounds, 7 Ont. App. 515; Bank of Deer Lodge v. Hope Mining Co., 3 Mont. 146, 35 Am. Rep. 458; First Nat. Bank v. Hall, 8 Mont. 341; Rice v. James, 193 Mass. 458. Especially where that act was an isolated transaction done more than a year from the one in question with no evidence of similar acts in the meantime. Bartley v. Rhodes (Tex. Civ. App.), 33 S. W. 604. To same effect: Green v. Hinkley, 52 Iowa, 633.

The fact that an agent had on two occasions signed contracts by his principal's direction and in his presence does not create an inference that he had independent power to make contracts. Fadner v. Hibler, 26 Ill. App. 639.

In an action on a note against two principals given by an agent without authority, evidence that the agent had previously given two notes, to one of which only one of the principals assented, and the other of which for only $4, the principals settled after suit upon it, is not sufficient to show authority to execute the note now in suit. Paige v. Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420.

Part payment of a note given without authority is not of itself sufficient to bind the principal to pay the remainder. The part payment may have been accompanied by a positive refusal to pay more. Cook v. Baldwin, 120 Mass. 317, 21 Am. Rep. 517.

The fact that the agent, upon one prior occasion, had given a note, to which his principal objected when he learned of it, and which he paid only after obtaining security from the agent, does not justify an inference that the agent later had authority to give another note. Temple v. Pomroy, 4 Gray (Mass.), 128.

"It is hardly necessary to discuss the proposition that the ratification of one unauthorized act is not a ratification of another and entirely distinct act; or that the acceptance of the results of a series of unauthorized acts of the same kind is the creation of an implied agency to do an entirely different thing;" therefore recognition of acts of agency, in collecting interest only, justifies no inference of authority to collect part or all of the principal sum. Hoffmaster v. Black, 78 Ohio St. 1, 125 Am. St. R. 679, 21 L. R. A. (N. S.) 52, 14 Ann. Cas. 877.

Approval of one act on one occasion has no legal tendency to establish agency "months before and for purposes of an entirely different character." Gordon v. Vermont Loan & Trust Co., 6 N. Dak. 454.

The fact that a mother had, during a period of several years, paid under pressure for three or four horses which her minor son, "a spoilt boy," had bought, has no tendency to prove that he is her general agent to buy horses. Barrett v. Irvine, [1907] 2 Irish, 462.

[16] "A single act of an assumed agent and a clear recognition of his authority by his principal may be sufficient to prove his authority in

It must, moreover, be kept in mind that when authority is deduced from recognition of certain acts, it must be limited to the performance of other acts of the same general kind, and cannot be extended to acts of a wholly different nature.[17]

It must also be kept in mind that one who might otherwise have been justified in relying upon this appearance of authority, is no longer justified in doing so if he has inquired of the principal and learned the real facts.[18]

§ 264. ——— Acquiescence to show expired authority continuing.—Acquiescence or misleading conduct may be as potent to show that an expired authority apparently continues, or that a really special authority was apparently general, as to furnish evidence of an authority in any other case. In the former case, as will be seen hereafter, a general authority will ordinarily continue operative as to certain classes of persons until notice has been given of its termination;[19] and as to the second case, while notice of the termination of a special authority is not usually necessary,[20] yet if the principal knows that an agent authorized to do a single act is assuming to do other acts of the same sort, a duty to give notice of the facts may arise which will charge him with responsibility if it be not performed.[21]

§ 265. ——— Acquiescence to construe authority.—Acquiescence, as will be more fully seen hereafter, may also be as material in showing the nature and the extent of an authority, as in proving its existence. The fact that the principal, with knowledge, recognizes and

other similar cases." Ames-Brooks Co. v. Aetna Ins. Co., 83 Minn. 346. "A single act of an assumed agent and a single recognition of it, may be of so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do *similar* acts for the principal beyond question." Graves v. Horton, 38 Minn. 66; Wilcox v. Chicago, etc., R. Co., 24 Minn. 269. Same: Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138; Bryan v. Jackson, 4 Conn. 288; Harrison v. Legore, 109 Iowa, 618.

[17] See *ante*, § 262; Smith v. Georgia R. Co., 113 Ga. 625; Graves v. Horton, *supra;* Stratton v. Todd, 82 Me. 149; Hazeltine v. Miller, 44 Me. 177; Robinson v. Nevada Bank, 81 Cal. 106; Mt. Morris Bank v. Gorham, 169 Mass. 519; Robinson v. Nipp, 20 Ind. App. 156; Bickford v. Menier, 107 N. Y. 490; Gregory v. Loose, 19 Wash. 599. "Ostensible authority for one purpose certainly does not confer authority for all purposes." Ruddock Co. v. Johnson, 135 Cal. xix, 67 Pac. 680.

[18] After inquiry he must rely only upon what he was told. Norton v. Richmond, 93 Ill. 367.

[19] See *post*, § 628.

[20] See *post*, § 629.

[21] Where the principal knew, or was charged with notice, that an agent constituted for a single act was continuing to act in *some* way in the matter, it was held that he ought to have inferred that the agent was continuing to act as he began, and if the principal objection to this

acquiesces in the performance of the authority in a certain manner or to a certain extent, is ordinarily competent evidence that execution in that manner or to that extent was authorized.[22]

§ 266. By acts so notorious as to justify inference of acquiescence.—Usually, of course, no inference of recognition or acquiescence can be drawn unless it appears that the alleged principal had knowledge of what had thus been assumed in his name or on his account;[23] but this knowledge need not be expressly shown: the act done may have been so public or notorious or so closely related to the alleged principal that he could not be heard to say that he was ignorant of it.[24] As stated in one case,[25] if the acts "are of such nature and so continuous as to justify a reasonable inference that the principal knew of them, and would not have permitted them if unauthorized, the acts are competent evidence of agency to be submitted to the jury."

§ 267. By regular and public exercise of office or agency.—It is upon this ground that proof of the agency of those who regularly and publicly exercise the duties or functions of an agent of a corporation or individual serving the public, is frequently made. Thus evidence that a person regularly and publicly sits in the place and performs the duties and exercises the functions of the cashier of a bank, the ticket agent or freight agent of a railroad company, the agent of a telegraph, or telephone, or insurance company, the clerk of a hotel, and the like in an almost endless variety of instances, would furnish *prima facie* evidence at least of his authority to act as he thus publicly purports to do.[26] Regular and public possession or use of the distinctive property

he should have given notice. 'Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138.

Principal charged where he knew agent was continuing to act in the matter and made no objection. Harrison v. Legore, 109 Iowa, 618; Johnson v. Brewing Co., 66 App. Div. 103; Cosmopolitan Range Co. v. Midland R. Term. Co., 44 App. Div. 467; Gragg v. Home Ins. Co., 32 Ky. L. Rep. 988.

[22] See First Nat. Bank v. Ridpath, 47 Neb. 96; Dodge v. McDonnell, 14 Wis. 553; Lake Shore, etc., R. Co. v. Foster, 104 Ind. 293, 54 Am. Rep. 319; Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61; Hagerman v. Bates, 24 Colo. 71.

[23] Reynolds v. Collins, 78 Ala. 94.

[24] Reynolds v. Collins, 78 Ala. 94; Hooe v. Oxley, 1 Wash. (Va.) 19, 1 Am. Dec. 425; Indiana, etc., Ry. Co. v. Adamson, 114 Ind. 282; Singer Mfg. Co. v. Holdfodt, 86 Ill. 455, 92 Am. Rep. 43; Neibles v. Minneapolis, etc., R. Co., 37 Minn. 151; Black Lick Lumber Co. v. Camp Construction Co., 63 W. Va. 477.

[25] Reynolds v. Collins, *supra.*

[26] Reynolds v. Collins, 78 Ala. 94 (cashier); Singer Mfg. Co. v. Holdfodt, 86 Ill. 455, 92 Am. Rep. 43 (sewing machine agent); Curtis v. Murphy, 63 Wis. 4, 53 Am. Rep. 242 (clerk in hotel); Southern Exp. Co. v. Platten, 93 Fed. 936 (agent of express company); Elsner v. State, 30 Tex. 524 (barkeeper); Markley v. Western Un. Tel. Co., 144 Iowa, 105, 138 Am. St. Rep. 268 (agent of tele-

of the principal, wearing his uniform, or badge, etc., may serve the same purpose.[27]

§ 268. Presumptions based upon ordinary course of conduct—Answering letters, telephone, etc.—The ordinary conduct of men, and the inherent improbability of the given act occurring if it were not authorized, may also furnish *prima facie* evidence. Thus if I write to a business house concerning a matter of business, and receive in due course a reply to my letter, purporting to be made through a manager, superintendent, or other agent or officer within whose department such a matter would ordinarily lie, a presumption that he so replied with the authority of his principal would arise which would suffice until evidence to the contrary was offered.[28] If I buy a harvesting machine under a contract providing that, in case of trouble, I shall notify the home office and give opportunity for an expert to come to cure the difficulty; and I write such a letter and in due course a man appears who purports to have been sent by the seller in pursuance of my letter, a similar presumption would arise that he came with the authority of the seller.[29] So, also, it has been held—though there are contrary holdings—that if I call a business house by telephone upon a proper matter of business with it, and receive in due course what purports to be the authorized response of one in charge, a similar presumption that the response is authorized attends this transaction.[30]

§ 269. By proof of an express authority to which the authority in question is an incident.—It is, of course, but a restatement of a rule already referred to, to say that proof of authority to do a particular act may often be made by showing authority to do some other and

graph company); Smith v. Pullman Co., 138 Mo. App. 238 (railroad agent acting as agent for sleeping car company); Pullman Car Co. v. Nelson, 22 Tex. Civ. App. 223 (same); Shea-non v. Pac. Mut. L. Ins. Co., 83 Wis. 507 (agent of insurance company).

[27] Norris v. Kohler, 41 N. Y. 42; Thiry v. Brewing Co., 37 N. Y. App. Div. 391; Bowman v. Brewing Co., 17 Tex. Civ. App. 446; Foss-Schneider Brew. Co. v. McLaughlin, 5 Ind. App. 415 (agent in charge of wagon with principal's name painted on it); Hughes v. New York, etc., R. Co., 36 N. Y. Super. 222 (man wearing brakeman's coat and jacket); McCoun v. New York, etc., R. Co., 66 Barb. (N. Y.) 338 (man working on engine in working attire).

[28] Armstrong v. Advance Thresher Co., 5 S. Dak. 12; Norwegian Plow Co. v. Munger, 52 Kan. 371; McDonald v. Gilbert, 16 Can. Sup. 700 (partnership).

[29] See Aultman-Taylor Mach. Co. v. Ridenour, 96 Iowa, 638.

[30] Gilliland v. Southern Ry. Co., 85 S. C. 26, 137 Am. St. R. 861, 27 L. R. A. (N. S.) 1106; General Hospital Co. v. New Haven, etc., Co., 79 Conn. 581, 118 Am. St. R. 173, 9 A. & E. Ann. Cas. 168; Godair v. Ham Nat. Bank, 225 Ill. 572, 116 Am. St. R. 172, 8 A. & E. Ann. Cas. 447; Wolfe v. Missouri Pac. Ry. Co., 97 Mo. 473, 10

principal act to which the act in question may fairly be regarded as a natural and ordinary incident reasonably necessary and proper to be done under the circumstances in question.[31]

§ 270. By proof of a custom covering the case.—It is also only another form of a rule already referred to and hereinafter often discussed, to say that proof of authority to do a given act may be made by showing that it falls within the range of an established general custom or of a proved particular custom in contemplation of which it is shown that the parties dealt.[32]

§ 271. By proof of an established course of dealing.—Equally so, is the rule that proof of authority to do the act in question may be made by showing that it is one of a class concerning which the parties had established a course of dealing which recognized its validity, whether it would otherwise have been so or not; or concerning which there was such a general course of dealing as would justify the conclusion that this authority had in fact been conferred.[33] The doctrine of estoppel would often enter into the first; the latter would usually rest wholly upon inferences of fact.

Evidence of an established course of dealing may also, as will be more fully seen hereafter, be admissible in many cases for the purpose of showing how the parties had interpreted an authority undoubtedly conferred.

§ 272. Liability by ratification.—The liability of the principal in a given case may also be established by proof that the agent's performance of the act in question has subsequently been ratified and approved by the person alleged to be his principal. Something of the scope and application of this mode of authentication has been incidentally developed in the preceding pages, but its full treatment will be reserved for a following chapter.

§ 273. Limitations upon these rules.—But it is not to be inferred, however, that authority is, in any case, to be implied without reason, or presumed without cause. The implication must be based upon facts for which the principal is responsible,[34] and cannot arise from any

Am. St. R. 331, 3 L. R. A. 539; Reed v. Burlington, etc., Ry. Co., 72 Iowa, 166, 2 Am. St. R. 243; Oskamp v. Gadsden, 35 Neb. 7, 37 Am. St. R. 428, 17 L. R. A. 440.

[31] See *ante*, § 242; *post*, Book II, Chap. I.

[32] See *ante*, § 243; *post*, Book II, Chap. I.

[33] See Standley v. Clay, 68 Neb. 332.

[34] In the absence of express authority, the facts upon which an implied authority is to be based must be traced home to the principal—to *his* conduct, acquiescence, approval, ratification. Without this there is no foundation upon which to build. Gregory v. Loose, 19 Wash. 599; Kansas & Tex. Coal Co. v. Millett, 50 Mo. App. 382; Stratton-White Co. v. Castleberry, 15 Tex. Civ. App.

mere argument as to the convenience, utility or propriety of its existence.[35] So, too, the facts from which it is sought to be implied are to be given their natural, legal and legitimate effect, and this effect is not to be expanded or diminished in order to establish or overthrow the agency. And again, when implied, the agency is to be limited in its scope and operation to the reasonable and necessary requirements of the case which called it into being. If implied from the ratification or adoption of acts of a certain kind, its scope is to be limited to the performance of acts of that kind, and it can not be construed as warranting the performance of acts of a different kind.[36]

§ 274. What facts sufficient—Instances.—Illustrations of these rules are too numerous for complete enumeration. A few, however, will be given which may be taken as typical of the greater number. Express or tacit acquiescence is the feature in many of them. Thus where one stands by and permits another, in his presence, to make a contract for him as his agent, without disclosing the want of authority, he will be estopped from denying the authority;[37] and one who knows that another is collecting money on his account and does not object, but allows him to keep it as a loan, makes him his agent to collect it.[38]

149; Harvey v. Trust Co., 199 Pa. 421; Rowland Lumber Co. v. Ross, 100 Va. 275.

"While a principal is bound by his agent's acts when he justifies a party dealing with his agent in believing that he has given to the agent authority to do those acts, he is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent." Edwards v. Dooley, 120 N. Y. 540.

[35] See Bickford v. Menier, 107 N. Y. 490.

[36] See Graves v. Horton, 38 Minn. 66; McAlpin v. Cassidy, 17 Tex. 449; Gordon v. Loan & Trust Co., 6 N. Dak. 454; Gregory v. Loose, *supra;* Wikle v. Louisville, etc., R. Co., 116 Ga. 309; Collins v. Crews, 3 Ga. App. 238; St. Louis, etc., R. Co. v. Blocker, — Tex. Civ. App. —, 138 S. W. 156.

The fact that a principal has permitted an agent to solicit orders which the principal may accept or not as he chooses, as the person who gives them well knows, is not evidence of a holding out of the agent as authorized to make binding contracts or to agree that the principal will in any event accept orders given. Spooner v. Browning, [1898] 1 Q. B. 528.

[37] James v. Russell, 92 N. C. 194. But where one who is not an agent says to another who is under no obligation to pay bills contracted by him, that he will expect the other to pay them, the silence of the latter where no one is misled by it, does not justify an inference of assent. Parker v. Brown, 131 N. C. 264. Where a man without objection receives a copy of a contract which on its face purports to be made by another as his agent and thereafter accepts from the other contracting party part performance of the contract he is estopped to deny the authority of him who assumed to act as agent in negotiating the contract. Farrer v. Caster, 17 Colo. App. 41.

[38] Simon v. Brown, 38 Mich. 552.

§ 275. ——— Where it was shown that a son had for years been signing his father's name to his own notes to the knowledge of the father who took no steps to prevent it, and gave no notice that it was unauthorized, the son's authority to so bind the father was presumed;[39] so where a son had been, to his father's knowledge, in the habit of attending the father's store and there selling goods, taking orders, receiving payment for goods sold and ordering goods from wholesale houses, the authority of the son to bind the father by a purchase of goods was inferred, although the son appropriated the goods so purchased to his own use;[40] so where a son, acting for his father in procuring a mortgage, took upon himself with his father's consent the whole negotiation, examined the title, attended to the execution of the papers, received the money from his father and delivered it to the mortgagor, and in short did everything there was for an agent to do in the matter, and as much as any agent could have done in a similar negotiation, he was conclusively presumed to have been the agent of his father in the transaction.[41]

§ 276. ——— Again where one charged as defendants' agent was shown to have been for years a clerk in their store, and in many instances as their agent to have done business with the plaintiffs, it was held that there was sufficient proof of a general agency;[42] and where one sent another who desired to purchase lands of him, to his father to make a bargain, with the statement that whatever bargain they might make he would agree to, it was held that this authorized the person

One who knowingly permits another to make collections for him is bound by payments made to such other. Sax v. Drake, 69 Iowa, 760; Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138; Wilson v. Fones, 99 Iowa, 132; Grant v. Humerick, 123 Iowa, 571; Gross v. Owen, 86 N. Y. Supp. 266; Morgan v. Neal, 7 Idaho, 629, 97 Am. St. Rep. 264.

"If in consequence of a notorious agency, the agent is in the habit of drawing bills, and the principal in the habit of paying them, this is such an affirmance of his power to draw that a purchaser of his bills has a right to expect payment of them by the principal, and if refused he may coerce it." Hooe v. Oxley, 1 Wash. (Va.) 19, 1 Am. Dec. 425.

[39] Weaver v. Ogletree, 39 Ga. 586. See also Brown v. Deloach, 28 Ga. 486.

[40] Thurber v. Anderson, 88 Ill. 167; Elsner v. State, 30 Tex. 524. See also Watkins v. Vince, 2 Stark. 368.

[41] Matteson v. Blackmer, 46 Mich. 393. Same effect: Durfee v. Seale, 139 Cal. 693.

In Center v. Rush, 85 Misc. 294, a father sending his son away to school left the boy to make the necessary arrangements as to tuition, etc., and the son arranged for an entire year. *Held*, that the father was liable though the son withdrew before the year was ended.

[42] Eagle Bank v. Smith, 5 Conn. 71, 13 Am. Dec. 37.

Where the alleged agent was shown to have been openly in charge of defendant's shop, alone, on the

thus sent to regard the father as the son's agent, and bound the son by his father's statements.[43]

§ 277. ——— So in an action to charge a married woman for goods sold and delivered to her husband as her agent, it was held competent to show that she had paid for similar goods bought by her husband during the same period within which the goods in question were bought;[44] and evidence that a husband who had the management of certain land belonging to his wife, ordered material for building a house thereon, and that the wife knew that the house was being built, and occupied it when finished, was held to warrant a finding that the husband acted as her agent.[45]

§ 278. ——— So, where the question was whether an employee, in case of absence from work, might employ a substitute and it appeared that soon after he was employed he was given permission to be

day in question and there conducted business for the defendant, there was held to be *prima facie* evidence of agency. Ingalls v. Averitt, 84 Mo. App. 371.

[43] Reeves v. Kelly, 30 Mich. 133. *Agency by reference.*—So if one party refers another to a third person for information, as authorized to answer for him, he will be bound by the statements of the person so referred to. Rosenbury v. Angell, 6 Mich. 508; Beebe v. Knapp, 28 Mich. 53; Beebe v. Young, 14 Mich. 136; Marx v. King, 162 Mich. 258; McBroom v. Cheboygan Co., 162 Mich. 323; Armstrong, Byrd & Co. v. Crump, 25 Okla. 452; Fruit Dispatch Co. v. Gilinsky, 84 Neb. 821.

Where goods are shipped to P with directions to notify A, this *prima facie* makes A agent of P to receive notice of the arrival of the goods. Southern Ry. Co. v. Adams Mach. Co., 165 Ala. 436.

In Haner v. Furuya, 39 Wash. 122, the plaintiff had sold goods for the use of a group of men employed by the defendant to M. who represented that he had authority to bind the defendant. The plaintiff called at the defendant's place of business and by the general manager who had authority to pay or to pass upon the thing was referred to another man in the place. There the plaintiff was told that it was all right and that the defendant would pay. The defendant was held bound by these statements and was held to pay for goods supplied both before and after the visit.

[44] Lovell v. Williams, 125 Mass. 439.

[45] Arnold v. Spurr, 130 Mass. 347. And see Thomas v. Wells, 140 Mass. 517; Lindquist v. Dickson, 98 Minn. 369, 6 L. R. A. (N. S.) 729; Gillies v. Gibson, 17 Manitoba, 479; and cases cited *ante*, § 171.

Where after the transfer of the legal title of a mine from the name of the father to that of his son, the father continued to take entire charge and management; the son paying no attention to the property, authority in the father to lease the premises may be inferred. Jordan v. Greig, 33 Colo. 360.

Where lumber was bought of the plaintiff by one without authority from the defendant to pledge defendant's credit, but in the defendant's name and the defendant accepted shipment of the lumber to it in its name and sees that the following correspondence comes in defendant's name and at no time made any ob-

absent upon supplying a substitute and upon three or four subsequent occasions he had absented himself and provided a substitute, with the knowledge and without the objection of the employer, it was held that there was at least sufficient evidence to go to the jury that he was authorized to employ a substitute on the occasion in question.[46] So where the question was whether the agent in charge of a building was authorized to make repairs thereon and it appeared that the owner was a non-resident and had left it in charge of the agent, that on more than one occasion the agent had caused repairs to be made and had paid for them out of the principal's money without his objection, and that the agent had funds in his hands from which such repairs could be made, it was held that there was sufficient evidence to go to the jury that the agent had authority to make the repairs, at least so far as to charge him in tort to third persons for injury caused to them by his failure to make the repairs.[47] Where the question was whether the agent in charge of a farm had implied power to employ the plaintiff as manager upon it, evidence that the agent directed the work on the farm, kept the time of the employees and paid them their wages, coupled with the fact the owner later saw the plaintiff upon the farm and made no objection, was held to be sufficient to justify the jury in finding that the agent was authorized to employ the plaintiff.[48] So where the question was whether the father of the defendant had authority to assign to the plaintiff a contract for the sale of land, made by her, and it appeared that the father acted for the defendant in the purchase of the land, that the daughter left the contract with him, that he sold it for its full value, that he used the proceeds in erecting a house on other land belonging to the daughter, and that the daughter appropriated the house to her own use, it was held that this evidence was sufficient to make a *prima facie* case that the assignment of the contract to the plaintiff had been made by the daughter's authority.[49]

§ 279. ——— So where the question was whether the defendant was justified in purchasing from the agent of the plaintiff certain checks, drawn to the order of the plaintiff and indorsed by the agent with the plaintiff's name by means of a rubber stamp, and it appeared that, although when the account was first opened another agent had

jection, but silently turned things over to the contractor, the defendant was held estopped to deny the contractor's agency to pledge defendant's credit. Graff Bros. v. Lena Lumber Co., 96 Ark. 350.

[46] Aga v. Harbach, 127 Iowa, 144, 109 Am. St. R. 377, 4 A. & E. Ann. Cas. 441.

[47] Lough v. Davis, 35 Wash. 449.

[48] Trollinger v. Fleer, 157 N. C. 81

[49] Cooper v. Farmers' & Merchants' Bank, 68 Wash. 310.

been designated as the only one whose signature should bind the plaintiff in transactions with the bank, yet for a period of two or three years the agent in question had been allowed, apparently in the regular course of business, to indorse checks with such rubber stamp and deposit them, to transfer checks by such indorsement, and to receive money upon checks indorsed with such stamp or with no indorsement at all, it was held that the jury were justified in finding that the agent was apparently authorized to deal as he did with the checks in question.[50] Where a mother, having practically finished negotiation of a contract to purchase land, then left her son to complete matters and he made the first payment by a check upon her bank account, and she kept the contract so made in her possession for several weeks and then claimed that he had authority only to take an option, it was held that the evidence would sustain a finding that the son had authority to make the contract, and justify a judgment of specific performance.[51] Where the evidence showed that the defendant, knowing there was a disagreement as to the terms upon which she might remove her buildings from the land she was selling, sent her brother to sign for her a specific contract at the agreed price and later sought to repudiate it because she was dissatisfied with the terms on that point, it was held that "when the defendant directed [the agent] to act for her in executing a specific contract of sale, the terms of which had not been previously agreed upon, she necessarily gave him authority to fix such terms."[52]

§ 280. ——— So where a person openly and notoriously exercises the functions of a particular agency of a corporation, he will be presumed to have sufficient authority from the corporation to so act;[53] and where a manufacturing company knowingly permitted a person to

[50] Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224.

[51] Wren v. Cooksey, 147 Ky. 825.

[52] Clark v. Pett, 150 Iowa, 707.

[53] Singer Mfg. Co. v. Holdfodt, 86 Ill. 455.

Where it appeared that a person had acted for two or three years as the agent of corporation in settling its obligations, it was held that this was sufficient *prima facie* to establish his agency. "From the natural improbability," said Dickinson, J., "that one should voluntarily, without authority, assume to act for another, settling his obligations for a considerable period of time, and from the fact that such conduct would naturally come to the knowledge of the assumed principal, the fact of agency may be presumed." Neibles v. Minneapolis, etc., R. R. Co., 37 Minn. 151, 33 N. W. 332. See also Rockford, etc., R. R. Co. v. Wilcox, 66 Ill. 417; Reynolds v. Collins, 78 Ala. 94; Summerville v. Hannibal, etc., R. R. Co., 62 Mo. 391; Vicksburg, etc., R. R. Co. v. Ragsdale, 54 Miss. 200; McCormick Harv. Co. v. Lambert, 120 Iowa, 181; Southern Express Co. v. Platten, 93 Fed. 936; Smith v. Bank, 72 N. H. 4.

sell goods in a store-house with their name over the door, though in a town distant from their place of business, and there to sell goods of their manufacture and to buy country produce as their agent, they were charged as his principals in the purchase of such produce.[54] So placing a man in general charge of a retail store is such a holding out of him as general agent as to bind the principal for goods purchased for sale in the store by the agent, although he had agreed with the principal not to buy any goods without the latter's consent.[55] And where it appears that the alleged agent has repeatedly performed acts, like the one in question, which the principal has ratified and adopted, his authority for the performance of the disputed act may be inferred.[56]

§ 281. What facts not sufficient—Instances.—The cases upon this side are also too numerous for detailed statement, and a few must serve as illustrations for all. Thus, for example, the mere making a note payable at a certain bank will not make the bank the agent of the payee to receive payment unless the note is left there for collection,[57]

[54] Gilbraith v. Lineberger, 69 N. C. 145. But this authority does not extend to borrowing money or buying goods for himself. *Id.*

The fact that one was in charge of a truck with defendant's name upon it and delivered beer from it with bills and receipts bearing defendant's name, is evidence from which a jury might infer agency (Thiry v. Taylor Brewing Co., 87 N. Y. App. Div. 391); and where a brewing company furnished to one claiming to be its agent horses and wagon and a place of storage, there was evidence of agency (Bowman v. Texas Brewing Co., 17 Tex. Civ. App. 446); and so where a brewing company furnished a person with an ice house and wagon with his name painted on it as agent (Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. App. 415). So where the agent had the name of his principal posted in his office to the latter's knowledge. Daggett v. Champlain Mfg. Co., 71 Vt. 370.

[55] White v. Leighton, 15 Neb. 424.

[56] Jewett v. Lawrenceburgh, etc., R. R. Co., 10 Ind. 539; Fisher v. Campbell, 9 Por. (Ala.) 210; Robinson v. Green, 5 Har. (Del.) 115; Rawson v. Curtiss, 19 Ill. 456; Emerson v. Coggswell, 16 Me. 77; Odiorne v. Maxcy, 15 Mass. 39; Walsh v. Pierce, 12 Vt. 130; Downer v. Morrison, 2 Gratt. (Va.) 237; Hawkins v. Windhorst, 77 Kan. 674, 127 Am. St. R. 445, 17 L. R. A. (N. S.) 219.

[57] Ward v. Smith, 74 U. S. (7 Wallace) 447, 19 L. Ed. 207; Mutual Ben., etc., Co. v. Miles, 81 Fed. 32; Glatt v. Fortman, 120 Ind. 384; Caldwell v. Evans, 68 Ky. (5 Bush.) 380, 96 Am. Dec. 358; Trowbridge v. Ross, 105 Mich. 598; St. Paul National Bank v. Cannon, 46 Minn. 95, 24 Am. St. R. 189; Adams v. Hackensack Imp. Co., 44 N. J. L. 638, 43 Am. Rep. 406; Hollinshead v. Stuart & Co., 8 N. D. 35, 42 L. R. A. 659; Bank of Montreal v. Ingerson, 105 Iowa, 349; Bartel v. Brown, 104 Wis. 493. In Cheney v. Libbey, 134 U. S. 68, 33 L. Ed. 818, the bank at which certain notes were made payable had actual control of the notes, but they had not been left there for collection. It was held that the deposit of money in the bank for the payment of the notes did not operate as payment, that the bank was not agent of the payee to receive payment, but held the notes for the payee and the money for the payor.

In Grissom v. Bank, 87 Tenn. 350,

nor, in any event, unless the officers are disposed to accept the agency;[58] nor will the delivery of a subscription list to a person of itself confer authority on such person to collect the money and discharge the subscribers;[59] nor is authority to collect a debt to be implied merely from the possession by the party claiming the authority, of a copy of the account.[60]

So an agency will not be presumed from a previous employment in a similar matter where it does not appear that the former employment was with the principal's knowledge, although he may have accepted the advantages resulting from such previous employment.[61]

§ 282a. —— The lender of money who asks the borrower to obtain the indorsement of a third person as surety does not thereby make the borrower his agent so as to be charged with notice if the surety's signature is forged.[62]

And if a debtor employs an agent to carry money to his creditor, the creditor by accepting the money, does not so make the messenger his agent that if at any future time the messenger should appropriate

10 Am. St. R. 669, 3 L. R. A. 273, the bank at which a note was by its terms payable had a general account of the surety on the note and when the note was brought in, paid it out of this general account without express directions. In holding that this was unauthorized on the part of the bank the court said that making a note payable at a bank simply names a place of payment and does not make the bank agent for anyone.

If however the note is left at the bank for collection, the bank is the payee's agent, and the incidents of agency attach. Smith v. Bank, 22 Barb. (N. Y.) 627; Alley v. Rogers, 19 Grattan, 366.

[58] Pease v. Warren, 29 Mich. 9. But where a savings bank delivers to a national bank money drafts, notes, securities, etc., to pay a creditor, the relation between the debtor bank and the national bank is that of principal and agent, until the creditor assents or acts upon the transaction; and the assent of the creditor will not be presumed when he has no notice or knowledge of it. Brockmeyer v. Washington Nat. Bank, 40 Kan. 376, 40 Kan. 744.

[59] Antram v. Thorndell, 74 Penn. St. 442.

[60] Dutcher v. Beckwith, 45 Ill. 460, 92 Am. Dec. 232; Swofford Bros. Co. v. Berkowitz, 7 Kan. App. 24.

[61] Cobb v. Hall, 49 Iowa, 366. And see Abrahams v. Weiller, 87 Ill. 179.

[62] Wheeler v. Barr, 7 Ind. App. 381. So where a creditor pushing for payment was unwilling to take his debtor's note but suggested that he could take the debtor's note if endorsed by the defendant and the debtor went to defendant and obtained his accommodation endorsement, no agency of the debtor for the creditor to obtain the endorsement has been established and the defendant cannot show that his undertaking with the debtor was to sign for accommodation of the creditor as well as of the debtor. Carter v. Goff, 141 Mass. 123. See also, to the same effect, Woodward v. Bixby, 68 N. H. 219.

money so sent, the loss would be that of the creditor and not of the debtor;[63] and if a debtor leaves with A money to pay a note, informing the creditor of that fact, and the creditor thereupon writes to A to bring or send the money to him, this does not make A the agent of the creditor so as to impose upon the latter the loss of the money while in A's possession.[64]

§ 283. ——— So the mere fact that, under the terms of the contract for the sale of goods of which the title is to be retained by the seller until payment, it is agreed that the buyer shall cause the goods to be shipped in a certain way in order to protect the seller's interest, does not make the buyer the seller's agent in making the shipment, so as to give the seller a cause of action against the carrier, the seller not appearing upon the face of the contract to be a party to it.[65] The fact that a third person had agreed, as the friend of one employed to sell chattles, to vouch for the genuineness of the signatures upon notes which such employee was to procure by way of security for an existing indebtedness to his employer, such third person not having any authority to accept the notes or to do anything with them, does not make him the agent of the employer, so as to charge the employer with notice which such third person had that the employee was practicing a fraud upon one of the sureties upon the note.[66] In an action by plaintiffs to rescind certain mortgages given by them, upon the ground of fraud, it appearing that plaintiffs were present and acting for themselves, when the mortgages were executed, the mere fact that a third person was present at their request "in order to see that everything was done right" does not make such third person the agent of plaintiffs, so as to charge them with his knowledge or bind them by his testimony as to what was then said and done.[67] Where plaintiff, who had bought land of another for the latter's accommodation and had agreed that the latter might have the privilege of reselling it at any time and of retaining all that he could obtain for it above a fixed sum, and the latter employed defendants, who were real estate agents, to assist him in making a sale, the defendants are not thereby made the agents of the plaintiff, so as to relieve them from their indorsement of certain drafts taken in payment of the purchase price and turned over to the plaintiff in payment of the fixed sum due him.[68] One who bought property

[63] Fisher v. Lodge, 50 Iowa, 459.
[64] First Nat. Bank v. Free, 67 Iowa, 11.
[65] Mills v. Abbeville, etc., Ry. Co., 137 Ala. 505.
[66] Hardin v. Chenault, 25 Ky. L. R. 1083, 77 S. W. 192.
[67] Grewing v. Minneapolis Thresh. Mach. Co., 12 S. Dak. 127.
[68] O'Connell v. Marvin, 47 Wash. 8.

and had employed a title company to examine the title and had given an assignable non-negotiable mortgage bond to the title company for money, which under the mortgagor's direction the title company then applied in paying vendor and in improving the property, and who then resold the property and delivered the deed and received the purchase money through the title company, and who without any knowledge that the mortgage bond had been assigned, allowed the title company to keep part of the purchase money in satisfaction of the mortgage bond, has not so made the title company her agent as to be bound by its knowledge of the assignment and to have her payment defeated.[69] The fact that one who had made a catalogue of the cattle of a decedent's estate answered plaintiff's letter addressed to the estate, and that he sold cattle of that herd to plaintiff, making representations as to the condition of the cattle, where the administrators claim that he was not their agent and that they sold to him, does not make him the agent of the administrators so as to bind them by his representations.[70]

§ 284. ——— The fact that the mortgagee of a stock of goods is employed in the mortgagor's store and that while there the mortgagor buys goods "as agent," does not tend to show that the mortgagee was the principal, he not being such in fact and receiving no benefit of the goods.[71] So where a person suggests to a judgment debtor that he will buy the judgment against him and the latter tells him to do so but furnishes no money to make the purchase, the buyer is not thereby made the agent of the judgment debtor in such sense that the latter is afterwards entitled to satisfaction of the judgment upon reimbursing the buyer for what he paid for it, having bought it at a discount.[72]

The fact that the owner of land gives another an option contract or a bond for title does not make the latter the agent of the owner even though they are tenants in common.[73]

Nor will the fact that one as a father or friend merely gives information or advice in reference to a land trade, make such father or friend the agent of the person to whom such advice or information is given.[74]

[69] Fidelity T. & S. V. Co. v. Carr, 24 Ky. L. R. 156, 66 S. W. 990.

[70] Newell v. Clapp, 97 Wis. 104. The fact that defendant allowed his brother to live in and transact business from the defendant's residence does not constitute a holding out of the brother as defendant's agent. Rowan v. Kemp, 103 N. Y. Supp. 775. A stockbroker who tells a customer that he may send him directions over a certain private wire, does not make the operator of that wire his own agent so as to be bound by his mistakes. Smith v. Hutton, 138 App. Div. 859.

[71] Steele v. Watson, 86 Iowa, 629.

[72] Walton v. Dore, 113 Iowa, 1.

[73] Alger v. Keith, 105 Fed. 105.

[74] McNamara v. McNamara, 62 Ga. 200.

§ 285. Agent's authority cannot be established by his own statements or admissions.—The authority of an agent, and its nature and extent where these questions are directly involved, can only be established by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself or make himself agent merely by saying that he is one. Evidence of his own statements, declarations or admissions, made out of court therefore (as distinguished from his *testimony* as a witness), is not admissible against his principal for the purpose of establishing,[75] en-

See also upon this general subject, Whitehead v. Tuckett, 15 East, 400; Hazard v. Treadwell, 1 Stra. 506; Burt v. Palmer, 5 Esp. 145; Peto v. Hague, *Id.* 134; Anderson v. Sanderson, 2 Stark. 204; Clifford v. Burton, 1 Bing. 199; Fenner v. Lewis, 10 Johns. (N. Y.) 38; Bryan v. Jackson, 4 Conn. 291.

[75] Williamson v. Tyson, 105 Ala. 644; Manly v. Sperry, 115 Ala. 524; Drum v. Harrison, 83 Ala. 384; Tanner Engine Co. v. Hall, 86 Ala. 305; Eagle Iron Co. v. Baugh, 147 Ala. 613; Gould v. Cates Chair Co., 147 Ala. 629; Smiley v. Hooper, 147 Ala. 646; Gambill v. Fuqua, 148 Ala. 448; Union Naval Stores Co. v. Stewart, 156 Ala. 369; Cohn, etc., Co. v. Robbins, 159 Ala. 289; Crone v. Long, 159 Ala. 487; Eubanks v. Anniston Co., 171 Ala. 488; Carter v. Burnham, 31 Ark. 212; Dennis v. Young, 85 Ark. 252; Latham v. Bank, 92 Ark. 315; Bell v. State, 93 Ark. 600; Petterson v. Stockton, etc., Ry. Co., 134 Cal. 244. See also Ferris v. Baker, 127 Cal. 520; Santa Cruz Butchers' Union v. I. X. L. Lime Co. (Cal.), 46 Pac. 382; Union Const. Co. v. W. U. Tel. Co., — Cal. —, 125 Pac. 242; Murphy v. Gumaer, 12 Colo. App. 472; Mulford v. Rowland, 45 Colo. 172; C. & C. Electric Motor Co. v. Frisbie, 66 Conn. 67; Coe v. Kutinsky, 82 Conn. 685; Russell v. Washington Savings Bank, 23 App. D. C. 399; Orange Belt Ry. Co. v. Cox, 44 Fla. 645; Griffin v. Societe Anonyme la Floridienne, 53 Fla. 801; Martin v. Johnson, 54 Fla. 487; Fla. East Coast Ry. v. Lassiter, 58 Fla. 234, 19 A. & E. Ann. Cas. 192; Cottondale State Bank v. Burroughs Add. Mach. Co., 61 Fla. 143; Nelson v. Tumlin, 74 Ga. 171; Amicalola Marble Co. v. Coker, 111 Ga. 872; Jones v. Harrell, 110 Ga. 373; Grand Rapids Co. v. Moral, 110 Ga. 321; Almand v. Equitable Mortgage Co., 113 Ga. 983; Abel v. Jarratt & Co., 100 Ga. 732; Alger v. Turner, 105 Ga. 178; Harris Loan Co. v. Elliot, etc., Co., 110 Ga. 302; Massillon Engine, etc., Co. v. Akerman, 110 Ga. 570; Americus Oil Co. v. Gurr, 114 Ga. 624; Hood v. Hendrickson, 122 Ga. 795; Indiana Fruit Co. v. Sandlin, 125 Ga. 222; Franklin Co. Lumber Co. v. Grady Co., 133 Ga. 557; Becker v. Donalson, 133 Ga. 864; Southern Ry. Co. v. Grant, 136 Ga. 303; Georgia Steel Co. v. White, 136 Ga. 492; Johnson County Bank v. Richardson, 9 Ga. App. 466; Michigan Mut. Life Ins. Co. v. Parker, 10 Ga. App. 697; Maxey v. Heckethorn, 44 Ill. 437; Rawson v. Curtiss, 19 Ill. 455; Chicago, etc., R. R. Co. v. Fox, 41 Ill. 106; Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401; Mellor v. Carithers, 52 Ill. App. 86; Cleveland, etc., Ry. Co. v. Jenkins, 75 Ill. App. 17; Sonnenschein v. Max Malter Co., 144 Ill. App. 183; Elevator Safety Co. v. Iron Works, 153 Ill. App. 313; Columbus, etc., Ry. Co. v. Powell, 40 Ind. 37; Blair-Baker Horse Co. v. Bank, 164 Ind. 77; Wood Mowing, etc., Machine Co. v. Crow, 70 Iowa, 340; Fritz v. Chi-

cago Elevator Co., 136 Iowa, 699; Whitam v. Dubuque, etc., R. Co., 96 Iowa, 737; Sax v. Davis, 81 Iowa, 692; Sandusky, etc., Works v. Hooks, 83 Iowa, 305; Heusinkveld v. Ins. Co., 106 Iowa, 229; Schlitz Brew. Co. v. Barlow, 107 Iowa, 252; Mentzer v. Sargeant, 115 Iowa, 527; McManus v. Chicago G. W. Ry. Co., — Iowa, —, 136 N. W. 769; Streeter v. Poor, 4 Kan. 412; Howe Machine Co. v. Clark, 15 Kan. 492; Leu v. Mayer, 52 Kan. 419; Mo. Pac. Ry. Co. v. Johnson, 55 Kan. 344; St. Louis, etc., Ry. Co. v. Kinman, 49 Kan. 627; Ream v. McElhone, 50 Kan. 407; Swofford Bros. Dry Goods Co. v. Berkowitz, 7 Kan. App. 24; Kane v. Barstow, 42 Kan. 465, 16 Am. St. Rep. 490; French v. Wade, 35 Kan. 391; Edmiston v. Hurley, 30 Ky. L. R. 557, 99 S. W. 259; Hensley v. McDonald, 32 Ky. L. R. 1333, 108 S. W. 362; B. & O. S. W. Ry. Co. v. Clift, 142 Ky. 573; Crenshaw v. Ware's Exr., 148 Ky. 196; Dawson v. Landreaux, 29 La. Ann. 363; State v. Harris, 51 La. Ann. 1105; Lafourche Transportation Co. v. Pugh, 52 La. Ann. 1517; Eaton v. Provident Asso., 89 Me. 58; Harker v. Dement, 9 Gill (Md.), 7, 52 Am. Dec. 670; Wilson v. Kelso, 115 Md. 162; Stollenwerck v. Thacher, 115 Mass. 224; Mussey v. Beecher, 3 Cush (57 Mass.), 511; Brigham v. Peters, 1 Gray (67 Mass.), 139; Nowell v. Chipman, 170 Mass. 340; Haney v. Donnelly, 78 Mass. (12 Gray) 361; Baker v. Gerrish, 96 Mass. (14 Allen) 201; Westheimer v. State Loan Co., 195 Mass. 510; Deane v. American Glue Co., 200 Mass. 459; Hatch v. Squires, 11 Mich. 185; Kornemann v. Monaghan, 24 Mich. 36; Reynolds v. Continental Ins. Co., 36 Mich. 131; Fontaine Crossing, etc., Co. v. Rauch, 117 Mich. 401; Grover & Baker S. M. Co. v. Polhemus, 34 Mich. 247. See also Bond v. Pontiac, etc., R. R. Co., 62 Mich. 643, 4 Am. St. R. 885; Henneberger v. Matter, 88 Mich. 396; Swanstrom v. Improvement Co., 91 Mich. 367; Coldwater Nat. Bank v. Buggie, 117 Mich. 416; McPherson v. Pinch, 119 Mich. 36; Logan v. Agricultural Society, 156 Mich. 537; Cronk v. Mulvaney, 168 Mich. 346; Memphis, etc., R. Co. v. Cocke, 64 Miss. 713; Therrell v. Ellis, 83 Miss. 494; Sumrall v. Kitselman, — Miss. —, 58 So. 594; Peck v. Ritchey, 66 Mo. 114; Salmon Falls Bank v. Leyser, 116 Mo. 51; Murphy v. Mechanics Ins. Co., 83 Mo. App. 481; Mitchum v. Dunlap, 98 Mo. 418; Waverly, etc., Co. v. St. Louis Cooperage Co., 112 Mo. 383; National Bank v. Morris, 125 Mo. 343; Handlan v. Miller, 143 Mo. App. 101; Groneweg v. Estes, 144 Mo. App. 418; Nyhart v. Pennington, 20 Mont. 158; Anheuser-Busch Brewing Association v. Murray, 47 Neb. 627; Nostrum v. Halliday, 39 Neb. 828; Burke v. Frye, 44 Neb. 223; Norberg v. Plummer, 58 Neb. 410; Richardson & Boyton Co. v. School District, 45 Neb. 777; Blanke Tea Co. v. Rees Co., 70 Neb. 510; Fitzgerald v. Kimball Bros. Co., 76 Neb. 236; Warner v. Sohn, 86 Neb. 519; Schlitz Brewing Co. v. Grimmon, 28 Nev. 235; Bohanan v. Railroad, 70 N. H. 526; Clough v. Rockingham, etc., Co., 75 N. H. 84; Dowden v. Cryder, 55 N. J. L. 329; Pederson v. Kiensel, 71 N. J. L. 525; Brounfield v. Denton, 72 N. J. L. 235; Ryle v. Manchester, etc., Asso., 74 N. J. L. 840; Standard Oil Co. v. Linol Co., 75 N. J. L. 294; Nicholas v. Oram, 77 N. J. L. 220; Yoshimi & Co. v. U. S. Express Co., 78 N. J. L. 281; Schweitzer v. Church, — N. J. —, 78 Atl. 400; Stringham v. St. Nicholas Ins. Co., 4 Abb. App. Dec. 315; Jaeger v. Kelley, 52 N. Y. 274; Fleming v. Ryan, 9 N. Y. Misc. 496; Reid v. Horn, 25 Misc. 523; Wanamaker v. Megraw, 48 N. Y. App. Div. 54; Booth v. Newton, 46 App. Div. 175. See also Mullen v. Quinlan & Co., 195 N. Y. 109, 24 L. R. A. (N. S.) 511; Mitchell v. Gennis, 124 N. Y. Suppl. 996; Berry v. Broadway Co., 148 App. Div. 159; Willis

larging [76] or renewing [77] his authority; nor can his authority be established by showing that he acted as agent or that he claimed to have the powers which he assumed to exercise.[78] His written statements and admissions are as objectionable as his oral ones, and his letters, tele-

Cab. Co. v. General Assurance Co., 136 N. Y. Suppl. 100; Taylor v. Hunt, 118 N. C. 168; Summerrow v. Baruch, 128 N. Car. 202; Parker v. Brown, 131 N. Car. 264; Smith v. Browne, 132 N. Car. 365; Daniel v. Railway Co., 136 N. Car. 517, 67 L. R. A. 455; Brittain v. Westall, 137 N. Car. 30; McCormick v. Williams, 152 N. Car. 638; Sutton v. Lyons, 156 N. Car. 3; Gordon v. Vt. Loan Asso., 6 N. Dak. 454; Plano Mfg. Co. v. Root, 3 N. Dak. 165; General Cartage Co. v. Cox, 74 Ohio St. 284, 113 Am. St. R. 959; Sloan v. Sloan, 46 Or. 36; Harding v. Oregon-Idaho Co., 57 Or. 34; Spande v. Western Life, etc., Co. (Or.), 117 Pac. 973; Aerne v. Gostlow, 60 Or. 118; Long v. North British Fire Ins. Co., 137 Pa. 335, 21 Am. St. R. 879; Pepper v. Cairns, 133 Pa. 114, 19 Am. St. R. 625, 7 L. R. A. 750; Baltimore Relief Asso. v. Post, 122 Pa. 579, 9 Am. St. R. 147, 2 L. R. A. 44; Fee v. Adams Exp. Co., 38 Pa. Super. Ct. 83; New England Mtg. Secur. Co. v. Baxley, 44 S. C. 81; Martin v. Suber, 39 S. C. 525; Ehrhardt v. Breeland, 57 S. C. 142; Gen. Elect. Co. v. Southern Ry., 72 S. C. 251, 110 Am. St. R. 600; Seneca Co. v. Crenshaw, 89 S. C. 470; J. I. Case Machinery Co. v. Gidley, — S. D. —, 132 N. W. 711; Page v. Cortez (Tex. Civ. App.), 31 S. W. 1071; Western Industrial Co. v. Chandler (Tex. Civ. App.), 31 S. W. 314; Brady v. Nagle (Tex. Civ. App.), 29 S. W. 943; Mills v. Berla (Tex. Civ. App.), 23 S. W. 910; Sullivan v. Fant, 51 Tex. Civ. App. 6; Missouri Bridge Co. v. Ballard, 53 Tex. Civ. App. 110; Stockton v. Crow, — Tex. Civ. App. —, 132 S. W. 952; Young v. Robinson, — Tex. Civ. App. —, 135 S. W. 715; Madeley v. Kellam, — Tex. Civ. App. —, 135 S. W. 659; Guitar v. McGee, — Tex. Civ. App. —, 139 S. W. 622; Cannel Coal Co. v. Luna, — Tex. Civ. App. —, 144 S. W. 721; McCornick v. Queen of Sheba, etc., Co., 23 Utah, 71; Dickerman v. Quincy Ins. Co., 67 Vt. 609; Prouty v. Nichols, 82 Vt. 181, 72 Atl. 988, 137 Am. St. Rep. 996; Fisher v. White, 94 Va. 236; Hoge v. Turner, 96 Va. 624; Comegys v. Lumber Co., 8 Wash. 661; Gregory v. Loose, 19 Wash. 599; Larson v. Am. Bridge Co., 40 Wash. 224, 111 Am. St. R. 904; Singer v. Guy Invest. Co., 60 Wash. 674; Rosendorf v. Poling, 48 W. Va. 621; Garber v. Blatchley, 51 W. Va. 147; McCune v. Badger, 126 Wis. 186; Henderson v. Coleman, 19 Wyo. 188, 115 Pac. 439, 1136; Empire State Nail Co. v. Faulkner, 55 Fed. 819, affirmed 67 Fed. 913; Walmsley v. Quigley, 129 Fed. 583; W. K. Niver Coal Co. v. Piedmont, etc., Co., 136 Fed. 179; C. R. I. & P. Ry. Co. v. Chickasha Nat. Bank, 174 Fed. 923.

Non-declarations. — Where the fact of agency is in dispute evidence that the alleged agent made no declarations that he was such is not admissible. Moore v. Rankin, 33 N. Y. Misc. 749.

[76] Stollenwerck v. Thacher, 115 Mass. 224; Mussey v. Beecher, 3 Cush. (Mass.) 511; Merchants' Nat. Bank of Peoria v. Nichols & Shepherd Co., 223 Ill. 41; John Gund Brew. Co. v. Peterson, 130 Iowa, 301; Superior Drill Co. v. Carpenter, 150 Mich. 262; West v. Grocery Co., 138 N. C. 166; Edwards v. Dooley, 120 N. Y. 540.

[77] Van Dusen v. Mining Co., 36 Cal. 571, 95 Am. Dec. 209.

[78] James v. Stookey, 1 Wash. (U. S. C. C.) 330; Harker v. Dement, *supra;* Grover & Baker S. M. Co. v.

grams, advertisements and other writings cannot be used as evidence of his agency.[79] The fact that the agent has since died does not change the rule.

Where his authority is in writing he cannot extend its scope by his own declarations.[80] His acts and statements cannot be made use of against the principal until the fact of the agency has been shown by other evidence.[81]

Polhemus, *supra;* Bacon v. Johnson, 56 Mich. 182; North v. Metz, 57 Mich. 612; Doonan v. Mitchell, 26 Ga. 472; McDougald v. Dawson, 30 Ala. 553; Coburn v. Paine, 36 Me. 105; Schmidt v. Shaver, 196 Ill. 106, 89 Am. St. Rep. 250; Fourth Nat. Bank v. Frost, 70 Kan. 480; Hart v. Waterhouse, 1 Mass. 433.

[79] *Letters.*—Sax v. Davis, 81 Iowa, 692; Wilcox v. Eadie, 65 Kan. 459; Spande v. Western Life Indem. Co. (Or.), 117 Pac. 973.

Telegram.—Manly v. Sperry, 115 Ala. 524.

Newspaper advertisement.—Schlitz Brewing Co. v. Barlow, 107 Iowa, 252.

Sign on wagon.—Anheuser Busch Brew. Ass'n v. Murray, 47 Neb. 627. Written statement that he had a power of attorney. Abel v. Jarratt, 100 Ga. 732.

Entries in alleged agent's private books.—Boyd v. Jennings, 46 Ill. App. 290.

[80] Mapp v. Phillips, 32 Ga. 72.

[81] Hatch v. Squires, 11 Mich. 185; McClung v. Spotswood, 19 Ala. 165; South & North Ala. R. R. Co. v. Henlein, 52 Ala. 606; Peck v. Ritchey, 66 Mo. 114; Francis v. Edwards, 77 N. C. 271; Gilbert v. James, 86 N. C. 244; Grandy v. Ferebee, 68 N. C. 356; Williams v. Williamson, 6 Ired. (N. C.) 281, 45 Am. Dec. 494; Galbreath v. Cole, 61 Ala. 139; Baltimore & O. Relief Ass'n v. Post, 122 Pa. 579, 9 Am. St. Rep. 147, 2 L. R. A. 44.

What meant by showing by other evidence.—When it is said that the agent's statements, admissions and declarations cannot be made use of until the fact of his agency has been shown by other evidence, it is, of course, not meant that there must first be a separate verdict found establishing that fact; what is meant is, that there must first be some competent testimony offered tending to prove that fact.

Curing error later by proper evidence.—But if after the evidence has been admitted, the agency is otherwise proved as by the admissions of the principal or the *testimony* of the agent or some other competent witness, the error will be cured. Rowell v. Klein, 44 Ind. 290, 15 Am. Rep. 235; McCormick v. Roberts, 36 Kan. 552; Singer, etc., Co. v. Hutchinson, 184 Ill. 169; Union Guaranty Co. v. Robinson, 79 Fed. 420; Domasek v. Kluck, 113 Wis. 336; Singer, etc., v. Christian, 211 Pa. 534; Roux v. Blodgett, etc., Lumber Co., 94 Mich. 607; Eagle Iron Co. v. Baugh, 147 Ala. 613; Albert v. Mut. L. Ins. Co., 122 N. C. 92, 65 Am. St. R. 693.

Discretion of court as to order of proof.—The mere order of proof upon this subject is usually within the discretion of the court (Woodbury v. Larned, 5 Minn. 339; First Unitarian Soc. v. Faulkner, 91 U. S. 415, 23 L. Ed. 283; Central Penn. Tel. & Supply Co. v. Thompson, 112 Pa. 118; Buist v. Guice, 98 Ala. 255; General Hospital Co. v. New Haven, etc., Co., 79 Conn. 581, 118 Am. St. R. 173, 9 A. & E. Ann. Cas. 168); and the court may, in its discretion, admit the evidence upon condition of the subsequent proof of the agency (C. & C. Elec. Motor Co. v. Friesbie, 66 Conn. 67); though it is said that this practice should not be

§ 286. ——— **When admissible.**—His statements and admissions would, however, in any proper case be admissible against himself.[82] So the statements and dealings of the principal with third persons in recognition of the alleged agency are admissible against the principal.[83] And so, of course, in any case if the statement or admission of the agent was made in the presence of the principal or under such other circumstances that the principal may fairly be deemed to have assented to it, it would be admissible against him as his own statement or admission.[84]

§ 287. ——— **To show attitude or intention of parties.**—Where the purpose of the admission is not to bind the principal, but merely to show the attitude of the agent, as, for example, to show that he purported to act as agent and not personally, or to show for which of two

adopted except for special reasons (Comegys v. Am. Lum. Co., 8 Wash. 661).

Statements as to Agency after other Evidence of it is offered.—It is said in several cases that, after other evidence of agency has been offered, the agent's statements may then be used in corroboration (White Sewing Mach. Co. v. Horkan, 7 Ga. App. 283); or are harmless (Stringfellow v. Brazelton, —— Tex. Civ. App. ——, 142 S. W. 937; Gilliland v. Ellison, —— Tex. Civ. App. ——, 137 S. W. 168; Robinson v. Greene, 148 Ala. 434; Childress v. Smith, etc., Hdw. Co., 162 Ala. 371; Miller-Brent Lumber Co. v. Stewart, 166 Ala. 657, 21 Ann. Cas. 1149; Stewart v. Climax Road Mach. Co., 200 Pa. 611); or may be received for the purpose of showing what induced the other party to deal with the agent (Singer Mfg. Co. v. Christian, 211 Pa. 534).

Where there was evidence of the former existence of a power of attorney which was now apparently lost, evidence of the agent's statements was admitted as making together a *prima facie* case. Mulford v. Rowland, 45 Colo. 172.

Statements of Agent to disprove Agency.—The statements of the alleged agent that he was not such cannot usually be used by the alleged principal to disprove it. Peck v. Ritchie, 66 Mo. 114; Harrington v. Bronson, 161 Pa. 296.

Admissions of one Agent to prove Agency of another.—The agency of one alleged agent cannot be shown by the admissions, declarations or recognition of another agent of the same principal, unless the latter be one authorized to make those admissions, etc. Hirsch v. Oliver, 91 Ga. 554; Heusinkveld v. Ins. Co., 106 Iowa, 229.

A declaration of an agent to a third person is inadmissible in behalf of the principal to prove that the third person was not his agent or to support the agent's testimony that such third person was not an agent. Short Mt. Coal Co. v. Hardy, 114 Mass. 197.

[82] As where principal or a third person is suing the agent. New Home Sew. Mach. Co. v. Seago, 128 N. C. 158; Blake v. Bremyer, 84 Kan. 708, 35 L. R. A. (N. S.) 165.

[83] Haughton v. Maurer, 55 Mich. 323; Ransom v. Duckett, 48 Ill. App. 659; Mitchell v. Samford, 149 Mo. App. 72.

[84] Hoge v. Turner, 96 Va. 624; International Harvester Co. v. Campbell, 43 Tex. Civ. App. 421.

persons he purported to act, it would be admissible,[85] or to show that the other party understood that he purported to act as agent only;[86] or to show with whom the other party attempted or purported to deal.[87] So where the purpose is to show the information upon which the other party acted, statements made to him by the agent as to what the agent had done upon other occasions would be admissible.[88]

§ 288. ——— The mere order of the proof is not vital, and it is not reversible error that evidence of the agent's acts was admitted before proof of his agency had been offered, if it was supplied at a later stage in the trial.[89]

§ 289. Or by his own acts only.—The agent's authority moreover, may not be shown merely by proving that he acted as agent.[90] A person can no more make himself an agent by his own acts only than he can by his own declarations or statements. If his acts can be connected with the principal in some way, as by showing that the principal knew of them and assented to them, a different result ensues; and where the acts are of such a public or intimate nature, so notorious or so long continued as reasonably to justify the inference that the principal must have known of them and would not have permitted them to continue if they were unauthorized, evidence of them is admissible as against the alleged principal.[91]

§ 290. Agent's authority cannot be proved by general reputation.—The authority of a private agent to represent his principal where that is a fact in issue cannot be established by proof that he was generally reputed to be so authorized, unless the principal can in some way be

[85] Nowell v. Chipman, 170 Mass. 340; Hirschmann v. Railroad Co., 97 Mich. 384; White v. Elgin Creamery Co., 108 Iowa, 522. See also Hine v. Cushing, 53 Hun (N. Y.), 519; Johnson v. Cole, 178 N. Y. 364; Siers v. Wiseman, 58 W. Va. 340; Aetna Indemnity Co. v. Ladd, 135 Fed. 636; Parker v. Bond, 121 Ala. 529.

[86] Swinnerton v. Argonaut, etc., Co., 112 Cal. 375; Bergtholdt v. Porter Bros. Co., 114 Cal. 681.

[87] Wishard v. McNeill, 85 Iowa, 474.

[88] Grant v. Humerick, 123 Iowa, 571.

[89] Childress v. Smith, etc., Hdw. Co., 162 Ala. 371, and other cases cited *supra*.

[90] Reynolds v. Collins, 78 Ala. 94; Richards v. Newstifter, 70 Kan. 350; Fletcher v. Willis, 180 Mass. 243; Jones v. Bloomgarden, 143 Mich. 326; Loverin-Browne Co. v. Bank of Buffalo, 7 N. D. 569.

[91] Fowlds v. Evans, 52 Minn. 551; Neibles v. Railway Co., 37 Minn. 151. See also Best v. Krey, 83 Minn. 32; Reynolds v. Collins, 78 Ala. 94; Bradford v. Barclay, 39 Ala. 33; Gimon v. Terrell, 38 Ala. 208; Southern Express Co. v. Platten, 93 Fed. 936; Timpson v. Allen, 7 N. Y. Misc. 323; Dodge v. Weill, 158 N. Y. 346; Black Lick Lumber Co. v. Construction Co., 63 W. Va. 477.

held responsible for the reputation or has acquiesced in it or can be estopped to deny it.[92]

§ 291. Agent must be called as a witness.—If it is deemed essential to prove the authority by the agent himself, he must be called as a witness; his testimony both as to the fact, and as to the nature and extent, of his authority, where it rests in parol, being as competent as that of any other witness.[93] The rule upon this subject has been stated

[92] Blevins v. Pope, 7 Ala. 371; Central R. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Graves v. Horton, 38 Minn. 66; Bartley v. Rhodes (Tex. Civ. App.), 33 S. W. 604; Dyer v. Winston, 33 Tex. Civ. App. 412, 77 S. W. 227; Union Trust Co. v. McKeon, 76 Conn. 508; Thompson v. Laboringman's Merc. Co., 60 W. Va. 42, 6 L. R. A. (N. S.) 311.

[93] Parker v. Bond, 121 Ala. 529; Beekman Lumber Co. v. Kittrell, 80 Ark. 228; Ayer & Lord Co. v. Young, 90 Ark. 104; Dierks, etc., Co. v. Coffman Bros., 96 Ark. 505; McRae v. Land Co. (Cal.), 54 Pac. 743; Kast v. Miller, 159 Cal. 723; Culver v. Newhart, 18 Cal. App. 614; Wales v. Mower, 44 Colo. 146; Russell v. Wash. Savings Bank, 23 D. C. App. 398; Flournoy v. Interstate Elect. Co., 61 Fla. 216; Armour v. Ross, 110 Ga. 403; Thayer v. Meeker, 86 Ill. 470; St. L. S. Ry. Co. v. Elgin Condensed Milk Co., 74 Ill. App. 619, s. c. 175 Ill. 557, 67 Am. St. R. 238; Phillips v. Poulter, 111 Ill. App. 330; Moffitt v. Cressler, 8 Iowa, 122; Van Sickle v. Keith, 88 Iowa, 9; O'Leary v. German Amer. Ins. Co., 100 Iowa, 390; O'Neill v. Wilcox, 115 Iowa, 15; French v. Wade, 35 Kan. 391; Aultman, etc., Co. v. Knoll, 71 Kan. 109; Jahren v. Palmer, 71 Kan. 841; Drummond v. Krebs, 8 Kan. App. 180; Rice v. Gove, 39 Mass. (22 Pick.) 158, 33 Am. Dec. 724; Gould v. Norfolk Lead Co., 63 Mass. (9 Cush.) 338, 57 Am. Dec. 50; De Witt v. Prescott, 51 Mich. 298; First National Bank v. St. Anthony Co., 103 Minn. 82; Crothers v. Acock, 43 Mo. App. 318; State v. Henderson, 86 Mo. App. 482; Griswold v. Haas, 145 Mo. App. 578; Nyhart v. Pennington, 20 Mont. 158; Nostrum v. Halliday, 39 Neb. 828; Schlitz Brewing Co. v. Grimmon, 28 Nev. 235; Union Hosiery Co. v. Hodgson, 72 N. H. 427; Clough v. Rockingham Co., 75 N. H. 84; Joseph v. Shutler, 25 (N. Y.) Misc. 173; Mullin v. Sire, 37 Misc. 807; Stone v. Cronin, 72 App. Div. 565; Brown v. Cone, 80 App. Div. 413; Norden v. Dake, 106 App. Div. 514; Steuerwald v. Jackson, 123 App. Div. 569; Irvin v. Cohen, 109 N. Y. Suppl. 169; Lefkowitz v. Iba, 114 N. Y. Suppl. 29; Appel v. Lipman, 125 N. Y. Suppl. 400; New Home Co. v. Seago, 128 N. C. 158; Hill v. Bean, 150 N. C. 436; State v. Yellowday, 152 N. C. 793; Sutton v. Lyons, 156 N. C. 3; Reeves & Co. v. Bruening, 13 N. D. 157; Chickasha Co. v. Lamb, 28 Okla. 375; Wicktorwitz v. Insurance Co., 31 Or. 569; McInnes v. Rittenhouse, 1 Montag. (Pa.) 657; Lawall v. Groman, 180 Pa. 532, 57 Am. St. R. 662; Empire Mfg. Co. v. Hench, 219 Pa. 135; Brown v. Kirk, 26 Pa. Super. Ct. 157; Fee v. Adams Express Co., 38 Pa. Super Ct. 83; Connor v. Johnson, 59 S. C. 115; Kean v. Landrum, 72 S. C. 556; Am. Tel. Co. v. Kersh, 27 Tex. Civ. App. 127; Rainey v. Kemp, 54 Tex. Civ. App. 486; Bybee v. Embree-McLean Co., — Tex. Civ. App. —, 135 S. W. 203; Autrey v. Linn, — Tex. Civ. App. —, 138 S. W. 197; Cannel Coal Co. v. Luna, — Tex. Civ. App. —, 144 S. W. 721; Liter v. Mining Co., 7 Utah, 487; Bender v. Ragan, 53 Wash. 521; Singer v. Guy Investment Co., 60 Wash. 674; Piercy v. Hedrick, 2

by a learned judge as follows: "It is competent to prove a parol agency and its nature and scope by the testimony of the person who claims to be the agent. It is competent to prove a parol authority of any person to act for another, and generally, to prove any parol authority of any kind by the testimony of the person who claims to possess such authority. But it is not competent to prove the supposed authority of an agent for the purpose of binding his principal by proving what the supposed agent has said at some previous time. Nor is it competent to prove a supposed authority of any kind, as against the person from whom such authority is claimed to have been received, by proving the previous statements of the person who, it is claimed, had attained such authority."[94]

§ 292. ——— Agent's testimony—Effect.—What the agent is to testify to is the facts of the case; he is no more competent than any other witness to testify to conclusions.[95] And his testimony is no more conclusive than that of any other witness; it is received for what it is worth; and the jury may find the fact to be opposed to his testimony.[96] He may be called by either party—by the principal to disprove the alleged agency, as well as by the other party to establish it.[97]

After a *prima facie* case of authority has been made by the agent's testimony, evidence of his acts and declarations, if they would be competent under such an authority if established, is admissible as in

W. Va. 458, 98 Am. Dec. 774; Union Bank Co. v. Long Pole Co., 70 W. Va. 558, 74 S. E. 674; Somers v. Germania Nat. Bank, — Wis. —, 138 N. W. 713; Aetna Indemnity Co. v. Ladd, 135 Fed. 636; Joslyn v. Cadillac Co., 177 Fed. 863.

[94] Valentine, J., in Howe Mach. Co. v. Clark, 15 Kan. 492.

[95] Where the question of agency or not is the issue it is not competent for the witness to express his opinion or testify merely to his conclusions; he must give the facts upon which he relies. McCornick v. Queen of Sheba, etc., Co., 23 Utah, 71; Stuart v. Asher, 15 Colo. App. 403; Gore v. Canada Life A. Co., 119 Mich. 136; McCluskey v. Minck, 18 N. Y. Misc. 565; Cottondale State Bank v. Burroughs Add. Mach. Co., 61 Fla. 143.

His testimony however "cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject." Lawall v. Groman, 180 Pa. 532, 57 Am. St. R. 662.

But see Parker v. Bond, 121 Ala. 529, 25 So. 898.

[96] Majors v. Goodrich (Tex. Civ. App.), 54 S. W. 919; Jones v. Mansfield Lumb. & Merc. Co., 97 Ark. 643, 132 S. W. 1004. Where the alleged agent testifies that he was not agent, a letter written by him in the same transaction and tending to show that he was agent, may be used to contradict him. Gregg v. Berkshire, 10 Kan. App. 579, 62 Pac. 550.

[97] Dowell v. Williams, 33 Kan. 319; Rope v. Hess, 118 N. Y. 668. One agent is, of course, competent to testify as to another agent's authority, if he knows the facts. Moyers v. Fogarty, 140 Iowa, 701.

other cases,[98] subject of course to be disregarded if the authority be finally not proved.

§ 293. How question of agency determined—Court or jury.—The questions, what constitutes agency and what evidence is necessary or admissible to prove its existence; whether evidence offered has any legal tendency to prove agency; and whether there is any evidence in the case tending to establish it; are all questions of law to be determined by the court.[99]

Whether, under the evidence, there is agency, is usually a question of fact, to be determined by the triers of the facts, whether court or jury; what the agent may do by virtue of the agency so found, is usually a question of law.[1]

§ 294. ——— Construction of writing for court.—Whether a certain writing or a series of writings creates an agency or not, and if so, what is the nature and extent of the power conferred, the writing being produced, and being couched in such terms as to require no aid from extrinsic evidence, are questions of law for the decision of the court.[2]

§ 295. ——— Effect of undisputed facts to be determined by court.—And so where the facts are undisputed, and only one inference can reasonably be drawn from them, the court must determine whether they create an agency, and if so with what powers and limitations, and this is equally true whether it is sought to establish the agency by previous authorization or by subsequent ratification.[3]

[98] See *ante*, § 285; O'Leary v. German Am. Ins. Co., 100 Iowa, 390.

[99] See National Mechanics Bank v. National Bank, 36 Md. 5; New Orleans Coffee Co. v. Cady, 69 Neb. 412; Trimble v. Mercantile Co., 56 Mo. App. 683.

[1] Neppach v. Oregon, etc., R. Co., 46 Or. 374; Anderson v. Adams, 43 Or. 621; Rumble v. Cummings, 52 Or. 203.

[2] Savings Fund Society v. Savings Bank, 36 Penn. St. 498, 78 Am. Dec. 390; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Claflin v. Continental Works, 85 Ga. 27; Pollock v. Cohen, 32 Ohio St. 514; Simonds v. Wrightman, 36 Or. 120; Williamson v. Lumber Co., 38 Or. 560; Tarbox v. Cruzen, 68 Minn. 44; State v. Fellows, 98 Minn. 179; Queen City Ins. Co. v. First Nat. Bank, 18 N. D. 603, 22 L. R. A. (N. S.) 509; McCreery v. Garvin, 39 S. Car. 375; Hackworth v. Hastings Industrial Co., 146 Ky. 387; Atwood v. Rose, 32 Okla. 355.

[3] Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Ryle v. Manchester, etc., Ass'n, 74 N. J. L. 840; Belcher v. Manchester, etc., Ass'n, 74 N. J. L. 838; Savings Fund Society v. Savings Bank, *supra;* South Bend, etc., Co. v. Dakota Ins. Co., 3 S. D. 205; McCornick v. Queen of Sheba Co., 23 Utah, 71; Walsh v. Peterson, 59 Neb. 645; Franklin Bank Note Co. v. Mackay, 83 Hun, 511, but see s. c. 158 N. Y. 140; Willcox v. Hines, 100 Tenn. 524, 66 Am. St. Rep. 761; Parker v. Brown, 131 N. C. 264; Harris v. Fitzgerald, 75 Conn. 72; Lester v. Snyder, 12 Colo. App. 351; Seehorn v.

Within the operation of the foregoing rules, is the question whether the agency in issue is general or special.[4]

§ 296. ——— In other cases question is for the jury.—Where, however, the authority was not conferred by written instrument and the facts are in dispute, or if, though the facts are not disputed, there may fairly be difference of opinion as to the inferences—whether of the existence of authority or of its nature or extent—which may reasonably be drawn from them, it is for the jury to determine, under proper instructions from the court, not only whether agency exists, but, if so, what is its nature and extent.[5]

Hall, 130 Mo. 257, 51 Am. St. R. 562; Michigan Mut. L. Ins. Co. v. Thompson, 44 Ind. App. 180; Parr v. Northern Elec. Mfg. Co., 117 Wis. 278.

[4] Witcher v. Brewer, 49 Ala. 119.

[5] Savings Fund Soc. v. Savings Bank, *supra;* So. & N. Ala. R. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Buist v. Guice, 96 Ala. 255. See also Lafayette Ry. Co. v. Tucker, 124 Ala. 514; Robinson & Co. v. Greene, 148 Ala. 434; Birmingham, etc., R. Co. v. Tenn. Coal & Iron Co., 127 Ala. 137; Irving v. Shethar, 71 Conn. 434. See also Union Trust Co. v. McKeon, 76 Conn. 508; Hyman v. Waas, 79 Conn. 251; Held v. Walker, 25 App. D. C. 486; Arnold v. Adams, 4 Ga. App. 56; Morgan v. Neal, 7 Idaho, 629, 97 Am. St. R. 264; Cook v. Stimpson, 73 Ill. App. 483; Schmoldt Bros. v. Langston, 106 Ill. App. 385; Jewell v. Posey, 119 Iowa, 412; Shenkberg v. Porter, 137 Iowa, 245; Meagher v. Bowling, 107 Ky. 412, 21 Ky. L. R. 1149; Cartmel v. Unverzaght, 21 Ky. L. R. 1282, 54 S. W. 965; Groscup v. Downey, 105 Md. 273; Whittier v. Child, 174 Mass. 36; Heath v. New Bedford Safe Deposit Co., 184 Mass. 481; Marston v. Reynolds, 211 Mass. 590, 98 N. E. 601; Roberts v. Pepple, 55 Mich. 367; Wilkinson v. Steel & Spring Works, 73 Mich. 405; Fontaine, etc., Co. v. Rauch, 117 Mich. 401; Clark v. Dillman, 108 Mich. 625; Wilhelm v. Voss, 118 Mich. 106. See also Scheibeck v. Van Derbeck, 122 Mich. 29; McClure v. Murphey, 126 Mich. 134; Mail & Express Co. v. Wood, 140 Mich. 505. See Bartleson v. Vanderhoff, 96 Minn. 184; Black River Lumber Co. v. Warner, 93 Mo. 374; Seehorn v. Hall, 130 Mo. 257, 51 Am. St. R. 562; Walsh v. Peterson, 59 Neb. 645; Scull v. Skillton, 70 N. J. L. 792; Crossley v. Kenny, 71 N. J. L. 124; Franklin Bank Note Co. v. Mackey, 83 Hun, 511 (but see s. c. 158 N. Y. 140); Dickinson v. Salmon, 36 Misc. 169; Williams v. Brandt, 90 App. Div. 607; Delafield v. J. K. Armsby Co., 99 App. Div. 622; Merkel v. Lazard, 114 App. Div. 25; Ricker National Bank v. Stone, 21 Okla. 833; Mullen v. Thaxton, 24 Okla. 643; McNabb v. Hunt, 28 Okla. 42; Allen v. Kenyon, 30 Okla. 536; Midland Saving & Loan Co. v. Sutton, 30 Okla. 448; Mahon v. Rankin, 54 Or. 328; Lawall v. Groman, 180 Pa. 532, 57 Am. St. Rep. 662; Singer Mfg. Co. v. Christian, 211 Pa. 534; Am. Car & Fdy. Co. v. Water Co., 218 Pa. 542, 128 Am. St. R. 749, 15 A. & E. Ann. Cas. 641; Stockwell v. Loecher, 9 Pa. Super. 241; Buchholts v. Barrie, 36 Pa. Super. 454; Reid v. Kellogg, 8 S. D. 596; Willcox v. Hines, 100 Tenn. 524, 66 Am. St. Rep. 761; McCornick v. Queen of Sheba Co., 23 Utah, 71; Moore v. Blackburn, 67 Wash. 117.

The court should only take the case from the jury when there is no evidence whatever tending to prove agency. Buist v. Guice, 96 Ala. 255. See Osburn & Co. v. Ringland & Co., 122 Iowa, 329.

§ 297. ——— Under proper instructions from the court.—The court, however, in cases of this sort should carefully instruct the jury as to their function in the matter, and as to the rules of law by which they are to be guided. That function is not to determine whether the jury think it might be just or desirable or appropriate or convenient that the alleged principal should be held in the given case, but to decide whether, according to the rules of law, the alleged principal has, in fact, by word or conduct authorized the assumed agent to perform the act in question; or has, by conduct rationally and logically tending to that end, led the other party, who has himself exercised due care and caution, reasonably to believe that such authority has been conferred and to act upon such belief.

What the legal rules are which govern such situations should be explained by the court; and it is the duty of the jury to apply to the facts in the case the rules of law given them by the court. It is not for juries to make the law of agency.

§ 298. Burden of proof.—As has already been stated, the burden of proving agency, including not only the fact of its existence, but its nature and extent, rests ordinarily upon the party who alleges it.[6]

Where, however, there was a conceded agency but the principal contends that it has been terminated; or an otherwise undoubted authority but the principal contends that it had been limited or restricted; or an ostensible authority which the principal contends was not the real one; and the like, the burden of proving that the fact was as he contends and that the other party had notice of it where notice is necessary, would be upon the principal.[7]

§ 299. Amount of evidence requisite.—It is impossible to lay down any inflexible rule by which it can be determined what evidence shall be sufficient to establish agency in any given case. That is a question which must be determined in view of the facts in each particular case. Whatever form of proof is relied upon, however, must have a tendency to prove agency, and must be sufficient in probative force to establish it by a preponderance of the evidence. It may be said in general terms, however, that whatever evidence has a tendency to prove the

If there is more than a scintilla, it should go to the jury. Gates v. Max, 125 N. C. 139.

If different minds may honestly differ about it, it should go to the jury. South Bend, etc., Co. v. Dakota Ins. Co., 3 S. D. 205; Reid v. Kellogg, 8 S. D. 596; Parr v. Northern Elec. Mfg. Co., 117 Wis. 278. See also Beston v. Amadon, 172 Mass. 84; Southern Pine, etc., Co. v. Fries, 1 Neb. Unoff. 691.

[6] See *ante*, § 255.

[7] See Lowry v. Atlantic Coast Line, — S. C. —, 75 S. E. 278; Whaley v. Duncan, 47 S. C. 139.

agency is admissible,[8] even though it be not full and satisfactory,[9] as it is the province of the jury to pass upon it. So if evidence has first been introduced tending to prove the agency or to make out a *prima facie* case thereof, the admissions and declarations of the alleged agent, if otherwise competent, may then be shown, and the whole case be passed upon by the jury.[10]

§ 300. Whose agent is the agent.—The question whose agent a person is, who is undoubtedly the agent of some one of the parties to a transaction—whether, for example, a person clearly the agent of one or the other of two parties shall be deemed to be the agent of this one rather than of that one—is often a question of no little difficulty. A person who begins a negotiation as the undoubted agent of one party only may become, in the course of the transaction, the agent of both or of the other. The auctioneer or the broker often does this,—he may, for example, offer the goods as the agent of the seller, but sign a memorandum as the agent of the buyer. Other agents also may act first for one and then for the other of the parties to a transaction.

In the last analysis the question of whose agent the agent was, becomes a question of fact; and where the question is doubtful all of the facts must be taken into account in deciding it.[11] Who set him in mo-

[8] South & North Ala. R. R. Co. v. Henlein, 52 Ala. 606; Buist v. Guice, 96 Ala. 255; Dickinson v. Salmon, 36 N. Y. Misc. 169; Goodman v. Saperstein, 115 Md. 678.

[9] Morrison v. Whiteside, 17 Md. 452, 79 Am. Dec. 661; Goodman v. Saperstein, *supra*.

[10] National Mechanics' Bank v. National Bank, 36 Md. 5; York Co. Bank v. Stein, 24 Md. 447; Henderson v. Mayhew, 2 Gill (Md.), 393, 41 Am. Dec. 434; Central Penn. Tel. Co. v. Thompson, 112 Penn. St. 118; Buist v. Guice, *supra*.

[11] See Ford v. Postal Tel. Cable Co., 124 Ala. 400 (where the question was whether a person who was generally the agent of a city could be deemed to be the agent of the plaintiff so as to enable the plaintiff to sue upon a contract with defendant. *Held*, not to be plaintiff's agent); White City State Bank v. St. Joseph Stock Yards Bank, 90 Mo. App. 395 (where the question was whether a person acting under the direction of the president of a bank was to be deemed agent of the bank or of the president personally. *Held*, the former); Land Mortgage Co. v. Gilliam, 49 S. Car. 345 (where the question was whether a certain person applied to for the purpose of procuring a loan was to be regarded as the agent of the borrower or the lender. *Held* (by a divided court) the latter); Staats v. Pioneer Ins. Ass'n, 55 Wash. 51 (similar question where insurance was applied for); Fair v. Bowen, 127 Mich. 411 (where question was whether a person who wrote to a mortgagee that the mortgagor wished to pay part of a mortgage and get a part release, and asking the mortgagee to send on such a release, was to be deemed the agent of the mortgagee or of the mortgagor, so as to locate the loss of money paid to such person but not paid over to the mortgagee. *Held*, to be agent of mortgagor); McMul-

tion originally? Who gave him his instructions? Whose interests was he primarily to protect? Who was to pay him? Who could complain of his negligence? Will holding him to be the agent of one party leave the other without a representative present?—these and similar inquiries may throw light upon the situation.

len v. People's Savings & L. Ass'n, 57 Minn. 33 (where the question was whether a bank to which a debtor requested the creditor to send his claim for payment, was to be regarded as the agent of the debtor or the creditor. *Held*, the former]; De Turck v. Matz, 180 Pa. 347 (where the question was whether the general financial agent of another, having embezzled his principal's funds and being desirous of covering his shortage, and endeavoring to obtain a mortgage for that purpose under the guise of a loan of his principal's money to a borrower, was to be regarded as the agent of his general principal or of this borrower, so as to charge one or the other of them with the consequences of his fraud in trying to get the mortgage without actually advancing any money upon it. *Held*, that he was the agent of his general principal).

See also, Blaney v. Rogers, 174 Mass. 277; Polhemus v. Trust Co., 59 N. J. Eq. 93; Schroeder Lumber Co. v. Stearns, 122 Wis. 503.

In Moore v. Blackburn, 67 Wash. 117, where the question was whether a broker to secure a loan was the agent of the borrower or the lender, the court said the question was to be decided by determining under whose direction he was acting, and held him to be the agent of the borrower, relying upon Englemann v. Reuse, 61 Mich. 395; Lipman v. Noblit, 194 Pa. 416; Pepper v. Cairns, 133 Pa. 114, 19 Am. St. R. 625, 7 L. R. A. 750.

In a series of cases in Alabama one who applies to another to procure him a loan and promises to pay him a commission for taking the application, conducting the correspondence, making abstract of title, and securing and paying over the money, is held to be the principal of the agent, so as to charge the borrower with the loss if the agent fails to pay over the money to the borrower when received by the agent from the lender. Hamil v. American Freehold Land Mortgage Co., 127 Ala. 90; Land Mtg. Co. v. Preston, 119 Ala. 290; American Mtg Co. v. King, 105 Ala. 358; Edinburgh-Am. Mtg. Co. v. Peoples, 102 Ala. 241; George v. New England Mtg. Co., 100 Ala. 548. Same effect: Owings v. Howington, 31 Okla. 651. See also, Fatta v. Edgerton, 143 App. Div. 658.

In Morris McGraw Woodenware Co. v. German Fire Ins. Co., 126 La. 32, 38 L. R. A. (N. S.) 614, 20 Ann. Cas. 1229, where the question was whether the firm of Rocquet & Co. were to be regarded as the agents of the insurer or the insured, they not being the regular agents of the insurance companies, but an independent firm through whom the parties were brought together, the court said:

"One of the propositions of plaintiff through learned counsel is that the intermediary between an insurance company and a person seeking insurance is the agent of the applicant in procuring the policy, but after the policy has been issued he ceases to be the agent of the assured and becomes the agent of the insurance company for completing the contract, by delivery of the policy and collection of the premium.

"We have found no authority to sustain the position. There is precedent for holding that the local agency was the agent of the insured; to be explicit, that in those instances Rocquet & Co. were the agents of the insured. It looked after the plaintiff's insurance business, as before stated.

In some cases the inferences of fact may be so clear as to justify the court in drawing them.[12] Where more than one inference may reasonably be drawn, the question is usually for the jury.

"In a case wherein the facts were somewhat similar, that conclusion was arrived at in a lengthy opinion. Stone v. Franklin Insurance Co., 105 N. Y. 543. In another case it was held that the agency acted as a broker and exercised some discretion in selecting the companies. It was the agent of the insured. Dibble v. Northern Assur. Co., 70 Mich. 1, 14 Am. St. Rep. 470.

"The following is directly in point: It is unanswerable, we think. Though a duly appointed agent of an insurance company must, as relates to that company, be regarded as the agent of the insurer, yet as to other companies, as in the case in hand (as to the Rocquet Company) in which he procures insurance for a property owner, he may be considered as the agent of the insured. Smith & Wallace Insurance Co. v. Prussian Mutual Insurance Co., 68 N. J. Law, 674.

"In another decision it was held that one who was intrusted with keeping the property insured became the agent of the insured. Johnson v. North British Insurance Co., 66 Ohio St. 6.

"An insurance agent, to whom a request for insurance is made, and who, acting as broker, procures all or part of such insurance through other agents of companies not represented by him, is the agent of the insured. Parrish v. Rosebud Min. Co., 140 Cal. 635.

"Though, under special circumstances, a broker may be the agent of the insurer, it was decided the mere fact that he receives a commission from the insurer, for placing the insurance with him, does not change his character as agent of the insured. United Firemen's Insurance Co. v. Thomas, 92 Fed. 127, 47 L. R. A. 450; East Texas Fire Insurance Co. v. Brown, 82 Tex. 631; Seamans v. Knapp-Stout & Co., 89 Wis. 171, 27 L. R. A. 362, 46 Am. St. Rep. 825; American Fire Insurance Co. v. Brooks, 88 Md. 822."

Holding the agent to be the agent of the company. Abraham v. North German Ins. Co., 40 Fed. 717; Indiana Ins. Co. v. Hartwell, 123 Ind. 177; Packard v. Dorchester Mut. F. Ins. Co., 77 Me. 144; Hahn v. Guardian Assur. Co., 23 Or. 576, 37 Am. St. R. 709. There are many others.

[12] "Where a debtor delivers money to a third person for the purpose of paying a note which is not due, and of which such third person is not in the possession, the presumption is that the person receiving the money does so not as the agent of the creditor but as the agent of the debtor. This presumption can only be overcome, and the converse established, by evidence to the contrary:" Goodyear v. Williams, 73 Kan. 192.

So where the court deems that the facts disclose a case of agency "so conclusive that it is not possible to adopt any other view." Pochin v. Knoebel, 63 Neb. 768.

In Evans v. Pierce, 70 Ill. App. 457, the court approved a peremptory instruction that the registrar of a university to whom was delivered a check for a professor's salary was the agent of the treasurer of the university and not of the professor.

In Payne v. Newcomb, 100 Ill. 611, 39 Am. Rep. 69, where a loan agent was required to investigate the title for the lender and was liable to the lender for any mistake he made in title or in valuation, the court said he was the agent of the lender "beyond all dispute," although he was paid by the borrower alone. See also Figley v. Bradshaw, 35 Neb. 337.

§ 301. ——— Stipulations declaring — Validity — Testimony of parties.—The question, moreover, is one to be determined by the law's methods rather than by the mere stipulations of the parties. It is not uncommon, especially in the case of insurance companies, loan companies, and the like, to insert stipulations in the printed applications that the agent conducting the negotiations shall be deemed to be the agent of the applicant rather than of the company. Stipulations of this sort may sometimes be helpful, but they cannot change the real conditions of things, and if, under all the circumstances, the agent is really the agent of the company, the stipulation that he shall be deemed to be the agent of the other party will be unavailing.[13] For similar

One who pays a county debt to the deputy county clerk, who has neither duty nor authority to receive it, it being payable to the county treasurer, but who undertakes to receive it, makes the deputy his agent to pay it to the treasurer, and he must lose if the deputy misappropriates it. Knox Co. v. Goggin, 105 Mo. 182.

Where the defendant, seeking a loan from a building association, borrowed instead from its agent S, giving him notes and a deed, with the understanding that S should endeavor later to secure a loan from the association, it was held that there was no authority to S to mortgage to the association and receive the money for the defendant; but that the defendant had contemplated getting the money in his own name to pay his notes and redeem the land from S. American Bldg. & Loan Ass'n v. Warren, — Ark. —, 141 S. W. 765.

Actual agency is not terminated by the agent's deception, whereby he made the plaintiff think he was a fellow purchaser, so the real principal is liable for his misrepresentations as to the quality of the land. Wicks v. German Loan & Investment Co., 150 Iowa, 112.

[13] Thus in Union Cent. L. Ins. Co. v. Pappan, — Okla. —, 128 Pac. 716, where the question was whether certain agents through whom a loan was made were the agents of the lender or the borrower, although the application for the loan undertook to make them the agents of the borrower, the court said:

"The court had the right to examine all the evidence for the purpose of ascertaining whose agents Winne & Winne were, and if, upon a consideration of all the evidence, it appeared that they were the agents of the company to pay the money to Pappan, then it was proper for the court to cancel the mortgage, notwithstanding the instruments purporting to make Winne and Winne Pappan's agents to receive the money. No case has been cited opposing this doctrine. The cases of McLean v. Ficke, 94 Iowa, 283; Larson v. Lombard Investment Co., 51 Minn. 141; Jensen v. Lewis Investment Co., 39 Neb. 371; Olmstead v. New England Mtg. Sec. Co., 11 Neb. 487; New England Mtg. Sec. Co. v. Addison, 15 Neb. 335; Banks v. Flint, 54 Ark. 40, 10 L. R. A. 459; Travelers' Insurance Co. v. Jones, 16 Colo. 515; Bates v. American Mtg. Co., 37 S. C. 88, 21 L. R. A. 340; State v. Bristol Savings Bank, 108 Ala. 3, 54 Am. St. Rep. 141—sustain the rule applied here."

reasons, the testimony of the principal or the agent is not conclusive. The jury may find that the agent was the agent of one party although he may testify that he was agent of the other.[14]

The medical examiner of a life insurance company is the agent of the company in making the examination and writing down the answers, and a stipulation in the application that he shall be deemed the agent of the applicant is unavailing. Sternaman v. Metropolitan L. Ins. Co., 170 N. Y. 13, 88 Am. St. R. 625, 57 L. R. A. 318.

So of the soliciting agent of the insurance company. Clark v. Union Mut. F. Ins. Co., 40 N. H. 333, 77 Am. Dec. 721, and note collecting the earlier cases.

So in the case of an investment company (Larson v. Lombard Investment Co., 51 Minn. 141; Jensen v. Lewis Inv. Co., 39 Neb. 371) and of a loan company (McLean v. Ficke, 94 Iowa, 283; State v. Bristol Savings Bank, 108 Ala. 3, 54 Am. St. Rep. 141).

The cases upon this subject are too numerous to cite exhaustively. But where such a stipulation is as much in keeping with the facts as the opposite inference, the court will not disregard it. Detwilder v. Heckenlaible, 63 Kan. 627.

[14] State v. Bristol Savings Bank, *supra;* Stuart v. Asher, 15 Colo. App. 408.

CHAPTER VI

OF THE APPOINTMENT OF AGENTS BY OTHER AGENTS, AND HEREIN OF DELEGATION OF AUTHORITY

§ 302. In general—What here included.
303. Same subject.

I. OF DELEGATION BY THE AGENT

304. What included here.
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321. —— Assistants employed by servants.
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323. Care required in making authorized appointment.
324. Re-delegation — Subdelegation.
325. What the delegate may be.
326–329. Whose agent, etc., is the subagent.
330, 331. Is there privity between principal and subagent.
332. Effect of employment—Subagent is principal's agent, etc., if employment was authorized.
333. ——But he is agent's agent, etc., in other case.

II. OF AUTHORITY OF AN AGENT TO EMPLOY AGENTS, SERVANTS AND OTHERS FOR HIS PRINCIPAL

334. Agents generally have no such power.
335. Servants usually have no such authority.
336. Independent contractors have usually no such authority.
337. Authority to appoint may be expressly conferred.
338. Authority to employ may arise by implication.
339. Sudden emergency or special necessity may justify it.
340. —— Authority so arising is a narrow one.
341. —— Employment of physicians and surgeons in emergencies.
342. Privity between principal and persons thus employed.

§ 302. In general.—As has already been seen, the appointment and authorization of agents, in the sense in which those terms are used in this work, result only from some act or omission of the principal.

No one can, in general, appoint agents for him, except the principal himself or some one who acts by his authority, express or implied. Authority to appoint agents for him, or to employ servants, contractors, and others, may, however, be given by the principal to some one else, as agent for this purpose for him, and this may be done either expressly or by implication. The question to be discussed here is, when has one agent express or implied authority to appoint other agents or servants or contractors for his principal.

This question will, upon consideration, be seen to involve two aspects: I. The authority of an agent to employ some one else to do the very act, or some portion of the very act, which he was originally authorized to do; and II. The authority of one agent to appoint others or to employ other persons to do some other act or acts for his principal.

The first of these acts may take on either of two aspects. The agent may be permitted to put some one else in his place—a substitute—and get out of the transaction entirely, which may perhaps be called *substitution;* or he may be permitted to have some one under him—a subordinate—either as his agent or as his principal's agent, which may then be called *delegation.* As matter of fact, the latter term is constantly applied to both situations.

The second is a different question, namely, an authority to appoint other agents for other purposes, either generally or specially. Both will be considered in the present chapter, and in the order named.

§ 303. ——— It will also be observed that in the cases in which the agent is to appoint a substitute and retire, other considerations may be involved. If he retires, does the substitute step into the agent's existing obligations, or does he simply assume new ones on his own account? If the former, there may be the ordinary *novation;* if the latter, there needs to be a new arrangement with the substitute and, perhaps, a release of the agent from the obligations of the old one. If the latter be the situation, then the consent to the substitution will involve (1) an authority to appoint a new agent for the principal, and (2) a release of the old agent from any further obligation. If it be the ordinary novation, there is no difficulty about the consideration. If it be merely a new appointment, plus the release of the agent, what is the consideration for the release? If the agent procures the acceptance of the new appointment as a consideration for the release, there is no difficulty. If the new appointee accepts the appointment only upon condition that the old agent be released there is probably in most states a consideration. The transaction may possibly take on such a

form as to show no consideration. This latter kind of novation is called delegation in the civil law.[1]

With this much of explanation, perhaps, there will be no difficulty experienced in accepting the common nomenclature, and treating the whole matter under the generic title of *delegation*.

I.

OF DELEGATION BY THE AGENT.

§ 304. What here included.—In dealing with the question of delegation by the agent it is necessary, as has already been suggested, to distinguish two different situations which are sometimes very distinct and sometimes more or less similar. One is the power which an agent may have to appoint other agents for his principal, and the other is his power to appoint sub-agents. An agent may have power, either expressly or by implication, to appoint other agents for his principal, and this may, perhaps, be his only power. Such agents are not necessarily in any respect sub-agents, they need not exercise all or any part of the power of the appointing agent, but may be appointed to do acts which he has no power at all to do. In appointing them, he may be, not *delegating* his authority, but *exercising* it, and, perhaps, exhausting it in the exercise. Such appointment is not the delegation here involved.

In the other case, what the agent is attempting to do is to pass his own authority on to some one else either wholly or in part, and with or without retiring on his own part—endeavoring to make a substitution partially or completely; or, if he is not making a substitution, he is procuring assistance in the exercise of the power conferred upon him. These two acts may be more or less unlike—to get a substitute to do the act may be one thing; to get an assistant to aid in doing the act may be another. They are alike in this, that, whether a substitute or an assistant, the person employed is exercising a part or all of the authority originally conferred upon the agent who appointed him.

There may also be a combination of the two kinds of powers. Thus an agent may be sent out to collect a claim himself if he can, and, if he cannot, to appoint an attorney to collect it; or to do all that a layman may do in a given transaction and to engage an attorney to do the professional part of it.

What is here to be dealt with under the head of delegation is the power of an agent to appoint a substitute to do all, or to appoint an assistant to do part of that which he was authorized to do.

[1] See Stewart v. Campbell, 58 Me. 439, 4 Am. Rep. 296, 16 Am. & Eng. Enc. of Law (1st Ed.) p. 876; Caswell v. Fellows, 110 Mass. 52.

§ 305. **Delegatus non potest delegari.**—The selection of an agent in any particular case is made, as a rule, because he is supposed by his principal to have some fitness for the performance of the duties to be undertaken. In certain cases his selection is owing to the fact that he is considered to be especially and particularly fit. The undertaking demands judgment and discretion, which he is supposed to possess; or it requires the skill and learning of an expert, which he assumes to be; or personal force and influence are desirable, and these the agent is thought to be able to exercise, or honesty or even financial responsibility is relied upon, and this the agent selected is supposed to possess. Here is the *delectus personæ*, and it is obvious that unless the principal has expressly or impliedly consented to the employment of a substitute, the agent owes to the principal the duty of a personal discharge of the trust.

§ 306. **General rule.**—Hence it is the general rule of the law that in the absence of any authority, either express or implied, to employ a subagent, the trust committed to the agent is presumed to be exclusively personal and cannot be delegated by him to another so as to affect the rights of the principal.[2] Putting it into more specific form, an agent generally has no implied authority either to put a substitute in his place or to employ assistants on his principal's account.

[2] Appleton Bank v. McGilvray, 4 Gray (Mass.), 518, 64 Am. Dec. 92; McCormick v. Bush, 38 Tex. 314; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Lyon v. Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319; Smith v. Sublett, 28 Tex. 163; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236; Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400; Loomis v. Simpson, 13 Iowa, 532; Connor v. Parker, 114 Mass. 331; Gillis v. Bailey, 21 N. H. 149; Furnas v. Frankman, 6 Neb. 429; Harralson v. Stein, 50 Ala. 347; Springfield F. & M. Ins. Co. v. DeJarnett, 111 Ala. 248; Bromley v. Aday, 70 Ark. 351; North American Trust Co. v. Chappell, 70 Ark. 507; Harris v. San Diego Flume Co., 87 Cal. 526; Dingley v. McDonald, 124 Cal. 682; National Cash Register Co. v. Ison, 94 Ga. 463; Fudge v. Seckner Contracting Co., 80 Ill. App. 35; Ruthven v. American Fire Ins. Co., 92 Iowa, 316; Floyd v. Mackey, 112 Ky. 646, 23 Ky. L. Rep. 2030; Plummer v. Green, 49 Neb. 316; Carroll v. Tucker, 2 N. Y. Misc. 397; Fargo v. Cravens, 9 S. Dak. 646; Tynan v. Dullnig (Tex. Civ. App.), 25 S. W. 465; Smith v. Lowther, 35 W. Va. 300; Rohrbough v. United States Exp. Co., 50 W. Va. 148; McKinnon v. Vollmar, 75 Wis. 82, 17 Am. St. Rep. 173, 6 L. R. A. 121; Kehl v. Beach, 107 Wis. 409, 50 L. R. A. 600. "One who has a bare power of authority from another to do any act, must execute it himself, and cannot delegate it to a stranger; for this being a trust or confidence reposed in him personally, it cannot be assigned to one whose integrity or ability may not be known to the principal, and who, if he were known, might not be selected by him for such a purpose. The authority is exclusively personal unless from the ex-

The principal may, of course, expressly authorize the appointment of subagents, the delegation of the authority or the substitution of another in the place of the agent named; and formal powers of attorney quite frequently expressly confer "full power of substitution and revocation," and in terms confirm whatever the attorney named "or his substitute" may lawfully do in the premises.[3]

The general rule is, also, as will be seen, subject to be modified by the peculiar circumstances and necessities of each particular case, from which or from the usage of trade, a power to delegate the authority may be inferred;[4] but in the absence of such express authority or such circumstances the general rule is fixed, imperative and inflexible, resting upon ample foundation and constantly enforced by the courts.

The same rule applies to a servant as to an agent. That is to say, a servant ordinarily has no implied power to get someone else to do the work or to employ co-servants, sub-servants, or assistant servants, on his master's account.[5]

The rule, however, is ordinarily one for the protection of the principal only, and if he is satisfied with the performance third persons cannot object.[6]

It must also be kept in mind that there is no delegation where the act is so done in the presence and by the direction or consent of a party as to constitute in law his own act.[7]

§ 307. Judgment and discretion not to be delegated.—The reasons for this rule are particularly applicable (though not confined) to those cases where the performance of the agency requires, upon the part of the agent, the exercise of special skill, judgment or dis-

press language used or from the fair presumptions growing out of the particular transaction a broader power was intended to be conferred." Bell, J., in Wright v. Boynton, *supra*.

[3] As in Perles v. Aycinena, 3 W. & S. (Pa.) 64; Hoag v. Graves, 81 Mich. 628; Lockwood v. Abdy, 14 Simons, 437. And many others.

[4] See post, § 314, *et seq.*

[5] Gwilliam v. Twist, [1895] 2 Q. B. 84; Engelhart v. Farrant, [1897] 1 Q. B. 240; Harris v. Fiat Motors, 22 Times L. Rep. 556; James v. Muehleback, 34 Mo. App. 512; Cooper v. Lowery, 4 Ga. App. 120; Board of Trade Building Co. v. Cralle, 109 Va. 246, 132 Am. St. R. 917, 22 L. R. A. (N. S.) 297; St. Louis, etc., Ry. Co. v. Jones, 96 Ark. 558, 37 L. R. A. (N. S.) 418; Hot Springs Railroad Co. v. Dial, 58 Ark. 318; Vassor v. Atlantic Coast Line, 142 N. C. 68, 7 L. R. A. (N. S.) 950, 9 Ann. Cas. 535; Church v. Chicago, etc., R. Co., 50 Minn. 218, 16 L. R. A. 861; Cooper v. Erie, etc., R. Co., 136 Ind. 366; Eaton v. Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 513. See also 3 Michigan Law Review, 198.

See also *post*, § 335. In cases of emergency, see *post*, § 320.

[6] See Peterson v. Christensen, 26 Minn. 377; Harralson v. Stein, 50 Ala. 347.

[7] See *ante*, § 208.

cretion. Such relations are obviously created because the principal places special confidence in the particular agent selected, and, there is abundant reason why the trust should not be transferred to another of whose fitness or capacity the principal may have no knowledge, without the latter's express consent.[8]

Thus where an agent had been entrusted with the general administration of the affairs of a trading company, but no power to substitute others in his place had been given him, it was held that no such power could be implied, because there was evidently a confidence reposed in him which the company might not be willing to repose in others.[9] And so where one was appointed general agent to conduct the sale of subscription books in a certain territory under circumstances showing that the principal "depended upon the experience, skill and energy, as well as the resources and facilities of the general agent," it was held that his powers and duties could not be assigned or delegated without the principal's consent.[10] For the same reasons the agent who has been given the important power to bind his principal by the execution of promissory notes,[11] or to settle disputed claims,[12] or to adjust losses by fire,[13] or to loan money [14] or receive or collect money [15] cannot delegate the power to a subagent.

[8] Emerson v. Providence Hat Co., 12 Mass. 237, 7 Am. Dec. 66; Paul v. Edwards, 1 Mo. 30; Lewis v. Ingersoll, 3 Abb. (N. Y.) App. Dec. 55; Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280; Commercial Bank v. Norton, 1 Hill (N. Y.), 501; Dorchester, etc., Bank v. New England Bank, 1 Cush. (Mass.) 177; Planters, etc., Bank v. First National Bank, 75 N. C. 534; Pendall v. Rench, 4 McLean (U. S. C. C.) 259; Titus v. Cairo, etc., R. Co., 46 N. J. L. 393; North American Trust Co. v. Chappell, 70 Ark. 507; Plummer v. Green, 49 Neb. 316; McConnell v. Mackin, 22 N. Y. App. Div. 537; Carroll v. Tucker, 2 N. Y. Misc. 397; Smith v. Lowther, 35 W. Va. 300; Tynan v. Dullnig (Tex. Civ. App.), 25 S. W. 465; Kohl v. Beach, 107 Wis. 409, 50 L. R. A. 600; Rohrbough v. U. S. Exp. Co., 50 W. Va. 148.

[9] Emerson v. Providence Hat Co., *supra*.

[10] Bancroft v. Scribner, 72 Fed. 988.

[11] Emerson v. Providence Hat Co., *supra;* Brewster v. Hobart, 15 Pick. (Mass.) 302.

[12] Fargo v. Cravens, 9 S. D. 646.

[13] Ruthven v. American Fire Ins. Co., 92 Iowa, 316.

[14] Kohl v. Beach, 107 Wis. 409, 50 L. R. A. 600.

[15] People v. Public Serv. Com., 143 N. Y. App. Div. 769; McConnell v. Mackin, 22 N. Y. App. Div. 537; Dingley v. McDonald, 124 Cal. 682; Lewis v. Ingersoll, 1 Keyes (N. Y.), 347; Yates v. Freckleton, 2 Doug. 623; though the authority may be so restricted as to amount to no more than a power to do a merely mechanical act, in which event the rule would not apply. Grinnell v. Buchanan, 1 Daly (N. Y.), 538; Fellows v. Northrup, 39 N. Y. 117; Dunlap v. De Murrieta & Co., 3 T. L. R. 166.

Same rule applies to an agent authorized to locate land (Smith v. Suvlett, 28 Tex. 163); and to an agent authorized to keep his principal's property insured and to make con-

§ 308. ——— A bailment of personal property to an agent with duty to deliver it,[16] or an authority to sell it[17] also creates a personal trust which cannot be delegated. And so does authority to sell real estate.[18] So where an agent had been authorized to sell real estate, but in his absence and without his knowledge, the land was sold by one falsely assuming to be a subagent, it was held that the sale was binding neither upon the principal nor the agent, as the principal was entitled to the judgment and discretion of the agent in making the sale.[19] For similar reasons, authority to lease real estate cannot be delegated.[20]

For similar reasons also, the important duties confided to the agent of an insurance company of passing upon risks, accepting applications, making contracts of insurance, cancelling or consenting to the surrender of policies and the like fall within the rule against delegation.[21] The agent of a casualty or surety company is within the same rule.[22]

Within the same principle, also, it is thought by some courts, is the case of the stockholder in a corporation who undertakes, through the form of a "voting trust," or otherwise, to surrender the discretionary power and duty resting upon him to vote for the best interests of the corporation.[23]

tracts of insurance, accept policies, etc. (New v. Germania Fire Ins. Co., 171 Ind. 33, 131 Am. St. Rep. 245).

[16] Murray v. Postal Tel. Co., 210 Mass. 188, 24 Ann. Cas. 1183, where a dressmaker delivered to a particular messenger of defendant in whom she had confidence, valuable gowns for delivery, and he without her knowledge or consent turned them over to another messenger to deliver.

[17] Hunt v. Douglass, 22 Vt. 128; Drum v. Harrison, 83 Ala. 384; Hodkinson v. McNeal Co., 161 Mo. App. 87.

[18] Floyd v. Mackey, 112 Ky. 646, 23 Ky. L. Rep. 2030; Bromley v. Aday, 70 Ark. 351; Williams v. Moore, 24 Tex. Civ. App. 402; Carroll v. Tucker, 2 N. Y. Misc. 397; Bonwell v. Howes, 15 Daly (N. Y.), 43; Bocock v. Pavey, 8 Ohio St. 270; Foss Investment Co. v. Ater, 49 Wash. 446; Craver v. House, 138 Mo. App. 251; Chouteau Land Co. v. Chrisman, 204 Mo. 371; Kilpatrick v. Wiley, 197 Mo. 123; Groscup v. Downey, 105 Md. 273; Lynn v. Burgoyne, 52 Ky. (13 B. Mon.) 400; Doggett v. Greene, 254 Ill. 134.

[19] Barret v. Rhem, 6 Bush (Ky.), 466.

[20] Fairchild v. King, 102 Cal. 320.

[21] But see the cases cited *post*, § 317.

Within the same rule is the agent to keep his principal's property insured in reliable companies. Ins. Co. of No. Am. v. Wis. Cent. Ry. Co., 134 Fed. 794.

[22] Cullinan v. Bowker, 180 N. Y. 93.

[23] See Shepaug Voting Trust Cases, 60 Conn. 553; Harvey v. Linville Improvement Co., 118 N. C. 693, 54 Am. St. R. 749, 32 L. R. A. 265; Bridgers v. First Nat. Bank, 152 N. C. 293; Morel v. Hoge, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 A. & E. Ann. Cas. 935; Warren v. Pim, 66 N. J. Eq. 353. Compare Smith v. San Francisco, etc., R. Co., 115 Cal. 584, 56

§ 309. Attorneys may not delegate personal undertaking.—The appointment of an attorney to argue or conduct a cause, compromise a dispute, or enforce a claim, creates a personal trust, and he can not entrust the performance of this duty to another attorney of his own selection, or let the case out on shares, or in any other wise delegate the performance, without the consent of his principal.[24]

This rule, however, does not demand that the attorney shall perform, in person, all of the merely mechanical or ministerial work involved in the case, and he may avail himself of as much assistance of that nature as occasion may require. As will be seen in a subsequent section, the performance of such duties through the agency of others falls under a well recognized exception to the general rule.[25]

§ 310. Arbitrators may not delegate their powers.—This rule also applies with special force to arbitrators. They are selected by parties who have placed particular confidence in their personal judgment, discretion and ability, and it would be a palpable injustice if they were to be permitted to delegate their responsibilities and powers to others.[26]

Am. St. R. 119, 35 L. R. A. 309; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24; Mobile, etc., R. Co. v. Nicholas, 98 Ala. 92; Brightman v. Bates, 175 Mass. 105; Carnegie Trust Co. v. Security L. Ins. Co., 111 Va. 1, 31 L. R. A. (N. S.) 1186; Boyer v. Nesbitt, 227 Pa. 398. There are many other cases on both sides.

[24] Johnson v. Cunningham, 1 Ala. 249; Eggleston v. Boardman, 37 Mich. 14; Crotty v. Eagle, 35 W. Va. 143; Hilton v. Crooker, 30 Neb. 707; National Bank v. Oldtown Bank, 112 Fed. 726; Sloan v. Williams, 138 Ill. 43, 12 L. R. A. 496; City of New York v. Dubois, 86 Fed. 889; Meaney v. Rosenberg, 32 N. Y. Misc. 96; Reese v. Resburgh, 54 N. Y. App. Div. 378; Lucas v. Rader, 29 Ind. App. 287; Sedgwick v. Bliss, 23 Neb. 617; Dickson v. Wright, 52 Miss. 585; Danley v. Crawl, 28 Ark. 95; King v. Pope, 28 Ala. 601; Ratcliff v. Baird, 14 Tex. 43; Johnston v. Baca, 13 New Mex. 338; Corson v. Lewis, 77 Neb. 446; Lacher v. Gordon, 127 App. Div. 140.

If he does so, the client may declare the contract at an end, and recover whatever he has given for the services. Hilton v. Crooker, *supra*. The client may, however, ratify it with full knowledge of the facts. Reese v. Resburgh, *supra*.

As will be seen in the chapter upon Attorneys the attorney has no implied power to employ assistant counsel at his clients' expense. See also Chicago & So. Traction Co. v. Flaherty, 222 Ill. 67; Emblem v. Bicksler, 34 Colo. 496; Lathrop v. Hallett, 20 Colo. App. 207.

An attorney has no implied power to delegate to another his authority to receive and collect for the benefit of his client the amount due upon a judgment recovered. Mo., etc., Ry. Co. v. Wright, 47 Tex. Civ. App. 458; Dickson v. Wright, *supra;* Hendry v. Benlisa, 37 Fla. 609, 34 L. R. A. 283.

[25] See *post*, § 315; Eggleston v. Boardman, *supra;* Covell v. Hart, 14 Hun (N. Y.), 252.

An attorney has authority to get another to appear for him in the cause, and such an appearance is conclusive upon the client. Reich v. Cochran, 105 App. Div. 542, 102 N. Y. Supp. 827, aff'd, no opinion, 139 App. Div. 931.

[26] Harley Co. v. Barnefield, 22 R. I. 267; Allen-Bradley Co. v. Anderson,

But it is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them, as may be necessary to enable them to come to correct conclusions, provided that the award is the result of their own judgment after obtaining such information.[27] They may also avail themselves of such mechanical or ministerial assistance as the nature of their duties may require.[28]

§ 311. Auctioneers, brokers and factors may not delegate.—As will be seen also when these various forms of agency are taken up, the same rule applies to auctioneers,[29] brokers [30] and factors,[31] who are forbidden to delegate without the principal's consent the powers confided to them not merely mechanical or ministerial.

§ 312. Executors, etc., may not delegate personal trusts.—This principle is, likewise, of frequent application to the case of persons upon whom the *law* has devolved discretionary or fiduciary powers, such as executors, administrators, guardians and public trustees. Such powers cannot be delegated without express authority.[32]

§ 313. Rule applies to public and private corporations and officers. The same rule applies to the powers and duties conferred upon municipal corporations and municipal officers. Purely administrative or ministerial powers may be delegated, but wherever judgment and dis-

etc., Co., 99 Ky. 311; Williamson v. North Pacific Lumber Co., 43 Or. 337; Blakeston v. Wilson, 14 Man. 271; Lingood v. Eade, 2 Atk. 501; Proctor v. Williams, 8 C. B. (N. S.) 386; Whitmore v. Smith, 5 H. & N. 824; Little v. Newton, 2 Scott N. R. 509.

Arbitrators have no inherent power to select an umpire unless they are authorized by the terms of the submission. Allen-Bradley Co. v. Anderson, etc., Co., *supra*.

[27] Harley Co. v. Barnefield, *supra;* Soulsby v. Hodgson, 3 Burr. 1474; Caledonian Ry. Co. v. Lockhart, 3 Macq. 808; Anderson v. Wallace, 3 Cl. & Fin. 26; Eads v. Williams, 4 DeGex, Mac. & Gor. 674.

[28] Thorp v. Cole, 2 Cr. M. & R. 367; Harvey v. Shelton, 7 Beav. 455; Moore v. Barnett, 17 Ind. 349.

[29] See *post*, Book V, Chapter on Auctioneers.

[30] See *post*, Book V, Chapter on Brokers.

[31] See *post*, Book V, Chapter on Factors.

[32] Berger v. Duff, 4 Johns. (N. Y.) Ch. 369; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Lyon v. Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Hicks v. Dorn, 42 N. Y. 51; St. Peter v. Denison, 58 N. Y. 421; Curtis v. Leavitt, 15 N. Y. 190; Merrill v. Farmers, etc., Co., 24 Hun (N. Y.), 300; Terrell v. McCown, 91 Tex. 231; Whitlock v. Washburn, 62 Hun (N. Y.), 369; Gates v. Dudgeon, 173 N. Y. 426, 93 Am. St. Rep. 608; The California, 1 Sawyer, 596; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236; Cheever v. Ellis, 134 Mich. 645; Williamson v. Robinson, 134 Iowa, 345; Levara v. McNeny, 5 Neb. (Unoff.) 318; Rice v. Conwill, 35 Tex. Civ. App. 341; Dyer v. Winston, 33 Tex. Civ. App. 412.

cretion are to be exercised,—where legislative powers are involved, where rates are to be fixed, policies determined, and the like—there the body or officer entrusted with the duty must exercise it; it cannot be delegated or farmed out.[83]

It also applies to the directors and officers of private corporations. For while the directors may, of course, employ all necessary agents, and may appoint committees to look after matters of administration, they may not delegate to others the general duty of management and control which has been confided to their judgment and discretion.

§ 314. Exceptions and modifications.—But the general rule above given of course gives way before an express power of delegation or substitution; and it is also subject, as has been stated, to certain exceptions and modifications growing out of the nature of the authority or the exigencies and necessities of the case, or based upon the custom and usage of trade in similar cases. Thus—

§ 315. I. Subagent may be employed to perform acts mechanical or ministerial merely.—Where in the execution of the authority an act is to be performed which is of a purely mechanical, ministerial or

[83] State v. Hauser, 63 Ind. 155; State v. Bell, 34 Ohio St. 194; Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105; Brooklyn v. Breslin, 57 N. Y. 591; Matthews v. Alexandria, 68 Mo. 115, 30 Am. Rep. 776; Maxwell v. Bay City Bridge Co., 41 Mich. 453; Clark v. Washington, 12 Wheat. (U. S.) 40, 6 L. Ed. 544; Thompson v. Schermerhorn, 6 N. Y. 92; Davis v. Read, 65 N. Y. 566; Supervisors v. Brush, 77 Ill. 59; Rogers Park Water Co. v. Fergus, 178 Ill. 571, affirmed 180 U. S. 624; Thomson v. Boonville, 61 Mo. 282; State v. Fiske, 9 R. I. 94; State v. Paterson, 34 N. J. L. 168; Hydes v. Joyes, 4 Bush. (Ky.) 464; Oakland v. Carpentier, 13 Cal. 540; Galindo v. Walter, 8 Cal. App. 234, 96 Pac. 505; *Ex parte*, Grey, 11 Cal. App. 125, 104 Pac. 476; Whyte v. Nashville, 2 Swan (Tenn.), 364; Lord v. Oconto, 47 Wis. 386; Lauenstein v. Fond du Lac, 28 Wis. 336; Gale v. Kalamazoo, 23 Mich. 344; Indianapolis v. Indianapolis Gas Co., 66 Ind. 396; Ruggles v. Collier, 43 Mo. 353; Meuser v. Risdon, 36 Cal. 239; Darling v. St. Paul, 19 Minn. 389; St. Louis v. Clemens, 43 Mo. 395, s. c. 52 Mo. 133; State v. Garibaldi, 44 La. Ann. 809; Blair v. Waco, 75 Fed. 800; People v. McWethy, 177 Ill. 334; Zanesville v. Zanesville Telephone & Tel. Co., 63 Ohio St. 442; McCrowell v. Bristol, 89 Va. 652; Knight v. Eureka, 123 Cal. 192; State v. Ocean Grove Camp Meeting Ass'n, 59 N. J. L. 110; Harcourt v. Common Council, 62 N. J. L. 158; Lyth v. Buffalo, 48 Hun (N. Y.), 175; Trenton v. Clayton, 50 Mo. App. 535; Edwards v. Kirkwood, 147 Mo. App. 599; Ramsey v. Field, 115 Mo. App. 620; Seibel-Suessdorf, etc., Co. v. Manufacturers' Ry. Co., 230 Mo. 59; Curran Co. v. Denver, 47 Colo. 221, 27 L. R. A. (N. S.) 544; Brummitt v. Ogden Water Works Co., 33 Utah, 285; Tilford v. Belknap, 126 Ky. 244, 11 L. R. A. (N. S.) 708; Bowling Green v. Gaines, 29 Ky. L. 1013, 96 S. W. 852; Biddeford v. Yates, 104 Me. 506, 15 Ann. Cas. 1091; Mayor of Baltimore v. Gahan, 104 Md. 145; State ex rel. Thurmond v. City of Shreveport, 124 La. 178; Allman v. City of Mobile, 162 Ala. 226.

executive nature, involving no elements of judgment, discretion or personal skill, the reason for the general rule does not apply, and the power to entrust the performance of it to a subagent may be implied.[34]

Thus an agent empowered to execute a promissory note,[35] or to bind his principal by an accommodation acceptance,[36] or to sign his name to a subscription agreement,[37] or to execute a deed,[38] having himself first determined upon the propriety of the act, may direct another to perform the mechanical act of writing the note or signing the acceptance, subscription or deed, and the act so performed will be binding upon the principal.

So an agent authorized to sell real estate, who exercises his own discretion as to the price and the terms, may employ a subagent to look up a purchaser,[39] or to point out the land to one contemplating a purchase.[40]

[34] Williams v. Woods, 16 Md. 220; Chouteau Land Co. v. Chrisman, 204 Mo. 371; Grinnell v. Buchanan, 1 Daly (N. Y.), 538; Eldridge v. Holway, 18 Ill. 445; Joor v. Sullivan, 5 La. Ann. 177; Grady v. American Cent. Ins. Co., 60 Mo. 116; Newell v. Smith, 49 Vt. 255; Lord v. Hall, 8 C. B. 627.

In Michael v. Crawford, — Tex. Civ. App. —, 150 S. W. 465, a deed of trust to secure notes provided that if the trustee named in the deed refused to act, any holder of the notes might appoint one. This contingency happened, and the holder appointed an agent who appointed a substitute trustee. The court thought that because the power was originally conferred upon *any* holder, who might be a wholly unknown person, it could not have been thought that any personal trust or confidence entered into the case, and that therefore the power might be delegated.

Where the act is a signing or writing for the agent in his presence and at his request, there is really no question of delegation, and the act is regarded as the personal act of the agent. Calhoon v. Buhre, 75 N. J. L. 439; Worsley v. Ayres, 144 Iowa, 676; White-Wilson-Drew Co. v. Egelhoff, 96 Ark. 105.

[35] Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280; Lord v. Hall, *supra;* Weaver v. Carnall, 35 Ark. 198, 37 Am. Rep. 22; White-Wilson-Drew Co. v. Egelhoff, 96 Ark. 105.

[36] Commercial Bank v. Norton, 1 Hill (N. Y.), 501.

[37] Norwich University v. Denny, 47 Vt. 13; or to an advertising contract, Calhoon v. Buhre, 75 N. J. L. 439.

[38] Smith v. Swan, 1 Tex. Civ. App. 115.

[39] Renwick v. Bancroft, 56 Iowa, 527 (in which the court thought that a subagent employed to sell land to a responsible buyer upon terms entirely set by the agent furnished was but the instrumentality through which the agent accomplished his service and therefore held that his appointment was proper and this contract which he negotiated binding upon his principal); or to sign the principal's name to a particular contract (Worsley v. Ayres, 144 Iowa, 676); or to collect rent and if payment was refused to demand possession (McCroskey v. Hamilton, 108 Ga. 640, 75 Am. St. R. 79).

[40] McKinnon v. Vollmar, 75 Wis. 82, 17 Am. St. Rep. 178, 6 L. R. A. 121 (in which the act of the agent's clerk when he was sent to point out the land to be sold, in showing

So, in a different field, a city council having power to adopt ordinances may adopt a code compiled by the city attorney. "The adoption, not the compilation, was the legislative act." [41]

§ 316. II. When the proper conduct of the business requires it.—It is obvious, too, that notwithstanding the general rule, there are many cases wherein from the very nature of the duty, or the circumstances under which it is to be performed, the employment of subagents is imperatively necessary, and the principal's interests will suffer if they are not so employed. In such cases, although the general rule might otherwise apply, an exception is suggested based upon the presumed assent of the principal, and therefore if he has not manifested a contrary intent, the power to employ the necessary subagents will be implied.[42] The authority of the agent is always construed to include the necessary and usual means to execute it properly.

Thus if a note be sent to a bank for collection, and for the protection of the principal it becomes necessary to have the note protested, the authority of the bank to employ the proper officer will be implied; [43] and so if a note or draft be sent to a bank or other agent,[44] to be collected at a distant point, the authority of the bank or other agent to employ a subagent at the place of collection, and to forward the note or draft to him there, would be presumed.[45]

So an agent employed to collect a demand by suit or to do any other act requiring the services of a lawyer, would have implied power to

wrong land to the purchaser was held the act of the principal upon the ground that the duty of showing the land was a merely ministerial act and therefore properly delegated).

[41] Western, etc., R. Co. v. Young, 83 Ga. 512; Garrett v. Janes, 65 Md. 260.

[42] DeBussche v. Alt, 8 Ch. Div. 286; Dorchester, etc., Bank v. New England Bank, 1 Cush. (Mass.) 177; Johnson v. Cunningham, 1 Ala. 249; Rossiter v. Trafalgar Life Assur. Ass'n, 27 Beavan, 377; Appleton Bank v. McGilvray, 4 Gray (Mass.), 518, 64 Am. Dec. 92; McCroskey v. Hamilton, 108 Ga. 640; Strong v. West, 110 Ga. 382; Luttrell v. Martin, 112 N. C. 593; Kuhnert v. Angell, 10 N. Dak. 59; Breck v. Meeker, 68 Neb. 99; McCants v. Wells, 4 S. C. 381; Canfield v. Chicago, etc., R. Co., 59 Mo. App. 354; Tennessee River Transp. Co. v. Kavanaugh, 101 Ala. 1; Rohrbough v. U. S. Express Co., 50 W. Va. 148, 88 Am. St. R. 849; The Guiding Star, 53 Fed. 936.

[43] Tiernan v. Commercial Bank, 7 How. (Miss.) 648, 40 Am. Dec. 83; Baldwin v. Bank of Louisiana, 1 La. Ann. 13, 45 Am. Dec. 72; Commercial Bank v. Martin, 1 La. Ann. 344, 45 Am. Dec. 87.

[44] Breck v. Meeker, 68 Neb. 99.

[45] Whether the bank or other agent really undertakes to act as an agent merely or rather as an independent contractor is a disputed question. See *post*, Book IV, Chap. II, where the cases are collected.

employ the necessary attorneys;[46] or if authorized to sell land[47] or goods,[48] to employ a necessary broker or auctioneer where this method was contemplated; or if authorized to charter a vessel, to employ a vessel broker to assist him in securing the charter.[49]

§ 317. ——— So an agent like the general manager of a mercantile business, or the district agent of an insurance company, given charge of a large territory or of an extensive business in a smaller territory and expected to accomplish results which could not reasonably be demanded of his individual and personal efforts, would ordinarily be deemed to have implied power to appoint such subagents and assistants as the contemplated results reasonably required.[50] The mechanical and ministerial parts would, of course, be delegable within the rule already considered; but even discretionary portions might also be delegable in such a case upon the ground of an implied authority.

[46] Commercial Bank v. Martin, *supra;* Buckland v. Conway, 16 Mass. 396; Davis v. Matthews, 8 S. Dak. 300.

In Strong v. West, 110 Ga. 382, it is said: "If the services of an attorney are necessary to execute the duties of a created agency, the person intrusted with those duties, if not himself an attorney, is invested with the power to procure the services of an attorney for his principal, and * * * the attorney so employed is the attorney of the principal and not of the agent."

[47] Lee v. Conrad, 140 Iowa, 16; Renwick v. Bancroft, 56 Iowa, 527 (in which it was held that so long as the agent himself fixed the terms of the contract he might employ a subagent to find a purchaser and to make the contract with the purchaser). May employ auctioneer. Union Garment Co. v. Newburgher, 124 La. 819. An agent to buy land would likewise have implied power to employ an attorney "to close the title." Egan v. De Jonge, 113 N. Y. Supp. 737.

[48] Strong v. Stewart, 9 Heisk. (Tenn.) 137; Harralson v. Stein, 50 Ala. 347. See also McCants v. Wells, 4 S. C. 381.

The rule of course covers the purchase of stocks. See Hoogewerff v. Flack, 101 Md. 371.

[49] Saveland v. Green, 40 Wis. 431.

[50] Bodine v. Exchange Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Arff v. Star F. Ins. Co., 125 N. Y. 57, 21 Am. St. R. 721, 10 L. R. A. 609; Deitz v. Ins. Co., 33 W. Va. 526, 25 Am. St. Rep. 908; Grady v. American Cent. Ins. Co., 60 Mo. 116; Insurance Co. v. Eshelman, 30 Ohio St. 647; Krumm v. Insurance Co., 40 Ohio St. 225; Swan v. Insurance Co., 96 Pa. 37; McGonigle v. Insurance Co., 168 Pa. 1; Insurance Co. v. Thornton, 130 Ala. 222, 55 L. R. A. 547, 89 Am. St. R. 30.

Authority of ordinary local insurance agent to delegate.—In Bodine v. Exchange Ins. Co., *supra*, it was said: "We know, according to the ordinary course of business that insurance agents frequently have clerks to assist them; and that they could not transact their business if obliged to attend to all the details in person, and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver

For similar reasons an agent whose employment involves the performance of duties at various places may be found to have implied power to employ assistants because of the physical impossibility of his performing in person.[51]

And, generally, an agent put in charge of a business or a department of a business which can regularly and properly be carried on only by the employment of assistants and subordinates, would, where no other arrangement is made, have implied power to appoint them.[52]

The same rules will apply to the appointment of servants as of agents.[53]

policies, to collect premiums and to take payments of premiums in cash or securities, and to give credit for premiums or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person." This rule has sometimes been cited as authority for a sort of general power in the ordinary insurance agent to employ clerks who would thereby be vested with all his powers, discretionary as well as mechanical. Such a view is believed to be both unsound and dangerous unless the insurance business is to be put upon a different footing from others. See Waldman v. Insurance Co., 91 Ala. 170, 24 Am. St. R. 883; Springfield F. & M. Ins. Co. v. De Jarnett, 111 Ala. 248; distinguished in Insurance Co. v. Thornton, 130 Ala. 222, 55 L. R. A. 547, 89 Am. St. R. 30; Ruthven v. American F. Ins. Co., 92 Iowa, 316. See § 1049 *et seq.* See also McClure v. Miss. Valley Ins. Co., 4 Mo. App. 148; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. R. 121 (here there was evidence of ratification.)

[51] The Guiding Star, 53 Fed. 936.

[52] Breck v. Meeker, 68 Neb. 99; Tennessee River Transp. Co. v. Kavanaugh, 101 Ala. 1; Luttrell v. Martin, 112 N. C. 593; Canfield v. Chicago, etc., R. Co., 59 Mo. App. 354; McCroskey v. Hamilton, 108 Ga. 640; Williams v. Moore, 24 Tex. Civ. App. 402; Ladonia Dry Goods Co. v. Conyers (Tex. Civ. App.), 58 S. W. 967; McConnell v. Mackin, 22 App. Div. 537. In the last case, wherein it was urged that an agency to collect and receive money is one of personal trust and confidence and therefore not to be delegated, the court said, "That rule is applicable to special authority and not to a general agency to take charge of and manage the business of the principal." See also Shepherd v. Milwaukee Gas L. Co., 11 Wis. 234; Louisville, etc., R. Co. v. Blair, 63 Tenn. (4 Baxt.) 407; Thompson v. Mills, 45 Tex. Civ. App. 642. So the directors of a business corporation may appoint an executive committee to attend to the corporate business in the intervals between the meetings of the directors. First Nat. Bank v. Com. Travel. Asso., 108 App. Div. 78, affirmed, 185 N. Y. 575.

[53] That servants may be employed when usual or necessary or within the range of the employing agent's power of management, see Wanstall v. Pooley, 6 Cl. & Fin. 910, note; Bucki v. Cone, 25 Fla. 1, 6 So. 160; Gleason v. Amsdell, 9 Daly (N. Y.), 393; Banks v. Southern Express Co., 73 S. Car. 211.

As to the number which may be employed, see Beaucage v. Mercer, 206 Mass. 492, 138 Am. St. R. 401. As to the liability of a master for

Whose agent the subagent is in these cases—that is whether the consent is to employ the subagent as the agent of the principal or of the agent, is considered in a later section.

§ 318. III. When justified by usage or course of trade.—Again, the employment of a subagent may be justified by the presumed assent of the principal to a known and established usage or course of dealing.[54] Parties contracting in reference to a subject-matter concerning which there is such a usage and who indicate no contrary purpose may well be presumed to have it in contemplation. *In contractis tacite insunt quae sunt moris et consuetudinis,* is a maxim of law.[55]

Thus where goods were entrusted by the plaintiff to a merchandise broker to sell, deliver and receive payment, and the broker deposited them in accordance with a usage with a commission merchant connected with an auctioneer, taking his note therefor, and some of the goods were afterward sold at a less price than the broker was authorized to sell them for, it was held that the principal was bound by such act of the broker and that he could not maintain trover against the commission merchant. Said the court: "Business to an immense amount has been transacted in this way, and the usage being established, it follows that when the plaintiff authorized his broker to sell, he authorized him to sell according to the usage; and when the defendants dealt with the broker, even if they had known that the goods were not his own, they had a right to consider him as invested with power to deal according to the usage." [56]

The power of a bank receiving a note for collection at another place, to forward the note to a bank at that place for payment, may also be derived from the same source, as may other powers referred to in the preceding section.[57] Usage, however, will not be permitted to contravene express instructions, and if the agent has been denied the

the negligence of persons employed by a servant to assist him see *post*, § 321; 3 Michigan Law Review, 198.

[54] Buckland v. Conway, 16 Mass. 396; Smith v. Sublett, 28 Tex. 163; Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400; Moon v. Guardians, 3 Bing. N. Cas. 814; Gray v. Murray, 3 Johns. (N. Y.) Ch. 167; Darling v. Stanwood, 14 Allen (Mass), 504; Johnson v. Cunningham, 1 Ala. 249; Breck v. Meeker, 68 Neb. 99; Rohrbough v. U. S. Exp. Co., 50 W. Va. 148, 88 Am. St. R. 849; De Bussche v. Alt, 8 Ch. Div. 286.

[55] See Ewell's Evans' Agency, 58.

[56] Lausatt v. Lippincott, 6 Serg. & R. (Penn.) 386, 9 Am. Dec. 440. See also Wallace v. Bradshaw, 6 Dana (Ky.), 383; Darling v. Stanwood, 14 Allen (Mass.), 504; Jackson v. Union Bank, 6 H. & J. (Md.) 146; Strong v. Stewart, 9 Heisk. (Tenn.) 137.

[57] Wilson v. Smith, 3 How. (U. S.) 763, 11 L. Ed. 820, where the court speaks of it as an authority fairly to be implied from the usual course of trade or the nature of the transaction.

power of delegation, usage can not confer it.[58] Nor can usage justify the agent in violating the fundamental duties which he owes to his principal or change the intrinsic character of the contract existing between them.[59]

Whose agent the subagent, so employed, is to be deemed to be, will be considered in a later section.

§ 319. IV. When originally contemplated.—And so, if the employment of a subagent was contemplated by the parties at the time of the creation of the agent's authority, or if it was then expected that subagents might or would be employed, this would be treated as at least implied authority for such employment.[60]

The fact that the employment of subagents was contemplated by the parties need not be shown by express proof. The nature of the service, the place at which it is to be performed, the distance between the place of appointment and the place of performance and similar circumstances may be taken into account. Thus where the principal and agent were both residents of California and the agency was to sell land in Texas the court said, "It is a fair presumption growing out of the exigencies of the transaction that it was contemplated that a purchaser should be obtained through a subagent." [61] So in another case in which an agent appointed to sell land of small value was a busy man of large affairs living at some distance from the location of the land, the court said that the principal "must have known that he could not personally act for her in such unimportant matters" and that therefore action through a subagent must have been contemplated.[62]

[58] Barksdale v. Brown, 1 Nott. & McC. (S. C.) 517, 9 Am. Dec. 720; Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467; Hall v. Storrs, 7 Wis. 253; Day v. Holmes, 103 Mass. 306; Parsons v. Martin, 11 Gray (Mass.), 112; Clark v Van Northwick, 1 Pick. (Mass.) 343; Leland v. Douglass, 1 Wend. (N. Y.) 490; Catlin v. Smith, 24 Vt. 85; Hutchings v. Ladd, 16 Mich. 493.

[59] Robinson v. Mollett, L. R. 7 H. L. 802; Blackburn v. Mason, 68 L. T. (N. S.) 510; Minnesota Cent. R. R. Co. v. Morgan, 52 Barb. (N. Y.) 217.

[60] Johnson v. Cunningham, 1 Ala. 249; Duluth Nat. Bank v. Fire Ins. Co., 85 Tenn. 76, 4 Am. St. Rep. 744; National Steamship Co. v. Sheehan, 122 N. Y. 461, 10 L. R. A. 782; De-Bussche v. Alt, 8 Ch. Div. 286.

[61] Eastland v. Maney, 36 Tex. Civ. App. 147.

[62] Wright v. Isaacks, 43 Tex. Civ. App. 223. So in Arkadelphia Lumber Co. v. Thornton, 83 Ark. 403, the court said, "The land being situated in Arkansas and Head, the agent, authorized to sell same, being in Texas, it may be fairly presumed that the owners in executing the power of attorney contemplated that W. B. Head would employ a subagent to find a purchaser, and to perform the other merely incidental and ministerial acts necessary to consummate the sale of the land if made to a purchaser in this state."

So where an agent in Connecticut was given for collection a note payable in Georgia and secured by a

The cases in which claims are to be collected at a distance and many others of a similar nature, already referred to in the preceding sections, might also be embraced within this principle.

As in the previous cases, the question of whose agent the subagent is to be deemed to be, is reserved for consideration in a following section.

§ 320. V. When necessity or sudden emergency justifies it.—So there may be cases in which supervening necessity or sudden emergency may justify the employment of subagents.[63] Thus, for example, if a railroad train in transit should suddenly be deprived of its fireman or brakeman, the authority of the conductor to employ someone else to fill the place until the necessity was past or the company could act would doubtless be sustained,[64] and so it would doubtless be where the conductor himself was incapacitated and he delegated to another servant or even to a competent stranger the control of the train until the exigency was past or the company could act. In England it is held that the power can not exist if the circumstances are such that the principal may be communicated with and his instructions procured. "The impossibility of communicating with the principal," said Smith, L. J., "is the foundation of the doctrine of an agent of necessity." [65]

trust deed to a Georgia trustee upon Georgia land it was held that it was fairly within the contemplation of the parties that a subagent in Georgia should be appointed. Davis v. King, 66 Conn. 465, 50 Am. St. R. 104.

But the reason for the rule does not exist and the rule does not therefore apply to a case in which the agent to sell land, although he does not live in the place where the land is, has been in the habit of visiting that place from time to time in connection with the management and leasing of the land. Williams v. Moore, 24 Tex. Civ. App. 402.

While in Cockran v. Irlam, 2 M. & Sel. 301, it is said that a broker to whom goods are consigned for sale "has no right without notice to turn his principal over to another of whom he knows nothing;" it was held in Bromley v. Coxwell, 2 Bos. & Pul. 438, that where A entrusts goods to B to sell them in India, with the understanding that what B could not sell he might return to A, but allowing B to keep what he could obtain above a certain sum and to sell them for what he could get if he could not get that sum; and B, not being able to sell them himself in India left them with an agent to be disposed of and to remit the proceeds to B in England; A cannot maintain trover against B for so doing. Chambre, J., one of the judges, said: "It seems therefore that the delivery to his agent was within the terms of the agreement."

[63] Gwilliam v. Twist, [1895] 2 Q. B. 84; Georgia Pac. R. Co. v. Propst, 85 Ala. 203; Sloan v. Central Iowa Ry. Co., 62 Iowa, 728; Fox v. Chicago, etc., Ry. Co., 86 Iowa, 368, 17 L. R. A. 289.

[64] So held in Georgia Pac. Co. v. Propst; Sloan v Central Iowa Ry. Co.; Fox v. Chicago, etc., Ry. Co., *supra*. Same effect: Louisville, etc., R. Co. v. Ginley, 100 Tenn. 472.

[65] In Gwilliam v. Twist, *supra*. See also Harris v. Fiat Motors, 22 Times L. R. 556.

This is a salutary principle, though not always recognized in the American cases.

§ 321. ——— **Assistants employed by servants.**—The doctrine of the emergency has also been resorted to in several instances to support the employment by a servant of some one to assist him in some sudden exigency arising during the performance of the service.[66] Thus in a case [67] in which the master was held responsible for the negligence of a bystander requested by the driver to assist him in repairing a cart which had broken down on the street, the court said: "We think that the act of the bystander must be regarded as the act of the driver. The cart was out of order and the driver was trying to fix it as he was bound to do. For that purpose he asked the bystander to assist him. And in doing so he used the assistance of the bystander as he would have used a tool or appliance which he had procured and which he must be regarded as having implied authority to procure under the circumstances. The fact that the tool or appliance was an intelligent human being does not affect the matter any more than the fact that another person held the reins did in Booth v. Mister.[68] The case is not one where the servant attempted to delegate his duty to another as in Gwilliam v. Twist;[69] but a case where the driver needed for a moment, in the performance of his duty in a sudden emergency, another hand, and found it in the assistance given at his request by a stranger, and what was done by the stranger was as if done by himself." [70]

The liability of the master in these cases is considered more fully in a later section.[71]

§ 322. **VI. Ratification of an unauthorized employment.**—And, finally, even though authority to employ subagents cannot be deduced by any of the methods already enumerated, it may be found that such an appointment has subsequently, with knowledge of the facts, been either expressly or impliedly ratified;[72] and here, as in other cases,

[66] See the cases discussed by the present writer (in 1905) in 3 Michigan Law Review, 198. See also the discussion *post*, Book IV, Chap. V.

[67] Hollidge v. Duncan, 199 Mass. 121.

[68] Booth v. Mister, 7 C. & P. 66 (not a case of emergency).

[69] Gwilliam v. Twist, [1895] 2 Q. B. 84. (Here there was held to be no emergency or necessity since the master was within reach.)

[70] The court cites Althorf v. Wolfe, 22 N. Y. 355; Campbell v. Trimble, 75 Tex. 270; Bucki v. Cone, 25 Fla. 1; Pennsylvania Co. v. Gallagher, 40 Ohio St. 637, 48 Am. Rep. 689; James v. Muehlebach, 34 Mo. App. 512; all of which are more fully considered later.

[71] See *post*, Book IV, Chap. V.

[72] Haluptzok v. Great Northern Ry. Co., 55 Minn. 446; Katzenstein v. Raleigh, etc., R. Co., 84 N. Car. 688;

such a ratification is equivalent to a prior authority. Knowledge of the facts[73] and voluntary action, however, are as essential here as elsewhere, and the principal by accepting what he was entitled to from the agent, in ignorance that a subagent had been employed, does not ratify his appointment.[74]

§ 323. Care required in making authorized appointment.—Where the employment of a subagent is authorized, the agent appointing him does not impliedly warrant that the person selected by him will be in all respects a fit and proper agent. The measure of his duty in that regard is to exercise reasonable care and skill to appoint a suitable person.[75]

§ 324. Re-delegation — Sub-delegation. — The same principles which will admit of delegation in any case may suffice to justify a re-delegation or sub-delegation. If, for example, a bill is confided to a London banker for collection or protest in Los Angeles, it may be quite within the expected or usual or necessary course that the London banker will confide the matter to his New York correspondent, who will send it to his Chicago correspondent, who will send it on to a San Francisco banker, who will confide it to his correspondent in Los Angeles, who may in turn employ a local notary to certify the protest.

Formal powers not infrequently expressly provide for substitution, with authority to the substitute to re-delegate.

§ 325. What the delegate may be.—It is not at all essential that the delegate shall be an agent in the strict sense. The rules heretofore referred to may apply equally where he is a servant, an independent contractor, a public service corporation, or a public officer. One to whom goods are confided for sale may require the services of a carrier, a porter, a watchman, as well as of a broker, factor or auctioneer. If it becomes necessary to transport the goods from one place to another, the question of who may sue the carrier for his default, for example, may involve the same considerations as though an auctioneer had been employed.

§ 326. Whose agent, etc., is the subagent.—Wherever a subagent, etc., has been lawfully employed, in pursuance of the foregoing rules,

Teucher v. Hiatt, 23 Iowa, 527, 92 Am. Dec. 440; Sedgwick v. Bliss, 23 Neb. 617; Dewing v. Hutton, 48 W. Va. 576; Bellinger v. Collins, 117 Iowa, 178; Sergeant v. Emlen, 141 Pa. 520. See also Terrell v. McCown, 91 Tex. 231.

[73] Winkleback v. National Exch. Bank, 155 Mo. App. 1.

[74] Rice v. Post, 78 Hun (N. Y.), 547, 61 N. Y. St. Rep. 229.

[75] Kuhnert v. Angell, 10 N. Dak. 59; Baldwin v. Bank, 1 La. Ann. 13, 46 Am. Dec. 72; Tiernan v. Commercial Bank, 7 How. (Miss.) 648, 40 Am. Dec. 83; Conwell v. Voorhees, 13 Ohio, 523, 42 Am. Dec. 206.

he undoubtedly acts so far with the consent of the principal that the latter is bound by the act of the subagent done within the authority confided to him and within the scope of the authority conferred upon the original agent. Whether, however, he is the agent, etc., of the principal in such sense that there is a privity of contract between them—so that, for example, the principal may or must look to the subagent for redress if the authority be improperly exercised, or that the subagent may or must look only to the principal for indemnity or compensation—is another matter. The principal may, of course, authorize the employment of the subagent on his account and as his agent and thus create privity of contract between them. But he may also do less. He may occupy a middle ground. He may clearly be willing to consent that his agent may perform the duty through a substitute employed at *the agent's* risk and expense, when he would not be willing, at *his own* risk and expense, to have such a substitute employed.

Thus a principal who has put goods for sale into the hands of an agent,—the agent having no power to delegate his authority and it being perhaps a wrongful act on the part of the agent to entrust them to any one else and a wrongful act on the part of the latter to exercise any control over them,—may be willing that his agent may employ a subagent so far that the entrusting of the goods by the agent to the subagent, or the exercise of control over them by the latter, or the latter's sale of them upon the terms prescribed to the agent, may all be acts done with the principal's consent, and yet not done by a person who stands in any contractual relations to the principal, or who can look to the principal for compensation, or for whose promises or conduct the principal would be responsible to third persons.

The familiar case of the independent contractor also furnishes an analogy. The employer here expects that the contractor will avail himself of agencies and means selected by himself and for which he is responsible; but the employer does not expect to answer for the defaults of the contractor's servants or to pay them for their services. The principal may consent to the employment of subagents on such terms as please him, and where he has consented only upon the express or implied condition that the subagent shall not be deemed his agent, that condition, as between the parties, must control.

§ 327. ——— This distinction has been made in many cases. Thus it is said by Senator Verplanck in a leading case [76] in New York:

[76] Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289.

"There is a wide difference made as well by positive law as by the reason of the thing itself between a contract or undertaking *to do* a thing, and the delegation of an agent or attorney *to procure the doing* of the same thing—between a contract for building a house, for example, and the appointment of an overseer or superintendent, authorized and undertaking to act for the principal in having the house built. The contractor is bound to answer for any negligence or default in the performance of his contract, although such negligence or default be not his own, but that of some sub-contractor or under workman. Not so the mere representative agent who discharges his whole duty if he acts with good faith and ordinary diligence in the selection of his materials, the forming of his contracts and the choice of his workmen."

§ 328. ——— The same distinction is also stated in much the same way by Mr. Justice Blatchford in the supreme court of the United States. "The distinction," he says, "between the liability of one who contracts to do a thing and that of one who merely receives a delegation of authority to act for another is a fundamental one. If the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant under-contractors or subagents when defaults occur injurious to his interest. * * * The nature of the contract is the test. If the contract be only for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But when the contract looks mainly to the thing to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used." [77]

§ 329. ——— So where the question was as to the liability of a factor for the defaults of another to whom he had sent the goods for sale, the latter [the defendant] contended that if plaintiffs [the principals] told him to "do with the goods as with his own," or if "the employment of a subagent was necessary, and that fact was known to plaintiffs," then, in either event, defendant had a right to send the goods to a factor of good credit, to whom and not to the defendant, plaintiffs should look for their proper disposition. But the court said, "We do not think that if the jury had found both of these facts in favor of defendant it necessarily followed that he would not be liable

[77] Exchange National Bank v. Third National Bank, 112 U. S. 276, 28 L. Ed. 722.

for the default of the person so selected. The inquiry still remained, was this person selected as the servant of the agent or factor, or did he become the agent of the principal? It by no means follows, where produce, for instance, is intrusted to a commission merchant in Dubuque, and sent forward by him to his correspondent or agent at Chicago or St. Louis, that a privity of contract exists between such correspondent and principal, to the extent that the original factor is released and the subagent only is liable. Nor does it make any difference that the principal or consignor knows that it must and will be sent forward to find a market. He has a right to, and is presumed to repose confidence in, the financial ability and business capacity of the person so employed, and if such factor employs other persons, he does so upon his own responsibility; and, having greater facilities for informing himself and extending his business relations, upon him and not upon the principal should fall the loss of any negligence or default. If, however, another person has been substituted who, with the knowledge and approbation of the principal, takes the place of the original factor, or if such substitution is necessary from the very nature of the business, and this fact is known to the principal, the liability of the substitute may be direct to the principal, depending upon questions of good faith and the like on the part of the factor in selecting the substitute." [78]

§ 330. Is there privity between principal and subagent.—The question whether the subagent has been brought into privity with the principal and thus made the principal's agent is one not always easy of determination.[79] The statement is indeed found in many cases that wherever the principal has consented to the appointment of a subagent privity is thereby created between them; but it is obvious that that cannot be true as a universal rule. As has already been pointed out, the principal may consent to the appointment of a subagent as his agent or as the agent's agent. It may be urged that the agent does not need the consent of the principal to the appointment of the subagent as the agent's agent, but however true that may be as to the

[78] Loomis v. Simpson, 18 Iowa, 532. Where an English principal employed an agent to send goods to the Amsterdam market and there to dispose of them and it was acknowledged that the employment of some subagent was in the contemplation of the parties, but yet that the principal dealt only with the agent and relied upon him, it was held that the subagent could not claim commissions from the principal directly. Schmaling v. Thomlinson, 6 Taunton, 147.

[79] See an interesting article on the question so far as it relates to Dutch-South African law in 26 South African Law Journal, 517.

agent's affairs it is, as has been pointed out, not necessarily true as to the principal's affairs. Without the principal's consent many acts of the subagent in dealing with the principal's property would simply amount to a conversion.

It being thus true that the principal may consent to the appointment of a subagent as his agent or as the agent's agent, it becomes material to determine which form of consent has been given in a particular case. The consent may be expressly given and show its extent by its own terms; but in the ordinary case it is not expressly given, and its extent must be determined from the facts and circumstances of the case. In order to justify the inference of an employment as the principal's agent, the circumstances must be such as to reasonably warrant the conclusion that the principal has taken the subagent as his agent, and thereby, ordinarily, becoming liable for his compensation, assuming responsibility for his conduct, accepting the subagent's responsibility to him, and releasing the original agent from such responsibility.

Whether the principal has done so or not is ordinarily a question of fact, to be determined by the jury, unless the inference is so clear as to justify the court in deciding what it is.

§ 331. ——— The form in which the question most frequently presents itself is in determining the liability of a bank for the defaults of its correspondent banks in the process of collecting checks, notes and the like delivered to it for collection. Upon this question the authorities, as will be seen, are hopelessly in conflict—not, however, as to the rule of liability when the nature of the undertaking is determined but as to the proper construction of the facts in deciding upon the nature of the undertaking.[80]

[80] See *post*, Book IV, Chap. II, where the question is fully considered. See also Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722; Smith v. National Bank, 191 Fed. 226; Mackersy v. Ramsays, 9 Cl. & Fin. 818; Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Simpson v. Waldby, 63 Mich. 439; Bank v. Butler, 41 Ohio St. 519, 52 Am. Rep. 94; Titus v. Bank, 35 N. J. L. 588; Power v. First Nat. Bank, 6 Mont. 252; Streissguth v. Nat. Bank, 43 Minn. 50, 19 Am. St. R. 213, 7 L. R. A. 363; Campbell v. London, etc., Bank, 1 Roscoe (So. Afr.), 419. Compare Fabens v. Mercantile Bank, 23 Pick. 330, 34 Am. Dec. 59; Lawrence v. Stonington Bank, 6 Conn. 521; Jackson v. Union Bank, 6 H. & J. (Md.) 146; Aetna Ins. Co. v. Alton Bank, 25 Ill. 243; Stacy v. Dane County Bank, 12 Wis. 629; Guelick v. Nat. State Bank, 56 Iowa, 434, 41 Am. Rep. 110; Third Nat. Bank v. Vicksburg Bank, 61 Miss. 112, 48 Am. Rep. 78; Daly v. Bank, 56 Mo. 94, 17 Am. Rep. 663; Landa v. Traders' Bank, 118 Mo. App. 356; Bank of Louisville v. First Nat. Bank, 8 Baxt. (Tenn.) 101, 35 Am. Rep. 691; Merchants' Nat. Bank v.

§ 332. Effect of employment—Subagent is principal's agent when appointment as such authorized.—It is not the purpose here to go minutely into the mutual rights and obligations of the principal, agent, and subagent. This subject is reserved for subsequent consideration as each of the various relations shall be taken up. But—

In general.—If, under the circumstances, it appears that the agent employed the subagent *for* his principal, and by his authority, expressed or implied, then the subagent is the agent of the principal; his acts and contracts within the scope of the authority of the original agent and lawfully delegated to him are binding upon his principal.[81] Notice to him is notice to his principal as in the case of other agents.[82]

Goodman, 109 Pa. 422, 58 Am. Rep. 728; Hyde v. Planters' Bank, 17 La. 560; Irwin v. Reeves Pulley Co., 20 Ind. App. 101. This list does not purport to be exhaustive.

[81] Thus where the appointment of a subagent to collect a mortgage was held to be within the implied power of the agent, payment of the mortgage debt to the subagent was payment to his principal. Breck v. Meeker, 68 Neb. 99.

Payment to a subagent appointed with the authority of the principal under the rule stated is payment to the principal. Hoag v. Graves, 81 Mich. 628.

So where it was held that the general manager of a transportation company had implied power to appoint a local agent, the transportation company was held bound by a contract made in the course of his employment by such a local agent on behalf of the company. Tennessee R. Trans. Co. v. Kavanaugh, 101 Ala. 1.

Where the appointment of a purchasing agent is within the implied power of a general manager, the principal is liable for the price of goods properly bought by such a purchasing agent. Luttrell v. Martin, 112 N. C. 593.

Where an agent to charter a boat upon a certain condition with the knowledge and consent of the principal employed a vessel broker that vessel broker was held to be the agent of the principal and the principal bound by his agreement unconditionally to charter the boat. Saveland v. Green, 40 Wis. 431.

Thus where an agent authorized to look at certain pieces of land and to determine what was best to be done with the land and if he saw fit to sell upon such terms as he should think wise, viewed the land and investigated its condition, a contract made by a subagent authorized by the agent to sell upon terms absolutely set by the agent was held specifically enforceable against the principals. Renwick v. Bancroft, 56 Iowa, 527.

[82] See *Notice to Agent;* Merritt v. Huber, 137 Iowa, 135; Bates v. American Mtg. Co., 37 S. C. 88, 21 L. R. A. 340; Carpenter v. German American Insurance Co., 135 N. Y. 298; Bergeron v. Pamlico Ins. & B. Co., 111 N. C. 45; Phoenix Ins. Co. v. Ward, 7 Tex. Civ. App. 18; Goode v. Georgia Home Ins. Co., 92 Va. 392, 53 Am. St. R. 817, 30 L. R. A. 842.

He may look to the principal for his compensation,[83] reimbursement [84] or indemnity, as in the case of other agents. He owes to his principal the same duty of loyalty and fair dealing as other agents.[85] He must account to the principal, if he be called upon [86] and is directly responsible to the principal for his conduct; and if damage results from the conduct of such subagent, the agent is only responsible to his principal in case he has not exercised due care in the selection of the subagent.[87]

[83] Thus a lawyer who was employed by a bank to which a note secured by a mortgage had been sent for collection, and had rendered services by which the mortgaged property was applied to the satisfaction of the debt was allowed to recover compensation against the owner of the note. Strong v. West, 110 Ga. 882. To the same effect are Davis v. Matthews, 8 S. D. 300; Hornbeck v. Gilmer, 110 La. 500.

So where one of two joint owners of a farm authorized the other one who was in possession and management to sell the farm, it was held within the power of the one authorized to sell to employ a real estate broker, and to bind them both by an agreement to pay commissions to such a broker. Lee v. Conrad, 140 Iowa, 16.

[84] So where a note had been put by an agent to collect in a bank for collection and the bank with the mistaken idea that the amount of the note had been paid, paid the amount of it to the agent, the principal was not allowed, in a suit against him by the bank to recover the money after the agent had paid it over, to object that there was no privity between them. It was held that they were not strangers to one another. Appleton Bank v. McGilvray, 70 Mass. (4 Gray) 518, 64 Am. Dec. 92.

[85] Thus the subagent may not sell to himself or make secret profits and if he does he will be liable to the principal. DeBussche v. Alt, 8 Chan. Div. 286; Powell v. Jones, C. A. (1905) 1 K. B. 11.

[86] Commercial Bank v. Jones, 18 Tex. 811; Wilson v. Smith, 44 U. S. (3 How.) 768, 11 L. Ed. 820. See also Miller v. Farmers', etc., Bank, 30 Md. 392.

[87] Where it was understood that a steamship agent was to have subagents, and the agent distributed tickets among them, he was not liable in replevin for the tickets in the hands of subagents after the termination of his agency, as the subagents were also agents of the company. National Steamship Co. v. Sheahan, 122 N. Y. 461, 10 L. R. A. 782.

So where a bank had a note for collection and placed it in the hands of a notary chosen with reasonable diligence, to demand payment and if necessary protest the note, it was held that the bank was not liable for the notary's failure to do his duty. Tiernan v. Commercial Bank of Natchez, 7 Howard (Miss.), 648, 40 Am. Dec. 83. To the same effect: Baldwin v. Bank of Louisiana, 1 La. Ann. 13, 45 Am. Dec. 72; Warren Bank v. Suffolk Bank, 64 Mass. (10 Cush.) 582.

So where an agent to collect a note was directed to hire an attorney to collect the note by suit, and the owner of the note claimed that the attorney, who was the one to whom the agent sent its own business and who was thought therefore to have been chosen with reasonable care, had unreasonably delayed in prosecuting the suit to judgment, it was held that if that were the fact the agent would not be liable for the lawyer's omission to the owner of the note. Commercial Bank v. Martin, 1 La. Ann. 344, 45 Am. Dec. 87.

For the torts of such subagent to third persons the agent would not be liable merely by virtue of his relation, but the principal would be liable as for the torts of any agent.[88]

§ 333. ——— **But he is agent's agent in other cases.**—But if the agent, having undertaken to transact the business of his principal, employs a subagent on his own account to assist him in what he has undertaken to do, even though he does so with the *consent* of the princi-

So where it was held to be within the implied power of an agent to collect a note secured by a foreign mortgage to employ a subagent, it was held that the agent was not liable in a suit by the principal for the conversion of the note, for the act of the subagent in surrendering the note and accepting a renewal vote. Davis v. King, 66 Conn. 465, 50 Am. St. R. 104.

So where with at least the knowledge and approval of the railway company a station agent had a cashier and a transfer agent, and the station agent's own time was filled with other duties it was held that the station agent and his sureties were not liable to the railway company for the default of one or both of the subagents. Louisville, etc., R. R. Co. v. Blair, 63 Tenn. 407.

So where one employed a commission merchant to buy cotton in a foreign market, and the commission merchant had implied authority by virtue of a known custom of the trade to employ a broker in that market, the principal could not have of the commission merchant damages for injury consequent upon the broker's negligence in selecting the cotton and in preparing it for shipment, where the broker was one selected by the commission merchant with usual and reasonable care. Darling v. Stanwood, 96 Mass. (14 Allen) 504.

So where a commission merchant to ship cotton used "reasonable skill and diligence" in the choice of a vessel he was held not responsible to the owner of the cotton for the negligence of the master. McCants v. Wells, 4 S. C. 381.

So where a real estate agent authorized to employ a workman to make repairs used due care in selecting him, the agent was not liable to his principal for the workman's negligence. Morris v. Warlick, 118 Ga. 421.

[88] Where the general manager and the train despatcher properly employed a watchman to keep strikers from the right of way of a railway and the watchman in the course of his employment made an improper assault upon the plaintiff, it was held that the watchman and the railway company were liable to the plaintiff but that the general manager and the train despatcher were not. Canfield v. C. R. I. & P. Ry. Co., 59 Mo. App. 354.

So where the owner of land had directed that his real estate agent have a fence put upon the land and the agent used due care in the selection of a workman, it was held in a suit against the agent for injuries sustained by the plaintiff's horse alleged to be due to negligent construction of the fence, that the agent was not liable, and it was said that the workman and the owner would be liable. Kuhnert v. Angell, 10 N. D. 59, 88 Am. St. R. 675.

Where the agent, *e. g.* a factor brings suit on the contract, he is then affected so far as the defendant is concerned by any acts of his subagent which would constitute a defence against any principal. Harralson v. Stein, 50 Ala. 347.

pal he does so at his own risk, and there is no privity between such subagent and the principal. The subagent is, therefore, the agent of the agent only. His acts and contracts would bind the principal only so far as they could be deemed to be the authorized acts of the original agent.[89] Notice to or knowledge in him would not be imputed to the principal.[90] His statements or admissions except in so far as they could be deemed to be the statements or admissions of the agent would not be binding upon the principal.[91] He could not look to the principal for his compensation.[92] The principal would have no claim against him for accounting[93] which he would not have against any

[89] National Bank v. Old Town Bank, 112 Fed. 726; Winkleback v. National Exchange Bank, 155 Mo. App. 1.

Payment to the agent of the agent is not payment to the principal unless it is paid over by the subagent to the agent. Chouteau Land Co. v. Chrisman, 204 Mo. 371.

Sale by unauthorized subagent does not bind principal. Hodkinson v. McNeal Mach. Co., 161 Mo. App. 87.

[90] Waldman v. Ins. Co., 91 Ala. 170, 24 Am. St. R. 883; Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392.

[91] Where without express or implied authority an agent for his own convenience employs a clerk, the principal is not bound by the acts or statements of such clerk. Springfield, etc., Ins. Co. v. De Jarnett, 111 Ala. 248.

[92] In such a case he must look to the agent only. Houston Cotton Oil Mill & Mfg. Co. v. Bibby, 43 Tex. Civ. App. 100. See also Triplett v. Jackson, 130 Iowa, 408.

In such a case the rights of a subagent to commissions against the principal would in any case be limited by the contract which the agent has made with the principal. Brown v. Haigh, 113 La. 563.

Where the contract between the agent and the subagent provides that the subagent is to look to the agent for his compensation and the contract between the agent and the principal expressly provides that the principal shall not be responsible for the compensation of subagents, the subagent can acquire no claim against the principal for compensation at a time or under circumstances when the principal would not be liable to the agent. Union Casualty Co. v. Gray, 114 Fed. 422.

An agent authorized merely to solicit and take orders within the territory assigned to him, and to send them to the company, and who "could delegate his authority only to the extent of employing his own salesmen," cannot bind his principal by a contract to pay a salesman so employed for his services. National Cash Register Co. v. Hagan, 37 Tex. Civ. App. 281.

Where it was acknowledged that the principal must have contemplated the employment of some subagent to handle goods at a foreign market, but where the court thought that the circumstances were such that the principal looked fully and wholly to the agent and to him alone, it was held that the subagent could maintain no claim for commission against the principal. Schmaling v. Thomlinson, 6 Taunton, 147.

[93] New Zealand Land Co. v. Watson, 7 Q. B. Div. 374; Lockwood v. Abdy, 14 Simons, 437; Att'y General v. Earl of Chesterfield, 18 Beavan, 596; Mawr v. Pearson, 28 Beavan, 196. See also Pinto v. Santos, 1 Marsh. 132; Robbins v. Fennell, 11 Q. B. 248. Where a lawyer authorized to collect a debt due to a client left his business in the hands of a

stranger. He would not be liable to the principal for negligence,[94] except where any stranger would be, but his liability would be to the agent only,[95] while the agent would be responsible to the principal for the manner in which the business had been done, whether by himself, or his servant or his agent.[96]

As intimated above, even though no privity exists between the principal and the subagent, yet, if the subagent were employed by the agent

clerk, who received and receipted for the money due the client, it was held in a suit by the client against the clerk that the clerk's duty to account was to the lawyer only and that the client could have no action against him. Stephens v. Badcock, 3 B. & Adol. 354.

Where there was a bill for a discovery and for an accounting, it was held that a man who made a defense that his only concern with the affair was as agent of the agent, he was properly a witness and not an accounting party. Cartwright v. Hately, 1 Vesey Jr. 292.

Where one part owner of a ship was entrusted with the management of the ship and employed to collect rents one who acted and professed to act as the agent of the managing owner and who accounted to such owner, the other part owners could not maintain a suit against the subagent for money which he had collected on the ship's account. Sims v. Britten, 1 N. & M. 594.

Where an agent who was employed to secure a loan employed a subagent who without the knowledge of either the agent or the principal received a commission from the lender as well, it was held that he was liable to account therefor to the principal. The court thought there was evidence to establish privity of contract between the principal and the subagent but it held that the subagent with or without privity of contract stood under a fiduciary obligation to the people for whose benefit he knew he was being employed not to receive compensation from the other side. Powell v. Jones (1905), 1 K. B. 11 (C. A.).

[94] That is, for any resulting from the relation.

[95] Subagent liable to agent for negligence. Pownall v. Bair, 78 Pa. 403.

[96] Cowley v. Fabien, 204 N. Y. 566. Where an agent to buy stock with the consent of his principal appoints a subagent to make the actual purchase, the agent still owes to his principal the duty to get the stock from the subagent or to see that it is delivered to the principal. See Hoogewerff v. Flack, 101 Md. 371.

So where an agent without authority to appoint a subagent for his own convenience employed one to go out and make offers for the sale of lands which the agent was employed to sell, the agent was liable to his principal for fraudulent acts of the subagent by which the principal was damaged. Barnard v. Coffin, 141 Mass. 37, 55 Am. Rep. 443.

Even though the principal consented to the appointment of the subagent, the agent would be responsible to the principal for his failure to properly instruct the subagent or to communicate to him the limitations placed by the principal upon the authority of both. Strong v. Stewart, 56 Tenn. (9 Heiskell) 137; Barnard v. Coffin, *supra*.

Where an agent to sell goods without authority or custom of the trade to appoint subagents turned over the goods to another to sell, his act constitutes a conversion for which he is liable to his principal. Campbell v. Reeves, 3 Head (Tenn.), 226.

as the latter's agent with the consent of the principal, the acts and contracts of the subagent done for the agent and in his name within the scope of the agent's authority and within the field in which the principal has consented that a subagent may be employed, would bind the principal as the agent's acts.[97] But where the subagent is appointed without any consent of the principal either express or implied, his acts can only be binding upon the principal where they can be regarded as the acts of the agent done through a mechanical or ministerial agency.[98]

II.

OF AUTHORITY OF AN AGENT TO EMPLOY AGENTS, SERVANTS AND OTHERS FOR HIS PRINCIPAL.

§ 334. Agents generally have no such authority.—The ordinary agent, employed to do other acts, has usually no authority whatever to bind his principal by the employment of other agents, servants or contractors for him. For obvious reasons, this is a matter which the principal will ordinarily do in person or through an agent appointed for that purpose.

§ 335. Servants have usually no such authority.—The ordinary servant, also, has usually no authority to employ other servants, or agents or contractors for his principal. The test of the existence of the relation, as has been seen, is that the servant is not employed to create contractual relations between his master and third persons. How far a person, employed by a servant to assist him, can impose

[97] Thus in Lingenfelter v. Phoenix Ins. Co., 19 Mo. App. 252, it is said, "There is no occasion for the application or discussion of the maxim, *delegatus non potest delegare;* for it may be conceded that Hubert had no power to delegate his agency to another or to sublet it. But he may employ clerks and subagents, whose acts if done in his name and recognized by him, either specially or according to his usual method of dealing with them, will be regarded as his acts, and as such binding on the principal." This language is quoted and approved in Rohrbough v. Express Co., 50 W. Va. 148, 88 Am. St. R. 849.

[98] In Hope v. Dixon, 22 Grant's Ch. (Ont.) 439, it is held that a contract of sale made by the clerk of the real estate agent in the name of the agent but without his knowledge or consent was not binding on the principal. The statement in Fry on Specific Performance (4th Ed. § 531) that "the clerks of agents are not agents for the principal unless the principal has assented to their acting as such" was cited and relied upon.

liability upon the master for such person's negligence, is a question which will be found fully treated in a later chapter.[99]

§ 336. Independent contractors have usually no such authority.—The independent contractor, also, has usually no authority to employ agents, servants or other contractors for his employer. It is usually of the very essence of this relation, as has been seen, that the independent contractor is to accomplish the results stipulated for, by the employment of his own agents, servants and employees, and that the employer shall not be liable for the negligence or defaults of either the independent contractor himself or of his servants, agents or employees.

§ 337. Authority to appoint may be expressly conferred.—The authority to appoint or employ agents, servants, contractors, and the like may, of course, be expressly conferred; and the authority conferred may be general or special. Persons so employed, in accordance with the authority, become the agents, servants or employees of the principal and when so employed the same rules apply to the relation as though they had been employed by the principal in person.[1]

How an authority to employ, when conferred, is to be construed, and what can be done under it, are questions which will be found fully considered in a later chapter, upon the construction of authorities, in dealing with the construction of an authority to employ.

§ 338. Authority to employ may arise by implication.—The authority to employ agents, servants and others may arise by implication. Thus the chief executive of a corporation may, by virtue of his position, have by implication the authority to employ all the agents, servants and other employees whom the proper conduct of the business confided to his charge may reasonably require. The general manager or general superintendent of a business, corporate or otherwise, may

[99] Servant ordinarily no authority to employ (St. Louis, etc., R. Co. v. Jones, 96 Ark. 558, 37 L. R. A. (N. S.) 418; Eaton v. Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Cooper v. Lake Erie, etc., R. Co., 136 Ind. 366); unless there be some emergency (Georgia Pac. R. Co. v. Propst, 85 Ala. 203; Sloan v. Central Iowa Ry. Co., 62 Iowa, 728; Fox v. Chicago, etc., Ry. Co., 86 Iowa, 368, 17 L. R. A. 289).

Liability of employer for negligence of a stranger assisting servant is discussed in Book IV, Ch. V.

[1] Where an agent is sent out to do work requiring assistants, and his authority real or apparent is to employ only so many as are necessary the unnecessary men would not be the principal's servants; but if he is authorized to hire as many as he thinks necessary or as many as he pleases, all the men employed will be the principal's servants, though the agent employed an unnecessary number. Beaucage v. Mercer, 206 Mass. 492, 138 Am. St. Rep. 401.

have a similar authority, and some discussion of this question will be found in a later chapter when dealing with the implied authority of a manager of business.

It may also arise in particular instances, as in the case of a collection agent who may have implied authority to employ attorneys, and the like,—a matter hereafter to be considered.

It may also arise from considerations such as those which are considered in the preceding subdivision on Delegation. Thus the necessary and proper conduct of the business,[2] the custom or course of trade, an original tacit understanding, the subsequent acquiescence,[3] and the like, may, as mere inference of fact, be found sufficient to justify it. Many of the illustrations and citations there given are equally applicable here.

§ 339. Sudden emergency or special necessity may justify it.—So, also, as seen in the preceding subdivision on Delegation, there may be cases in which a sudden emergency or some supervening necessity may justify, not simply delegation, but the employment of some one to perform service on the part of the principal. The illustrations and citations given there are equally applicable here, and need not be repeated. What is there said about the narrow range of this authority is also equally applicable here.

§ 340. ——— Authority arising from emergency or necessity a narrow one—Ceases when the emergency or necessity ceases.—As has been well pointed out in a leading English case,[4] "An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present."

So, also, the authority so derived must cease when the emergency ceases to which it owes its origin. No authority to act, based upon an emergency, can arise after the emergency itself has ended and things have resumed their ordinary course.[5]

[2] Banks v. Southern Express Co., 73 S. Car. 211 (where the company was held liable for the negligence of a man driving its wagon who had been employed by the company's local agent) was put upon the ground that the proper performance of the business required and justified it.

[3] See Haluptzok v. Great Northern Ry. Co., 55 Minn. 446, 26 L. R. A. 739 (where an inference of authority was drawn from acquiescence and retention); Katzenstein v. Raleigh R. Co., 84 N. Car. 688 (where for more than two years the general superintendent knew of the employment and made no objection).

[4] Bank of New South Wales v. Owston, 4 App. Cas. 270.

[5] Bank of New South Wales v. Owston, *supra*.

§ 341. ——— Employment of physicians and surgeons in emergencies.—Upon this ground of emergency, is usually placed the power, not entirely easy to support, held by some courts to reside in subordinate administrative agents or servants of railroad companies, such as station agents, yard masters, conductors, and the like, to employ, on the company's account, physicians, surgeons or nurses to care for injured employees or, perhaps, passengers of the road, when there is no higher authority upon the ground and immediate action seems necessary.[6] (The power of the general manager or the general superintendent or other similar officers to authorize or ratify the employment in such cases is usually regarded as one of the attributes of management and is discussed in a later section.[7]) The same power is

[6] Terre Haute & Indianapolis R. Co. v. McMurray, 98 Ind. 358, 49 Am. R. 752, in which was sustained the conductor's employment upon the railroad's credit of a physician to give immediate care to a brakeman injured in an accident, where there was necessity for immediate care and the conductor was the highest agent of the company on the ground or within practicable communication. Louisville, etc., Ry. Co. v. Smith, 121 Ind. 353, 6 L. R. A. 320, in which it was held that although in a case of emergency a conductor who was the highest agent on the ground might employ upon the railroad's credit necessary medical attention for a brakeman injured in the line of his duty, still he could not bind the company to pay for an additional physician. Arkansas, etc., R. Co. v. Loughridge, 65 Ark. 300, and Toledo, etc., R. Co. v. Mylott, 6 Ind. App. 438, are cases to the same effect and upon substantially the same state of facts.

Evansville, etc., R. Co. v. Freeland, 4 Ind. App. 207, in which a physician was allowed to recover for services in caring for an employee of the defendant railroads who was injured in an accident to a construction train upon which he was being carried. The physician was called by the conductor of the construction train to give immediate service.

Chicago, etc., R. Co. v. Davis, 94 Ill. App. 54, in which it was held that where a member of a wrecking crew was injured about his work, the conductor of the wrecking train had authority in and for the emergency to employ a physician to care for the injury.

As to *passengers*, see Union Pac. Ry. Co. v. Beatty, 35 Kan. 265, 57 Am. Rep. 160 (denying the power of subordinate officers, but conceding that it may exist in the higher officers); Patterson v. Consolidated Trac. Co., 9 Pa. Dist. 362 (conceding that a street car conductor might have the power in an emergency, but denying the emergency).

A physician so employed has no authority to employ assistants on the company's account. Bond v. Hurd, 31 Mont. 314.

A physician regularly employed by a railroad company to render first aid to the injured has therefrom no implied authority to bind the company by an arrangement with a hotel keeper to board injured persons or their attendants. Southern Ry. Co. v. Grant, 136 Ga. 303, Ann. Cas. 1912, C. 472.

[7] See *post*, Book II, Ch. III, Authority of Agent Authorized to Manage Business.

extended by some courts to similar agents or servants of other corporations,[8] and if the power exists in the one case upon the principles of agency it is not easy to see why it should not exist also in the others, and also in the case of partnerships and individuals.

These cases proceed upon the theory that, by reason of the injury and the necessity of immediate help to save life or limb, an emergency exists which justifies the highest authority upon the spot in procuring, upon the principal's account, such medical or surgical aid as the emergency demands. The cases however which go furthest in sustaining the authority limit it strictly to the emergency presented. The authority, it is said, arises with the emergency and with it it expires.[9]

Other cases deny that the emergency justifies any such authority,[10] and still other cases hold that, whatever may be the rule respecting railroad companies, the doctrine cannot be extended to other corporations and individuals.[11]

[8] Texas Bldg. Co. v. Albert, 57 Tex. Civ. App. 638, in which an incorporated building company was held upon a contract which the foreman made with a physician to care for a workman injured in handling materials upon a piece of work being done at a distance from the defendant's office and under the guidance and control of this foreman. The services rendered were the immediate amputation of the legs.

In Weinsberg v. St. Louis Cordage Company, 135 Mo. App. 553, the same principles were applied although the agent who employed the physician was there the president of the company.

In Holmes v. McAllister, 123 Mich. 493, 48 L. R. A. 396, the court said that the rule allowing whatever agent of the principal was in control and upon the ground to employ a physician to attend in an emergency an employee injured at his work applied to cases "in which the employment is hazardous, exposing the employees to dangers and risks greater than those in the ordinary pursuits of life," but it was held that the owner of a laundry was not bound by a forewoman's employment of a physician to care for an injury to an employee which occurred while that forewoman was in charge, the court saying "There is no evidence in this case that employment in a laundry is accompanied by any such dangers."

[9] Evansville, etc., R. Co. v. Freeland, 4 Ind. App. 207; Toledo, etc., R. Co. v. Mylott, 6 Ind. App. 438, citing and quoting Terre Haute, etc., R. Co. v. McMurray, 98 Ind. 358, 49 Am. R. 752.

[10] Peninsular R. Co. v. Gary, 22 Fla. 356, 1 Am. St. R. 194, in which it was held that the employment of a physician to care for a man injured at work upon the track was not binding on the company when made either by the roadmaster in charge of the work upon which the man was injured or by the conductor who brought in the injured man upon his train. The court does not discuss the matter of emergency but cites Terre Haute, etc., R. Co. v. McMurray, *ante*, with express disapproval.

[11] Godshaw v. Struck Bros., 109 Ky. 285, 51 L. R. A. 668; New Pittsburgh Coal, etc., Co. v. Shaley, 25 Ind. App. 282 (coal yards); Chaplin v. Freeland, 7 Ind. App. 676 (an unincorporated factory for the manu-

§ 342. Privity between principal and persons thus employed.—The difficult question, considered in the preceding subdivision, of privity of contract between the principal and the persons employed by the agent of the principal authorized for that purpose, does not arise here. By the hypothesis, the person employed under the circumstances now contemplated, is, if properly employed, employed by the express or implied authority of the principal. He becomes therefore the agent or servant of the principal, privity of contract is created between them, and all the rights, duties and liabilities attach as though the employment had been made by the principal in person.

facture of buggies); Spelman v. G. C. M. & M. Co., 26 Mont. 76, 55 L. R. A. 640, 91 Am. St. R. 402.

A minor son who takes out his father's automobile for his own pleasure and who, while using it, injures a third person, has no implied authority to employ a physician at his father's expense to care for the injured person. Habhegger v. King, 149 Wis. 1, 39 L. R. A. (N. S.) 881.

CHAPTER VII

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§ 343. Purpose of this chapter.—The matters thus far dealt with have been those which relate to the creation of authority before an act is done. Cases, however, not infrequently arise in which a person has done an act as agent for another which proves to be unauthorized, either because the authority was not broad enough to include it, or because though it once existed it had expired, or because, perhaps, there was no semblance at any time of authority and the act was based upon a mere gratuitous assumption of authority. In all of these cases, of course, the supposed principal is not bound and may repudiate the act when brought to his attention.

Suppose, however, on the other hand, that, when the act is brought to his attention, he approves of it, and would be glad, or at least willing, to have it regarded as an act done on his account; or, without expressly deciding upon it, proceeds to treat it as authorized; or, still further, that he is so indifferent towards it that he simply does nothing, leaving the matter in such a condition that an inference of approval is just as legitimate as the inference of disapproval, or, perhaps, is stronger. What is now the legal situation? May an unauthorized act be subsequently approved, either expressly or by implication, so as to give it legal effect; and if so what are the nature and effect of such approval?

§ 344. ——— It would seem, at first view, that such a question must be answered in the negative. If the act be a contract, and the principal was not in fact a party to it, for lack of authority, when it was made, how can any act on his part alone later make him a party to it? Are not the rights of parties to contracts ordinarily determined when the contract is made, and by mutual consent? Can a new party be added by his own act alone, when that was not provided for by the original agreement? If the act be a tort, and the alleged principal was not liable for it when it was done, how can any later act of his, short

of some express assumption of liability for a consideration, operate to make him liable? Is a man liable for a tort, merely because he afterwards approves of it?

To these questions, the law gives no uncertain answer. The lack of prior authority, however anomalous it may seem, may often be supplied by subsequent approval, so as to give to the act the same effect, for many purposes, as though it had been originally authorized. This act or fact of approval is termed *ratification*, and the existence of this doctrine of ratification is one of the peculiar facts, heretofore referred to, which serve to give to agency, as a distinct subject, a place in the body of the law.

To consider this peculiar doctrine is the purpose of the present chapter. For convenience of treatment the matter may be arranged under the following heads.

I. What is meant by ratification; II. What acts may be ratified; III. Who may ratify; IV. Conditions of ratification; V. What amounts to ratification; and VI. The results of ratification.

WHAT IS MEANT BY RATIFICATION.

§ 345. In general.—The doctrine of ratification presents at once one of the most unique and characteristic chapters in the law of agency, and also one of the most important. The idea that one who was not actually a party to a contract—though he was one nominally,—may actually become one by some subsequent act of his own without new consideration or the assent of the other party; or that one who was not really a participant in a trespass or other wrong—though it was done on his account—may become responsible for it subsequently merely by assenting to it, would, as has been stated, seem very strange if it had not become so familiar.

It is, however, a very old idea. The Roman law had manifestations of it. It appears at an early date in our English law. The French Civil Code[1] and the German Civil Code[2] recognize and to some extent regulate it. In Scotch law it is usually termed homologation.[3]

In the early statements of the doctrine ratification was a thing *analogous* or *comparable* to authorization. *"Ratihabitio mandato comparatur,"* was usually the form, but since Coke's time it has taken on

[1] See the translation by Wright.
[2] See the translation by Wang or Loewy.
[3] See Erskine's Principles of the Law of Scotland, (20th ed.) par. 11; Bell's Principles, (10th ed.) par. 27.

a stronger aspect; it has become *equivalent* and *"mandato aequiparatur"* is now the almost universal form. Its retroactive force is now also equally emphasized, and the established maxim has become *"Omnis ratihabito retrotrahitur, et mandato priori aequiparatur."*

§ 346. Fictitious character of the doctrine.—Two passages from opinions given in a recent case, in the House of Lords,[4] may serve to still further emphasize the extraordinary character of this doctrine, if further emphasis is needed. Said Lord Macnaghten, "As a general rule, only persons who are parties to a contract, acting either by themselves or by an authorized agent, can sue or be sued on the contract. A stranger cannot enforce the contract, nor can it be enforced against a stranger. That is the rule, but there are exceptions. The most remarkable exception, I think, results from the doctrine of ratification as established in English law. That doctrine is thus stated [quoting from Tindal, C. J., in Wilson v. Tumman[5]]. And so by a wholesome and convenient fiction, a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract." Said Lord Lindley, "The mere statement of the general nature of what is meant by ratification shows that it rests on a fiction. Where a man acts with an authority conferred upon him, no fiction is introduced; but where a man acts without authority and an authority is imputed to him, a fiction is introduced, and care must be taken not to treat this fiction as fact."

§ 347. Ratification defined.—Ratification may briefly be defined as the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him while purporting to act as his agent.[6]

[4] Keighley v. Durant, [1901] Ap. Cas. 240, 1 Br. Rul. Cas. 351. Some exception could be taken to Lord Macnaghten's statement for it is clear that, if the proper conditions exist to make the contract ratifiable, the assumed principal can scarcely be regarded as an entire stranger to it.

[5] 6 M. & G. at p. 242.

[6] See Keighley v. Durant, [1901] App. Cas. 240, 1 Br. Rul. Cas. 351; McCracken v. San Francisco, 16 Cal. 591; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Smyth v. Lynch, 7 Colo. App. 383; Jameson v. Coldwell, 25 Oreg. 199; Steffens v. Nelson, 94 Minn. 365; Minnich v. Darling, 8 Ind. App. 539.

"Ratification means the adoption by a person, as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him, except for his subsequent assent, as where an act was done by a stranger having at the time no authority to act as his agent, or by an agent not having adequate authority." Ansonia v. Cooper, 64 Conn. 536

§ 348. Ratification not a form of authorization.—Proceeding now to consider the question more fully, it may, in the first place, be observed, that, although frequently said to be such, ratification is not a form of authorization. It is rather a cure for the lack of authorization, or a substitute for authorization. It presupposes that there was no authority; and there can, in the nature of the case, be no authority to do an act given after the act is done. The utmost that is then possible is to do something to cure that defect, or to provide some method of now dealing with the situation as though authority had been given.

§ 349. Ratification differs from estoppel.—Ratification, moreover, differs from estoppel, though they are often very closely associated. Estoppel requires that the party alleging it shall have done something or omitted to do something, in reliance upon the other party's conduct, by which he will now be prejudiced if the facts are shown to be different from those upon which he relied. Ratification requires no such change of condition or prejudice: if the principal ratifies, the other party may simply avail himself of it. As soon as ratification takes place, the act stands as an authorized one, and not merely as one whose effect the principal may be estoppel to deny.[7] If there be ratification, there is no occasion to resort to estoppel. There may, however, be cases in which one may be estopped to deny that he has ratified.

The difference in effect may be striking: ratification is retroactive, estoppel operates upon that done after the act and in reliance upon it;

Ratification is a subsequent act. A contract cannot be ratified before it is made. Atlanta, etc., Ass'n v. Bollinger, 63 Ark. 212.

[7] See Steffens v. Nelson, 94 Minn. 365; Stiebel v. Haigney, 134 App. Div. 516; Thompson v. Manufacturing Co., 60 W. Va. 42, 6 L. R. A. (N. S.) 311; Welch v. Brown, 46 Colo. 129; Blood v. La Serena Land & Water Co., 113 Cal. 221.

In Forsyth v. Day, 46 Me. 176, it is said: "The distinction between a contract intentionally assented to, or ratified in fact, and an estoppel to deny the validity of the contract, is very wide. In the former case the party is bound, because he intended to be; in the latter he is bound notwithstanding no such intention, because the other party will be prejudiced and defrauded by his conduct, unless the law treat him as legally bound. In the one case, the party is bound because this contract contains the necessary ingredients to bind him, including a consideration. In the other, he is not bound for these reasons, but because he has permitted the other party to act to his prejudice under such circumstances, that he must have known, or be presumed to have known, that such party was acting on the faith of his conduct and acts being what they purported to be, without apprising him to the contrary."

However, in St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. App. 270, the court seems to be of the opinion that the question of

ratification makes the whole act good from the beginning, while estoppel may only extend to so much as can be shown to be affected by the estopping conduct.[8]

§ 350. Ratification not a contract.—Ratification is an approval of a previous act or contract, which thereby becomes the act or contract of the person ratifying. It is not a *contract* to assume such liability. In the case of contracts, ratification is an affirmance of a contract already made, as it was made, and as of the date when it was made; and it is neither the making of a *new* contract to be bound by the *old* one, nor the making of a new contract in the terms of the old one.

§ 351. No new consideration required.—It therefore requires no new consideration to support it or the contract ratified. If the contract ratified was upon a sufficient consideration, it is enough.[9]

§ 352. Ratification wholly optional with principal.—Ratification is ordinarily a matter which is wholly optional with the principal. An act has been done which, by the hypothesis, was unauthorized. The principal may ratify it or he may repudiate it. The choice ordinarily is his only. No matter how advantageous ratification might be to himself or to the other party or to the agent, the principal is under no legal duty to ratify the act.[10]

ratification is always one of estoppel. Doughaday v. Crowell, 11 N. J. Eq. 201, seems to hold the same view.

[8] Thus see Stiebel v. Haigney, *supra*. The defendant had bought, on speculation, certain stock through the plaintiffs, and had left it in the plaintiff's hands for further manipulation. All directions for buying and selling were given to the plaintiffs by one Ryan, through whom the defendant first opened his account. Ryan gave many of the orders without authority from the defendant. But each time as soon as the direction was complied with, the plaintiffs had sent the defendant notice thereof and the defendant had never made any objection. Finally, after there was a considerable balance due to the plaintiffs, they rendered an account to the defendant to which he assented. The suit was upon that account, and for the interest that had accrued upon it. The defendant claimed that, even although he had in conversation directly with the plaintiffs fully admitted the account, yet, inasmuch as the plaintiffs' action was all prior to the conversation, there could be no estoppel. This, the court admitted was true, but held that there was in the particular conversation a ratification, which would be good when made after all of the plaintiffs' actions were complete.

[9] Grant v. Beard, 50 N. H. 129; Montgomery v. Crossthwait, 90 Ala. 553, 24 Am. St. R. 832, 12 L. R. A. 140; Drakely v. Gregg, 8 Wall. (U. S.) 242, 267, 19 L. Ed. 409; Pearsoll v. Chapin, 44 Pa. St. 9, 17; Lynch v. Smyth, 25 Colo. 103; McLeod v. Morrison, 66 Wash. 683, 38 L. R. A. (N. S.) 783.

[10] Principal may repudiate unauthorized act even though it would be beneficial to him. Williams v. Storm, 46 Tenn. (6 Coldw.) 203.

If the principal decides to repudiate, he is not obliged to allege reasons for doing so; and, if he gives a reason which afterwards proves to be unfounded, the giving of such untenable reason cannot, in the absence of something to work an estoppel, be construed as a ratification.[11]

WHAT ACTS MAY BE RATIFIED.

§ 353. In general.—The power to ratify an act done for and in behalf of another, necessarily presupposes in that other the power to do the act himself, both in the first instance [12] and at the time of ratification; [13] it also presupposes the power in that other to have authorized the doing of the act in the first instance and also to authorize its doing at the time of ratification.[14]

§ 354. The general rule.—It is, therefore, the general rule that one may ratify the previous unauthorized doing by another in his behalf, of any act which he might then and could still lawfully do himself, and which he might then and could still lawfully delegate to such other to be done.[15]

§ 355. What acts need ratification.—It must be borne in mind that the only cases, in which a resort to ratification is necessary, are those in which everything which was done before or contemporaneously with the act in question, and all inferences which may properly be drawn from the things so done, are insufficient to support the act as an authorized one. The various elements which go to make up authority, the distinction between real limitations and secret instructions, the doctrine of apparent powers or of estoppel, the rules of construction, the distinctions between general and special agents, and the like,[16] must all have been exhausted before there is any occasion to resort to ratification. What can be deemed to be authorized under any of these rules does not require ratification.

The persons involved must also be kept in mind. For it is very clear that there are cases in which, from the standpoint of third per-

[11] Brown v. Henry, 172 Mass. 559.

[12] Davis v. Lane, 10 N. H. 156.

[13] Cook v. Tullis, 18 Wall. (U. S.) 332, 21 L. Ed. 933.

[14] *Post*, § 385.

[15] Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; McCracken v. San Francisco, 16 Cal. 619; Brady v. Mayor, 16 How. (N. Y.) Pr. 432; O'Conner v. Arnold, 53 Ind. 205; Armitage v. Widoe, 36 Mich. 124; Supervisors v. Arrighi, 54 Miss. 668; Taymouth v. Koehler, 35 Mich. 22; Clarke v. Lyon Co., 8 Nev. 188; Etheridge v. Price, 73 Tex. 597; Moore v. Hupp, 17 Idaho, 232.

[16] See *post*, Book II, Chapter I, on the Nature and Extent of Authority.

sons, the principal may be bound without recourse to ratification, when he would not be if the question arose between the agent and himself.[17]

The distinction between a real absence of or departure from authority, and a mere irregularity or informality in the exercise of a conceded authority, must be observed. For while this distinction is not always an easy one to draw, it is perfectly clear that not every slight irregularity or departure from instructions will invalidate an act, so as to make resort to ratification necessary.[18]

§ 356. ——— Waiver rather than ratification.—It seems also possible to say that, what is needed in some cases, is not so much ratification as waiver, however much one may hesitate to use that uncertain and unsatisfactory expression. An act wholly or essentially unauthorized requires ratification; but there may be irregularities in the performance of an authorized act so insignificant that they may be ignored; and there seem also to be cases in which, in the exercise of an admitted authority, there may be irregularities, deficiencies or excesses, not so insignificant that they may be ignored, nor yet so material as to really require ratification of the act as an unauthorized one, but as to which there may be such acquiescence, condonation or disregard as to entitle one to say that they have been waived. It seems very clear also that, as an act progresses, there may, from time to time, be such waivers of conditions or requirements that the act may be valid at completion without the aid of ratification.

§ 357. Torts may be ratified as well as unauthorized contracts.—It is immaterial whether the unauthorized act arises from contractual dealings, or results in or is founded upon a tort. Whoever, with knowledge of the facts, adopts as his own, or knowingly appropriates the benefits of, a wrongful act which another has, without authority, assumed to do in his behalf, will be deemed to have assumed the responsibility of the act.[19] Ratification, of course, can not render valid acts which, when done, were so far illegal in themselves that they could not be lawfully authorized; but an act which is a trespass, simply because it was not authorized, may be ratified by the subsequent approval

[17] See *post*, §§ 492, 493.

[18] See *post*, Book III, Chapter I, on the Execution of Authority in General.

[19] Dempsey v. Chambers, 154 Mass. 330, 26 Am. St. Rep. 249, 13 L. R. A. 219; Wilson v. Tumman, 6 Man. & G. 242; Brewer v. Sparrow, 7 B. & C. 310; Morehouse v. Northrop, 33 Conn. 380, 89 Am. Dec. 211; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; Lee v. West, 47 Ga. 311; National Life Ins. Co. v. Minch, 53 N. Y. 144; Lane v. Black, 21 W. Va. 617; Tucker v. Jerris, 75 Me. 184; Judd v. Walker, 215 Mo. 312 (affirming 114 Mo. App. 128); Levy v. Abramsohn, 39 Misc. 781 (a case of partnership). See also Crockett v. Sibley, 3 Ga. App. 554.

of the person whose authority was needed; and so a person may assume liability by the adoption of an act which another has done in his behalf and as his agent, and which proves to be a trespass or other tort because, while it might lawfully be done under some circumstances, it was not lawfully done in the case in question.

§ 358. Void acts cannot be ratified—Voidable acts may be.—An act which was absolutely void at the time it was done cannot be ratified. If the principal himself could not lawfully have done the act, and certainly if it could not lawfully have been done by anyone, no subsequent ratification or confirmation can give it force or effect.[20] If, however, the act were voidable merely it can, of course, be rendered valid.[21]

This rule is of constant application to the contracts of private and public corporations. Thus if a contract cannot lawfully be made at all, or can be made only upon certain statutory conditions which have not been complied with, it cannot be rendered valid by subsequent ratification;[22] and it has been held to be immaterial that the statute, which rendered the contract void, has since been repealed.[23] But if the contract be neither immoral nor illegal, and is such as the corporation might lawfully make under proper circumstances, the only defect being in the power of the agents who made it, it may lawfully be ratified as in the case of a private individual.[24]

§ 359. Illegal acts cannot be ratified.—It is but a re-statement of the same rules to say that an act done in violation of law or in contravention of public policy, the performance of which, as has been seen,

[20] Armitage v. Widoe, 86 Mich. 124; Chapman v. Lee, 47 Ala. 143; Henry v. State Bank, 131 Iowa, 97; Day v. McAllister, 15 Gray (Mass.), 433; Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546; Decuir v. Lejeune, 15 La. Ann. 569; Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; Milford Borough v. Water Co., 124 Pa. 610, 3 L. R. A. 122; Rawlings v. Neal, 126 N. C. 271; Woodcock v. Merrimon, 122 N. C. 731; Christian B. & L. Ass'n v. Walton, 181 Pa. 201, 59 Am. St. Rep. 636.

[21] Pearsoll v. Chapin, 44 Pa. St. 9; Negley v. Lindsay, 67 Pa. St. 217, 5 Am. Rep. 427.

[22] Spence v. Wilmington Cotton Mills, 115 N. C. 210; La France Fire Engine Co. v. Syracuse, 33 Misc. (N. Y.) 516; Packard v. Hayes, 94 Md. 233; Thompson v. West, 59 Neb. 677, 49 L. R. A. 337; Handy v. Globe Pub. Co., 41 Minn. 188, 4 L. R. A. 466, 16 Am. St. R. 695; Rue v. Mo. Pac. Ry. Co., 74 Tex. 474, 15 Am. St. R. 852; Savage v. Springfield, 83 Mo. App. 328; Markey v. School District, 58 Neb. 479; Supervisors v. Arrighi, 54 Miss. 668; Smith v. Newburgh, 77 N. Y. 130; Aldrich v. Collins, 3 S. Dak. 154; Baldwin v. Travis County, 40 Tex. Civ. App. 149; Plattsmouth v. Murphy, 74 Neb. 749.

[23] See Spence v. Wilmington Cotton Mills, *supra*.

[24] See *post*, § 367.

could not lawfully be delegated to an agent,[25] cannot be ratified so as to give it legal effect.[26]

But liability for a merely unlawful but not legally void act may be incurred by ratification, as is frequently done in the case of trespasses and other torts.

§ 360. Forgery.—Whether a forgery is capable of ratification is a question upon which there is much conflict of opinion. In every forgery there are two parties interested,—the state in its efforts to detect and punish it as a crime; and the person whose responsibility has been pledged without his authority.

So far as the right of the state to pursue and punish the forger as a criminal is involved, it is certain that a subsequent ratification by the individual sought to be charged, will be unavailing to defeat it.[27] Any undertaking to suppress the crime would, as has been seen, be contrary to public policy and void.[28]

From the standpoint of the individual, however, different considerations apply. So far as the act may be regarded merely as the act of an unauthorized agent, there is no doubt that it may be ratified like any other unauthorized act. If at the time of the signing, therefore, the person doing so purported to act as agent, the act might doubtless be ratified;[29] but such a case is not a case of forgery—it is simply a case of a profession of authority which does not exist, and, although it may be so made as to render the actor responsible for some other offense, it does not ordinarily constitute forgery.[30]

[25] See *ante*, Chap. III.

[26] State v. Matthis, 1 Hill (S. C.), 37; Turner v. Phœnix Ins. Co., 55 Mich. 237; Harrison v. McHenry, *supra*. See Willoughby v. Allen, 25 R. I. 531; Hinsey v. Supreme Lodge, 138 Ill. App. 248.

[27] In McKenzie v. British Linen Co., 6 App. Cas. 82, Lord Blackburn says: "I wish to guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defense for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it. It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another." See also Williams v. Bayley, L. R. 1 H. L. 200; Howell v. McCrie, 36 Kan. 636, 59 Am. Rep. 584. So in case of embezzlement. State v. Frisch, 45 La. Ann. 1283.

[28] See *ante*, Chap. III.

[29] See Harper v. Devene, 10 La. Ann. 724.

[30] Rex v. Arscott, 6 C. & P. 408; Reg. v. White, 2 C. & K. 404, 2 Cox C. C. 210; Heilbonn's Case, 1 Park. Cr. Cas. (N. Y.) 429; Mann v. People, 15 Hun (N. Y.), 155; People v.

§ 361. ——— Ratification.—The chief difficulty in applying the doctrine of ratification to the case of actual forgery appears to lie in the fact that, in such a case, the forger usually neither intends nor purports to be acting as agent at all. The success of the forgery depends usually upon its appearing to be the personal act of the one whose name is signed. As will be seen in a later section [31] the doctrine of ratification can only apply where the act was done *as agent;* in some states it is not essential that he shall have *purported* to act as such; in England and in other states it is essential.

In Massachusetts, for example, where it is said to be not essential that the assumed agent shall have purported to act as such, it is held that there may be ratification of a forgery.[32] In England, on the other

Mann, 75 N. Y. 484, 31 Am. Rep. 482; Com. v. Foster, 114 Mass. 311, 19 Am. Rep. 353; State v. Wilson, 28 Minn. 52.

[31] *Post* § 386 *et seq.*

[32] Greenfield Bank v. Crafts, 4 Allen, 447; Wellington v. Jackson, 121 Mass. 157; Central Nat. Bank v. Copp, 184 Mass. 328.

In Greenfield Bank v. Crafts, the court, after calling attention to the unquestioned fact that a merely unauthorized signing might be ratified, proceeds: "It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same, and thus confirm what was originally an unauthorized and illegal act. We are supposing the case of a party acting with full knowledge of the manner in which the note was signed, and the want of authority on the part of the actor to sign his name, but who understandingly and unequivocally adopts the signature, and assumes the note as his own. It is difficult to perceive why such adoption should not bind the party whose name is placed on the note as promisor, as effectually as if he had adopted the note when executed by one professing to be authorized, and to act as an agent, as indicated by the form of the signature, but who in fact had no authority. It is however urged that public policy forbids sanctioning the ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted, the guilty party was not to be prosecuted for the criminal offense."

That there may be ratification.—See also, Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240; Wellington v. Jackson, 121 Mass. 157; Scott v. Bank, 23 Can. Sup. Ct. 277; Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Livings v. Wiler, 32 Ill. 387; Chicago Edison Co. v. Fay, 164 Ill. 323; Fay v. Slaughter, 194 Ill. 157, 88 Am. St. R. 148, 56 L. R. A. 564; Thorn v. Bell, Lalor's N. Y. Suppl. (Hill & Den.) 430; Howard v. Duncan, 3 Lans. (N. Y.) 174. [See also Trustees v. Bowman, 136 N. Y. 521; Commercial Bank v. Warren, 15 N. Y. 577]; Campbell v. Campbell, 133 Cal. 33; Montgomery v. Crossthwait, 90 Ala. 553, 24 Am. St. R. 832, 12 L. R. A. 140, *semble;* First National Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430; Cravens v. Gillilan, 63 Mo. 28 [but *contra* Kelchner v. Morris, 75 Mo. App. 588. See also Dow v. Spenny, 29 Mo. 386; Ferry

hand, where it is essential that he shall have purported to act as agent, it seems to be held that there may be no ratification of a forgery.[83] In the same line, it is said in Indiana, "One who commits the crime of forgery, by signing the name of another to a promissory note, does not assume to act as the agent of the person whose name is forged. Upon principle, there would seem to be no room to apply the doctrine of ratification or adoption of the act in such a case." [84]

§ 362. ——— If the real meaning of the rule, that the act must have been done as agent, were that the assumed agent should have purported to bind another and not himself, then the requirement would be satisfied in the most emphatic way in the case of the alleged forgery. The person committing the alleged forgery certainly does not intend to bind himself; what he puts forward purports to be the act and signature of the assumed principal; if the signing had been done in the same way *with* authority, it would clearly bind the principal (since, while common, it is not essential that an authorized agent shall add anything to the signature of his principal to show that it was made by an agent); the difference between the authorized act and the forgery amounts then merely to an absence of authority, and it is the chief function of ratification to supply the lack of authority.

v. Taylor, 33 Mo. 323; Harris v. Tinder, 109 Mo. App. 563]; Fitzpatrick v. School Commissioners, 7 Humph. (Tenn.) 224, 46 Am. Dec. 76; Ofenstein v. Bryan, 20 App. D. C. 1.

[83] Brook v. Hook, L. R. 6 Exch. 89; but see M'Kenzie v. British Linen Co., 6 App. Cas. 82, especially *per* Lord Blackburn.

That there may not be ratification, except where estoppel is involved or there is a new consideration. McHugh v. Schuylkill County, 67 Pa. 391, 5 Am. Rep. 445; Shisler v. Vandike, 92 Pa. 447, 37 Am. Rep. 702; Christian B. & L. Ass'n v. Walton, 181 Pa. 201, 59 Am. St. Rep. 636; Shroyer v. Smeltzer, 38 Pa. Super. 400; Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546; Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753; Woodruff v. Munroe, 38 Md. 146; Henry v. Heeb, 114 Ind. 275, 5 Am. St. Rep. 613; Howell v. McCrie, 36 Kan. 636, 59 Am. Rep. 584. The latest case on this side of the question is Shinew v. First National Bank, 84 Ohio St. 297, 36 L. R. A. (N. S.) 1006.

A mere promise to pay a forged note does not constitute a ratification where there was no duty, no consideration, and nothing to work an estoppel. Barry v. Kirkland, 6 Ariz. 1, 40 L. R. A. 471; Owsley v. Phillips, 78 Ky. 517, 39 Am. Rep. 258. No ratification without full knowledge. Trustees v. Bowman, 136 N. Y. 521; First Nat. Bank v. Martin, 56 Kan. 247. No ratification where statements were equivocal. Smith v. Tramel, 68 Iowa, 488.

There can be no ratification so as to give the forger himself an action on the instrument. Wilson v. Hayes, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196.

[84] Henry v. Heeb, 114 Ind. 275, 5 Am. St. Rep. 613.

If the requirement of the rule were, that the act should have been done in the name and as the act of the alleged principal, then that requirement would be satisfied in the case of forgery. It is only when so made, that the forgery has any prospect of success.

If the requirement be, that the act shall purport to have been done by an agent, then the case fails, for the disclosure of that fact would usually defeat the forger's purpose. Moreover, merely signing as agent without authority, as has been already stated, is usually not a forgery.[35]

§ 363. ——— To the objection that to permit ratification is to encourage the compromise of crime—that, in the words of the court in Indiana "it is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution," [36] it may be replied in the language of the supreme court of Massachusetts, "that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that, if the signature was adopted, the guilty party was not to be prosecuted for the criminal offense." [37]

§ 364. ——— **Estoppel.**—But whatever may be regarded as the true rule as to ratification, in the abstract, it is certain that the principal may, upon the discovery of the forgery, so conduct himself, as by permitting the paper to be taken upon the strength of his assertion of its genuineness; or by inducing the holder to change his position or intermit some remedial proceeding upon an assurance of its validity or a promise of protection; or, generally, by remaining silent as to its invalidity when in equity and good conscience he ought to have spoken, as to estop himself from asserting that it is not binding upon him.[38]

The elements of estoppel, however, must be present, and if the party complaining has in no way been prejudiced by the conduct of the other no estoppel will result.[39]

[35] *Ante*, § 360 and cases cited.

[36] In Henry v. Heeb, *supra*.

[37] In Greenfield Bank v. Crafts, 4 Allen (Mass.), 447.

[38] M'Kenzie v. British Linen Co., 6 App. Cas. 82 (but see Ogilvie v. West Australian Mtg. Co., [1896] A. C. 257); Casco Bank v. Keene, 53 Me. 103; Union Bank v. Middlebrook, 33 Conn. 95; Forsyth v. Day, 46 Me. 176; Buck v. Wood, 85 Me. 204; Crout v. DeWolf, 1 R. I. 393; Rudd v. Matthews, 79 Ky. 479, 42 Am. Rep. 231 (see also Forsythe v. Bonta, 5 Bush (Ky.), 547); Cohen v. Teller, 93 Pa. 123; Fall River Nat. Bank v. Buffington, 97 Mass. 498; Hefner v. Dawson, 63 Ill. 403, 14 Am. Rep. 123; Continental Nat. Bank v. National Bank, 50 N. Y. 575; Lynch v. Richter, 10 Wash. 486.

[39] Second Nat. Bank v. Wentzel, 151 Pa. 142; Smith v. Tramel, 68 Iowa, 488; Dean v. Crall, 98 Mich.

III.

WHO MAY RATIFY.

§ 365. The subdivisions of this chapter are so intimately connected, that much which is applicable to one is equally true of another. Thus, carrying out the line of the last subdivision, it may be said to be the—

General rule, that whoever was capable of doing an act or entering into a contract which another, unauthorized, has assumed to do or make for him as his agent, and who is still capable of doing or entering into it, is capable of ratifying that act or contract, thereby rendering it good from the beginning, and the same as though he had himself originally done or made it.[40]

§ 366. State may ratify.—Thus, beginning with the highest grade of organization known, it is settled that the state not only may have agents, binding it by virtue of a previous authorization, but it may also incur liability subsequently by ratifying acts and contracts made on its behalf.[41]

§ 367. Municipal corporations.—The rule extends also to municipal and *quasi*-municipal corporations, which may ratify all those acts and contracts,—and, as has been seen,[42] those only—which they might and can lawfully authorize.[43]

591, 39 Am. St. R. 571; Traders' Nat. Bank v. Rogers, 167 Mass. 315, 57 Am. St. R. 458, 36 L. R. A. 539.

[40] Wilson v. Dame, 58 N. H. 392; Williams v. Butler, 35 Ill. 544; Indianapolis, etc., R. Co. v. Morris, 67 Ill. 295; Pollock v. Cohen, 32 Ohio St. 514; Sentell v. Kennedy, 29 La. Ann. 679; McCracken v. San Francisco, 16 Cal. 591.

[41] State v. Torinus, 26 Minn. 1, 37 Am. Rep. 395; Jewell Nursery Co. v. State, 4 S. Dak. 213; State v. Shaw, 28 Iowa, 67; State v. Exr. of Buttles, 3 Ohio St. 309.

But the state, unlike the individual may ratify a portion of the act only, or forgive certain violations of duty, without affecting all. State v. Buchanan (Tenn.), 52 S. W. 480. Where the governor has employed an expert without authority, but the legislature makes an appropriation to pay him, this does not ratify the *contract* of employment. Young v. State, 19 Wash. 634.

[42] See *ante*, § 358.

[43] Moore v. Hupp, 17 Idaho, 232; Ft. Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558, 32 Am. St. R. 277, 18 L. R. A. 367; Union School Furn. Co. v. School District, 50 Kan. 727, 20 L. R. A. 136; Mound City v. Snoddy, 53 Kan. 126; School District v. Aetna Ins. Co., 62 Me. 330; Packard v. Hayes, 94 Md. 233; Taymouth v. Koehler, 35 Mich. 22; Highway Commissioners v. Van Dusan, 40 Mich. 429; Wheat v. Van Tine, 149 Mich. 314; True v. Commissioners, 83 Minn. 293; Supervisors v. Arrighi, 54 Miss. 668; Savage v. Springfield, 83 Mo. App. 323; Markey v. School District, 58 Neb. 479; Omaha v. Croft, 60 Neb. 57; Green v. Cape May, 41 N. J. L. 45; Smith v. New-

§ 368. Private corporations.—And this rule is as true in the case of a private corporation as of an individual. An act not within the corporate powers of the corporation cannot be rendered operative by ratification,[44] but if the act were one which the corporation might lawfully have done or authorized in the first instance, its unauthorized performance, in its behalf, may be ratified in the same manner and with the like effect as by an individual.[45]

So, as in the case of an individual, it is not necessary that there should be a direct proceeding, with an express intention to ratify. It may be done indirectly, and by acts of recognition or acquiescence, or by acts inconsistent with repudiation or disapproval.[46]

burgh, 77 N. Y. 130; O'Brien v. City of Niagara Falls, 65 Misc. 92; Hague v. Philadelphia, 48 Pa. St. 527; Silsby Mfg. Co. v. Allentown, 153 Pa. 319; *In re* Shiloh St., 165 Pa. 386, 44 Am. St. R. 671; Willoughby v. Allen, 25 R. I. 531; Aldrich v. Collins, 8 S. Dak. 154; Denison v. Foster (Tex. Civ. App), 28 S. W. 1052; Commercial Elect. Co. v. Tacoma, 20 Wash. 288, 72 Am. St. R. 103; Koch v. Milwaukee, 89 Wis. 220; Findlay v. Pertz, 13 C. C. A. 559, 66 Fed. 427, 29 L. R. A. 188.

[44] "A contract which a corporation has no power to make, it has no power to ratify." Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. 742, 30 C. C. A. 409 (citing California Bank v. Kennedy, 167 U. S. 362, 42 L. Ed. 198; Union Pac. Ry. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 41 L. Ed. 265; Central Transp. Co. v. Pullman Car Co., 139 U. S. 24, 35 L. Ed. 55; Jacksonville, etc., Ry. Co. v. Hooper, 160 U. S. 514, 40 L. Ed. 515); Wheeler v. Home, etc., Bank, 188 Ill. 34, 80 Am. St. Rep. 161; National, etc., Ass'n v. Home Sav. Bank, 181 Ill. 35, 72 Am. St. R. 245, 64 L. R. A. 399; Buckeye Marble Co. v. Harvey, 92 Tenn. 115, 36 Am. St. R. 71, 18 L. R. A. 252; Thompson v. West, 59 Neb. 677, 49 L. R. A. 337; Downing v. Mt. Washington Road Co., 40 N. H. 230; Bangor Boom Corp. v. Whiting, 29 Me. 123.

[45] Kelsey v. National Bank, 69 Pa. 426; Fleckner v. U. S. Bank, 8 Wheat. (U. S.) 363, 5 L. Ed. 631; Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Bulkley v. Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271; Peterson v. Mayor, 17 N. Y. 449; Baker v. Cotter, 45 Me. 236; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Whitewell v. Warner, 20 Vt. 425; City of Detroit v. Jackson, 1 Doug. (Mich.) 106; Church v. Sterling, 16 Conn. 388; Planters' Bank v. Sharp, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470. See also Schlesinger v. Forest Products Co., 78 N. J. L. 637, 138 Am. St. R. 627, 30 L. R. A. (N. S.) 347; Keenan v. Lauritzen Malt Co., 57 Wash. 367.

[46] Singer Mfg. Co. v. Belgart, 84 Ala. 519; Tabler v. Sheffield, etc., Co., 87 Ala. 305; Indianapolis, etc., R. R. Co. v. Morris, 67 Ill. 295; Cairo & St. Louis R. R. Co. v. Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Wolf Co. v. Bank of Commerce, 107 Ill. App. 58; Pacific R. R. Co. v. Thomas, 19 Kan. 256; Sherman Center Town Co. v. Morris, 43 Kan. 282, 19 Am. St. R. 134; Brown v. Winnisimmet Co., 11 Allen (Mass), 326; Sherman v. Fitch, 98 Mass. 59; Lyndeborough Glass Co. v. Mass. Glass Co., 111 Mass. 315; Arlington v. Peirce, 122 Mass. 270; Taymouth v. Koehler, 35 Mich. 22; Scott v. Methodist Church,

The rule extends to torts [47] as well as contracts, and to frauds, misrepresentations and deceits practiced in the course of the business.[48]

§ 369. Partners.—Partners, also, are undoubtedly competent to ratify what they might previously have authorized, and, within the same limits, one partner may ratify for the firm, and the ratification by the whole partnership may be implied from acquiescence after knowledge brought home to one, under such circumstances as to make the knowledge and approval of one the knowledge and approval of all.[49]

§ 370. Infants.—In the case of the infant, the expression "ratification" seems often to be unconsciously used in two different senses. One, the approval by a former infant, after attaining majority, of acts which during his infancy were voidable because he was an infant; and the other, the one now here involved, the question of ratification of what one as his agent has assumed to do without authority. As has been seen,[50] it is usually held that, as an infant cannot appoint an agent,

50 Mich. 528; Hitchcock v. Griffin & Skelley Co., 99 Mich. 447, 41 Am. St. R. 624; Washington Savings Bank v. Butchers' Bank, 107 Mo. 133, 28 Am. St. R. 405; Thomas v. City Nat'l Bank, 40 Neb. 501, 24 L. R. A. 263; German Nat'l Bank v. First Nat'l Bank, 59 Neb. 7; Bennett v. Millville Imp. Co., 67 N. J. L. 320; Hoyt v. Thompson, 19 N. Y. 207; Scott v. Middletown, etc., R. R. Co., 86 N. Y. 200; Dupignac v. Bernstrom, 37 Misc. (N. Y.) 677, affirmed 76 App. Div. 105; Moyer v. East Shore Terminal Co., 41 S. Car. 300, 44 Am. St. R. 709, 25 L. R. A. 48; Taylor Co. v. Baines Co., 31 Tex. Civ. App. 385; North Point, etc., Co. v. Utah, etc., Canal Co., 16 Utah, 246, 67 Am. St. R. 607, 40 L. R. A. 851; Dexter Horton & Co. v. Long, 2 Wash. 435, 26 Am. St. R. 867; Moody Co. v. Leek, 99 Wis. 49; Law v. Cross, 1 Black (U. S.), 533, 17 L. Ed. 185; Gold Mining Co. v. Nat'l Bank, 96 U. S. 640, 24 L. Ed. 648; Augusta, etc., R. Co. v. Kittel, 52 Fed. 63, 2 C. C. A. 615; Nebraska Farm Loan Co. v. Bell, 58 Fed. 326, 7 C. C. A. 253; Prentiss Tool Co. v. Godchaux, 66 Fed. 234, 13 C. C. A. 420; Central Trust Co. v. Ashville Land Co., 72 Fed. 361, 18 C. C. A. 590; American Exch. Nat'l Bank v. First Nat'l Bank, 82 Fed. 961, 27 C. C. A. 274; McKenzie v. Poorman Silver Mines, 88 Fed. 111, 31 C. C. A. 409; G. V. B. Mining Co. v. First Nat'l Bank, 95 Fed. 23, 36 C. C. A. 633; Kessler v. Ensley Co., 123 Fed. 546.

47 Nims v. Mt. Hermon School, 160 Mass. 177, 39 Am. St. R. 467, 22 L. R. A. 364 (following Dempsey v. Chambers, 154 Mass. 330, 26 Am. St. R. 249, 13 L. R. A. 219).

48 Flaherty v. Atlantic Lumber Co., 58 N. J. Eq. 467; Garrison v. Electrical Works, 55 N. J. Eq. 708.

49 Forbes v. Hagman, 75 Va. 168. See Chouteau v. Goddin, 39 Mo. 229, 90 Am. Dec. 462; Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324; Cassidy v. Saline Co. Bank, 14 Okla. 532 (by one partner of the other's unauthorized act); Gutheil v. Gilmer, 27 Utah, 496; Rosenthal v. Hasberg, 84 N. Y. Supp. 290; Levy v. Abramsohn, 39 N. Y. Misc. 781 (one partner's ratification of the other partner's act on behalf of the firm); Taylor v. Herron, 72 Kan. 652 (same kind of case); Clippinger v. Starr, 130 Mich. 463.

50 See *ante*, § 142; Armitage v. Widoe, 36 Mich. 124; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

he cannot, of course, while still an infant, ratify the act of one who has, unauthorized, assumed to act for him. But as the reason for this holding is, as has been seen,[51] believed to be unsound, the true rule will doubtless be held to be that an infant, like any other person, may ratify what he might authorize, and with the same effect. Under the older rule, the appointment being *void*, there could be no ratification after he became of age;[52] under the modern rule there could undoubtedly be.

§ 371. Insane person—Person under duress.—Upon the same principles which govern the creation of agency in the first instance, there can be no ratification of the unauthorized act of an agent if, at the time of the alleged ratification, the principal was insane.[53] On the other hand, one on whose behalf an act has been done during his insanity, may after his sanity is restored, ratify the act.[54] So likewise where a man's consent to an act on his behalf is obtained through duress, there can be no ratification while he is under the same duress.[55]

§ 372. Married women.—It has been seen that, at common law, a married woman could not act by agent,[56] and she had clearly no capacity to bind herself by ratification. Under the modern statutes, however, which more or less completely remove her common law disabilities, she may, like any other person, ratify what she might have authorized. This rule is of very constant application in cases wherein her husband has assumed to act for her, and she has approved of his acts with full knowledge of the facts.[57] But, as in any other case, she cannot thus do indirectly what she could not do directly, and no amount of alleged ratification can validate that which it was beyond her capacity to authorize.[58]

[51] See *ante*, § 143.

[52] Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Waples v. Hastings, 3 Harr. (Del.) 492. But see Ward v. Steamboat, 3 Mo. 358.

[53] Wilke v. Wackershauser, 143 Iowa, 107.

[54] Blinn v. Schwarz, 177 N. Y. 252, 101 Am. St. R. 806, aff'g 63 App. Div. 25.

[55] Henry v. State Bank, 131 Iowa, 97.

[56] See *ante*, § 148.

[57] Reed v. Morton, 24 Neb. 760, 8 Am. St. R. 247, 1 L. R. A. 736; McClintock v. South Penn Oil Co., 146 Pa. 144, 28 Am. St. R. 785; Royal Society v. Campbell, 17 R. I. 402, 13 L. R. A. 601; Ferguson v. Harris, 39 S. Car. 323, 39 Am. St. R. 731; Schloss v. Solomon, 97 Mich. 526; Hoene v. Pollak, 118 Ala. 617, 72 Am. St. R. 189; Buchanan v. Hubbard, 119 Ind. 187; Pattison v. Babcock, 130 Ind. 474; Edwards v. Barnes, 55 Ill. App. 38; Haar v. Benefit Ass'n, 71 Hun (N. Y.), 554; Kirkpatrick v. Pease, 202 Mo. 471. There are many others. Knowledge of the facts is here, as elsewhere, essential. *Post*, § 393; Brown v. Wright, 58 Ark. 20, 21 L. R. A. 467; Brown v. Rouse, 104 Cal. 672.

[58] McFarland v. Heim, 127 Mo. 327, 48 Am. St. R. 629. See also Rawlings v. Neal, 126 N. C. 271.

Where acts done by her during coverture are merely voidable, they doubtless may be ratified by her after that disability is removed; but where contracts made by her during coverture are *void*, acts done when she becomes discovert must, in order to amount to a ratification, be practically equivalent to a new contract.[59]

§ 373. Executor, administrator, etc.—An executor or administrator has usually no power to bind the estate by executory contracts, or to subject it to liability for his torts;[60] and cannot therefore usually ratify acts done in the life time of the deceased,[61] but where acts have been done for the deceased or his estate, which the representative might have authorized, and which he deems beneficial to the estate, he may ratify and enforce them,[62] and where he has power to bind the estate he may doubtless do it by ratification when the necessary conditions of knowledge and the like are present, but not otherwise.[63]

§ 374. When agent may ratify.—An agent cannot ratify his own unauthorized act;[64] nor can one of two joint agents ratify the act of his coagent;[65] but where the act, which when done by one agent was unauthorized, is within the general power of another agent of the same principal, the doing of the act by the first agent may be ratified by the second.[66]

"Ratification by an agent," it is said,[67] "depends upon certain facts which must affirmatively be made to appear: 1. The agent ratifying must have had general power to do himself the act which he ratifies. 2. They must both be agents of the same principal, and the agent whose act is in question must have professed to act as agent of the common principal."

[59] Nesbitt v. Turner, 155 Pa. 429; Brown v. Bennett, 75 Pa. 420; Buchanan v. Hazzard, 95 Pa. 240. See Dempsey v. Wells, 109 Mo. App. 470.

[60] See II Woerner's Am. Law of Administration, 756–7.

[61] Bundoora Park Estate Co. v. Fisher, 20 Victorian L. R. 460, 16 Australian L. Times, 107.

[62] Foster v. Bates, 12 Mees. & Wels. 226; Seaver v. Weston, 163 Mass. 202. But see Whiting v. Mass. Mut. L. Ins. Co., 129 Mass. 240, 37 Am. Rep. 317.

[63] Weber v. Bridgman, 113 N. Y. 600; Reeves v. Brayton, 36 S. Car. 384.

[64] Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; Hotchin v. Kent, 8 Mich. 526; Bi-Spool Sew. Mach. Co. v. Acme Mfg. Co., 153 Mass. 404; Lyndon Mill Co. v. Lyndon Lit. & Bib. Institution, 63 Vt. 581, 25 Am. St. R. 783; Britt v. Gordon, 132 Iowa, 431; Driscoll v. Modern Brotherhood, 77 Neb. 282; Young v. Inman, 146 Iowa, 492.

[65] Penn v. Evans, 28 La. Ann. 576.

[66] Mound City Mutual L. Ins. Co. v. Huth, 49 Ala. 530; Whitehead v. Wells, 29 Ark. 99; Dorsey v. Abrams, 85 Pa. 299; Palmer v. Cheney, 35 Iowa, 281. See also Platt v. Francis, — Mo. —, 152 S. W. 332.

[67] Ironwood Store Co. v. Harrison, 75 Mich. 197. See also Hartman Steel Co. v. Hoag, 104 Iowa, 269.

This doctrine is frequently applied to the ratification of the acts of subordinate agents by the superior agents of corporations.[68]

§ 375. ——— Subagents.—An agent who has the power to appoint a subagent and give him authority may ratify his act (if within the agent's authority) and thereby make it binding on the agent's principal.[69]

So where an agent, who has not authority to employ subagents for his principal, has employed one,—who thereby becomes the agent of the agent and for whose acts the agent is responsible,—acts of such subagent in excess of the authority given him by the agent may be ratified by the latter so as to make him liable for them to the principal.[70]

IV.

CONDITIONS OF RATIFICATION.

§ 376. Certain conditions must be satisfied.—In order to effect a ratification, certain conditions must be satisfied. The following are the most important:—

§ 377. I. Principal must have been identified.—The act to be ratified must have been done by one claiming to represent the person ratifying or persons of his description.[71] It is not necessary that the intended principal be known to the agent at the time, but it is necessary that the person for whom the agent professes to act must be a person who is then capable of being ascertained. He may be one of a class of persons, as where the agent acts for the "owners" of certain property, or effects insurance "for the benefit of those concerned," although he does not know the particular persons who answer this description.[72]

[68] Thus see Cairo, etc., R. Co. v. Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Toledo, etc., R. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484; Toledo, etc., R. R. Co. v. Prince, 50 Ill. 26; Darst v. Gale, 83 Ill. 136; Wood v. Whelen, 93 Ill. 155; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Ballston Spa Bank v. Marine Bank, 16 Wis. 129; Anglo-Californian Bank v. Mahoney Mining Co., 5 Sawy. (U. S. C. C.) 255, Fed. Cas. No. 392, s. c. 104 U. S. 192, 26 L. Ed. 707; Sherman v. Fitch, 98 Mass. 59; Walworth Co. Bank v. Farmers' L. & T. Co., 16 Wis. 629; Hoyt v. Thompson, 19 N. Y. 207; First National Bank v. Kimberlands, 16 W. Va. 555; Burrill v. Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Chouteau v. Allen, 70 Mo. 290; Lyndeborough Glass Co. v. Mass. Glass Co., 111 Mass. 315; Olcott v. Tioga R. R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Union Mutual Life Ins. Co. v. Masten, 3 Fed. 881; Pacific R. Co. v. Thomas, 19 Kan. 256.

[69] Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89.

[70] Cowley v. Fabien, 204 N. Y. 566.

[71] Foster v. Bates, 12 M. & W. 226.

[72] Hagedorn v. Oliverson, 2 M. & Selw. 485; Routh v. Thompson, 13 East, 274; Lucena v. Craufurd, 1 Taunt. 325; Stillwell v. Staples, 19 N. Y. 401.

So, also, where the agent acts for the administrators of A's estate,[73] or for the heirs of B,[74] though he does not know who these persons are, his act may be ratified by the persons so described. Neither is it necessary that the person represented should have been specifically named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound.[75]

§ 378. II. Principal must have been in existence.—It follows necessarily from the doctrine of the preceding section, as well as from the retroactive effect of ratification, that the principal must also have been in existence, either actually or in contemplation of law, at the time the act to be ratified was done.[76]

§ 379. ——— Administrator, assignee, etc.—In the case of the administrator, who is appointed and ratifies after the act,[77] the conclusion may be justified by the doctrine of relation, which causes the grant to operate from the date of the decease. And the same doctrine applies in the case of the assignee of bankrupts, and the like.[78]

§ 380. ——— Corporations subsequently organized.—The question whether a corporation, subsequently organized, may ratify acts and contracts done or made in its behalf, before its organization, has given much difficulty, and led to confusion in the authorities. The English courts have carried the doctrine to its logical conclusion, and hold that there can be no ratification as such,[79] though "it does not follow from that," said Jessel, M. R., "that acts may not be done by the company after its formation which make a new contract to the same effect as the old one, but that stands on a different principle." [80] The distinction here indicated is sustained by the weight of authority. The

[73] Foster v. Bates, *supra*.

[74] Lyell v. Kennedy, 14 App. Cas. 437.

[75] Watson v. Swann, 11 C. B. (N. S.) 756, 771; Kelner v. Baxter, L. R. 2 C. P. 174.

[76] Kelner v. Baxter, L. R. 2 C. P. 174.

[77] Foster v. Bates, 12 M. & W. 226.

[78] Thus in Kelner v. Baxter, *supra*, it is said by Willes J.: "Ratification can only be by a person ascertained at the time of the act done,—by a person in existence either actually or in contemplation of law; as in the case of assignees of bankrupts and administrators, whose title, for the protection of the estate, vests by relation. The case of an executor requires no such ratification, inasmuch as he takes from the will."

[79] Kelner v. Baxter, L. R. 2 C. P. 174; Scott v. Ebury, L. R. 2 C. P. 255; Melhado v. Railway Co., L. R. 9 C. P. 503; *In re* Empress Engineering Co., 16 Ch. Div. 125; *In re* Northumberland Ave. Hotel Co., 33 Ch. Div. 16; Howard v. Patent Ivory Mfg. Co., 38 Ch. Div. 156; Natal Land Co. v. Pauline Colliery Co., [1904] App. Cas. 120.

[80] *In re* Empress Eng. Co., *supra*.

corporation cannot, by its subsequent act of approval, make itself a party to the very contract made,[81] so as to be bound by it from the date of its making.

§ 381. ——— **Novation.**—There may undoubtedly, in such a case, be a *novation*. That is, the corporation and the parties to the contract may mutually agree that the corporation shall be substituted in place of the promoter; and this may doubtless be done by implication as well as in express terms. The difficulty in most cases is to find any evidence of such a novation.

§ 382. ——— **Adoption.**—It is also said, that though there can not be ratification, in its proper sense, of the contract, the corporation may nevertheless "adopt" that contract as its own from the date of the adoption, even though the contract so adopted imposes liabilities dating from the time it was made.[82] This "adoption" it is said, need not be made formally or expressly, but may be effected in any way in which such a contract might be made originally by the corporation.

[81] Abbott v. Hapgood, 150 Mass. 248, 15 Am. St. R. 193, 5 L. R. A. 586.

[82] *That there may be ratification.* Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 26 L. R. A. 544; Mesinger v. Mesinger Bicycle Saddle Co., 44 N. Y. App. Div. 26; Stanton v. New York, etc., R. Co., 59 Conn. 272, 21 Am. St. R. 110; Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Schreyer v. Turner Flour Co., 29 Oreg. 1.

That there may be adoption but not ratification.—McArthur v. Times Printing Co., 48 Minn. 319, 31 Am. St. R. 653; Battelle v. N. W., etc., Paving Co., 37 Minn. 89; Smith v. Parker, 148 Ind. 127; Grape Sugar Co. v. Small, 40 Md. 395; Wasser v. Western Land Co., 97 Minn. 460; Richardson v. Graham, 45 W. Va. 134; Pittsburg, etc., Min. Co. v. Quintrell, 91 Tenn. 693; Huron Printing Co. v. Kittleson, 4 S. Dak. 520; Weatherford, etc., R. Co. v. Granger, 86 Tex. 350, 40 Am. St. R. 837; Colorado Land Co. v. Adams, 5 Colo. App. 190; Robbins v. Bangor Co., 100 Me. 496, 1 L. R. R. (N. S.) 963; Dubuque Female College v. District Township, 13 Iowa, 555.

Other theories.—Liability may be assumed by taking benefits. Bells Gap R. Co. v. Christy, 79 Pa. 54, 21 Am. Rep. 39; Paxton Cattle Co. v. First Nat. Bank, 21 Neb. 621, 59 Am. Rep. 852; Low v. Conn., etc., R. Co., 45 N. H. 370; Buffington v. Bardon, 80 Wis. 635; Robbins v. Bangor Co., *supra;* where they are the benefits of the particular contract and are received under circumstances reasonably justifying an inference of consent to be bound. Weatherford R. Co. v. Granger, 86 Tex. 350, 40 Am. St. R. 837.

May assume liability by express agreement. Reichwald v. Commercial Hotel Co., 106 Ill. 439; Wood v. Whelen, 93 Ill. 153; Rockford, etc., R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587.

Cannot ratify or adopt but may make new contract on same terms. Pennell v. Lathrop, 191 Mass. 357; Koppel v. Massachusetts Brick Co., 192 Mass. 223.

That it is immaterial whether it be called ratification or adoption. Schreyer v. Turner Flouring Co., 29 Oreg. 1.

It may, therefore, it is said, "be inferred from acts or acquiescence on the part of the corporation, or its authorized agents, as any similar original contract might be shown." [83]

"But the liability of the corporation under such circumstances," it is said in one case,[84] "does not rest upon any principle of the law of agency, but upon the immediate and voluntary act of the company. Although the acts of a corporation, with reference to the contracts made by promoters in its behalf before its organization, are frequently loosely termed 'ratification,' yet a 'ratification,' properly so called, implies an existing person on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. What is called 'adoption' in such cases is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date."

The chief difficulty in the way of the acceptance of this doctrine of adoption, rather than ratification of the contract, lies in the fact that there seems not to be any such doctrine known to our law.

§ 383. ——— Continuing offer.—It has also been suggested that the proposal of the other party may be regarded as a continuing offer, which may be accepted by the corporation when it comes into existence, and thus create a real contract with the corporation. This acceptance may be express or may be implied from conduct.

Two difficulties present themselves in connection with this view. One, that to treat the so-called contract with the promoters as a continuing offer to the corporation, is, in many cases at least, contrary to the facts; and, second, the conduct from which acceptance of the offer is inferred seems often to have been too liberally construed in order to accomplish the result. Nevertheless, this theory is, perhaps, the most satisfactory one which has been suggested.

The proper solution of the difficulty, however, seems not to be a question in the law of agency.

That the contract may be expressly or by implication upon the term or condition that the promoter or agent shall be deemed to be released when the corporation comes into existence and he transfers and the corporation assumes the benefit of the contract. Heckman's Estate, 172 Pa. 185; Chicago Building Co. v. Talbotton Creamery Co., 106 Ga. 84; Shields v. Clifton Hill Land Co., 94 Tenn. 123, 45 Am. St. R. 700, 26 L. R. A. 509; Case Mfg. Co. v. Soxman, 138 U. S. 431, 34 L. Ed. 1019.

[83] McArthur v. Times Printing Co., *supra;* Schreyer v. Turner Flouring Co., *supra.*

[84] McArthur v. Times Printing Co., *supra.*

§ 384. III. Transaction must still stand.—The transaction must also still stand, and be open to ratification,—there must be something to ratify. Hence if, before the principal has ratified a contract, the agent and the other party have rescinded what had been done,[85] or,—although the authorities differ as to this,[86] if the other party has withdrawn from the proposed contract, there can be no effective ratification. Thus, where an agent without authority made a payment, but the payee discovered that the payment was unauthorized and returned the money, it was held that no subsequent ratification could defeat an action to recover the debt from the principal.[87] And so where a mere volunteer had negotiated insurance, it was held that he might cancel and surrender the policies before the assumed principal knew of and ratified them.[88] After ratification, however, the agent has no right to return to the other party money received by him by virtue of the contract ratified.[89]

§ 385. IV. Principal must have present ability.—As has been seen, the power to ratify presupposes a present ability in the principal to do the act himself or to authorize it to be done.[90] If, therefore, for any reason, the principal has become, since the doing of the act to be ratified, incapable of doing the act himself and of authorizing it to be done, he is incapable of ratifying it.[91]

And so if third persons acquire rights after the act is done and before it has received the sanction of the principal, the ratification cannot ordinarily operate retrospectively so as to overreach and defeat those rights.[92]

[85] Walter v. James, L. R. 6 Ex. 124; Stillwell v. Staples, 19 N. Y. 401. See also Cockerham v. Perot, 48 La. Ann. 209.

[86] See *post*, § 514 *et seq.*

[87] Walter v. James, *supra.*

[88] Stillwell v. Staples, *supra.*

[89] Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122.

[90] Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96. "Ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able at the time to make the contract to which, by his ratification he gives validity." Field, J., in McCracken v. San Francisco, 16 Cal. 591. See also Grogan v. San Francisco, 18 Cal. 590; McDonald v. McCoy, 121 Cal. 55; Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; Davis v. Lane, 10 N. H. 158.

[91] Cook v. Tullis, 18 Wall. (U. S.) 332, 21 L. Ed. 933; Dobbs v. Atlas Elevator Co., 22 S. D. 226 (where the plaintiff seeks to recover past rents which she claims as assignee of a principal lease, and can show no previous authority to the agent who made the lease on behalf of the lessor, and ratification by the lessor only after the lessor has already conveyed the premises even to the plaintiff, she has failed to show a good lease or a cause of action) but see s. c. on rehearing 25 S. D. 177.

[92] Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612 (where before ratification of an unauthorized assignment

An exception to the rule is found in the case of the ratification of insurance effected for the benefit of a principal: he may ratify even after knowledge of the loss, though he could not then himself effect insurance.[93]

§ 386. V. Act must have been done as agent.—Since the effect of ratification is to confirm the act as done, it is indispensable, in order to have an act of agency, that the act ratified must have been done by the assumed agent as agent and in behalf of a principal. If the act was done by him as principal and on his own account, or on account of some third person, it cannot thus be ratified.[94]

of an account, the debtor had been served with garnishment process at the suit of the principal's creditor); Stoddart's Case, 4 Ct. of Cl. 511 (ratification of the purchase of cotton by an agent without authority, after it had been seized by the U. S. government as enemy's goods, is too late to give the principal a claim against the government under the statute). See also *post*, § 486.

[93] Williams v. North China Ins. Co., 1 C. P. Div. 757.

[94] Keighley v. Durant, [1901] A. C. 240, 1 B. Rul. Cas. 351, (overruling Durrant v. Roberts, [1900] 1 Q. B. 629); Wilson v. Tumman, 6 M. & G. 236; Morris v. Salberg, 22 Q. B. Div. 614; Marsh v. Joseph, [1897] 1 Ch. 213; Fraser v. Sweet, 13 Manitoba L. R. 147, 2 Br. Rul. Cas. 254; Smith v. Varawa, 5 Comw. L. R. (Austr.) 68; Croader v. McAlister, [1909] Queensland S. R. 203; Lonwrens v. Clulee, 1 So. Afr. L. R. (Prob. Div.) 192; Ferris v. Snow, 130 Mich. 254; Mitchell v. Minnesota Fire Ass'n, 48 Minn. 278; Schlessinger v. Forest Products Co., 78 N. J. L. 637, 138 Am. St. R. 627, 30 L. R. A. (N. S.) 347. See also Puget Sound Lumber Co. v. Krug, 89 Cal. 237; Ilfield v. Ziegler, 40 Colo. 401; Russo v. Maresca, 72 Conn. 51; Balloch v. Hooper, 6 Mack. (D. C.) 421, aff'd 146 U. S. 363, 36 L. Ed. 1008; Florida, etc., R. Co. v. Varnedoe, 81 Ga. 175; Linn v. Alameda, etc., Co., 17 Idaho, 45; Collins v. Waggoner, Breese (1 Ill.), 26; Beveridge v. Rawson, 51 Ill. 504; Grund v. Van Vleck, 69 Ill. 478; Roby v. Cossitt, 78 Ill. 638; Merritt v. Kewanee, 175 Ill. 537; Western Pub. House v. Rock Tp., 84 Iowa, 101; Wycoff v. Davis, 127 Iowa, 399; Harrison v. Mitchell, 13 La. Ann. 260; Taliafero v. First Nat'l Bank, 71 Md. 200; Allred v. Bray, 41 Mo. 484, 97 Am. Dec. 283; Herd v. Bank of Buffalo, 66 Mo. App. 643; Vanderbilt v. Turnpike Co., 2 N. Y. 479, 51 Am. Dec. 350; Brainerd v. Dunning, 36 N. Y. 211; Garvey v. Jarvis, 46 N. Y. 310, 7 Am. Rep. 335; Hamlin v. Sears, 82 N. Y. 327; Collins v. Suau, 7 Robt. (30 N. Y. Super. Ct.) 623; Travis v. Scriba, 12 Hun (N. Y.), 391; Stanton v. Granger, 125 App. Div. 174; Ramsay v. Miller, 135 App. Div. 503 (there is a dictum to the contrary in Johnson v. Doll, 11 Misc. (N. Y.) 345); Rawlings v. Neal, 126 N. Car. 271; Williams v. Stearns, 59 Ohio St. 28; Johnson v. Insurance Co., 66 Ohio St. 6; Backhaus v. Buells, 43 Or. 558; Pittsburg, etc., R. Co. v. Gazzam, 32 Pa. St. 340; Minder, etc., Land Co. v. Brustuen, 24 S. D. 537; Fish, etc., Co. v. New Eng. Homestake Co., 27 S. D. 221, 130 N. W. 841; Commercial Bank v. Jones, 18 Tex. 811; Etheridge v. Price, 78 Tex. 597; Virginia Pocahontas Coal Co. v. Lambert, 107 Va. 868, 122 Am. St. R. 860, 13 Ann. Cas. 277; Shuman v. Steinel, 129 Wis. 422, 116 Am. St. R. 961, 7 L. R. A. (N. S.) 1048, 9 Ann. Cas. 1064; *In re* Roanoke Furnace Co., 166 Fed. 944.

And not only must the assumed agent have *intended* to act as agent for the person ratifying, but, as declared by the House of Lords after

The fact that a man purported to act as agent may be shown by his own declarations at the time of the act. Landgrof v. Tanner, 152 Ala. 511. See also cases cited *ante*, § 287.

In Durant v. Roberts, overruled in Keighley v. Durant, *supra*, Roberts, having been authorized by Keighley Maxsted & Co. to buy wheat on joint account of himself and them at a fixed price, made a purchase of the plaintiffs in excess of his authority at a higher price, and signed a contract in his own name, giving the plaintiffs no indication that he was dealing as agent for anyone, though he intended that the purchase should be on joint account. At a subsequent interview with Roberts, the manager of Keighley, Maxsted and Co. told him to take the wheat, as he thought it was worth it. This the plaintiffs claimed to be a valid ratification, and the Court of Appeal so held. Collins, L. J., pointed out in his opinion that the doctrine of ratification had been adopted from the Roman Law, where the contemplation or intent of the agent at the time of the act was considered the essential point. In reviewing the English cases he undertakes to show that this idea was always present, though the phrases always used relate to the two extreme cases, where he purports to be the agent of the ratifier or purports to be the agent of some one else. Where no disclosure at all is made, the situation of the third party is the same as in the case of an undisclosed principal, and the judges in the Court of Appeal held that since a prior command would have been effective "whether the agent had contracted in his own name or in terms on behalf of the principal," therefore if there be conceded an "intention existing in the mind of the would-be agent it seems impossible to suggest any reason why * * * avowal of it to the other contracting party should be essential." But this view was entirely overruled by the House of Lords, where it was decided that the Roman Law, whatever it might be, would give no support to the Court of Appeals, that the doctrine of undisclosed principal was so far an anomaly in English law that there was no ground for extending it to analogous cases. Lord Lindley there pointed out that by the principle of ratification validity is given to an act already done, though done without authority, and that "the doctrine of ratification as hitherto applied in this country to contracts has always * * * in fact given effect in substance to the real intentions of both contracting parties at the time of the contract, as shown by their language or conduct. It has never yet been extended to other cases."

In Fraser v. Sweet, 13 Manitoba L. R. 147, 2 Br. Rul. Cas. 254, *supra*, where a partner bought goods in the name of a new firm which he expected to organize, under the expectation that the old partnership would be dissolved, which goods were used by the old partnership, it was held that there could be no valid ratification by the old firm since there was no indication to the seller that the partner was acting in behalf of the old partnership, and since "it has long been established that no ratification is effectual unless the act has been done by the agent on behalf of the party who ratifies."

In Ferris v. Snow, 130 Mich. 254, *supra*, where two of the defendants gave Snow parol authority to buy land, in which they were to have equal interests, it was held that they could not ratify the act made ostensibly by Snow for his own benefit. Hooker, C. J. said: "No consent

most elaborate consideration [95] and according to the weight of authority in the United States,[96] he must have *professed* to act for a principal, though it is not necessary that he should have disclosed who that principal was if he be capable of identification within the rule already laid down.[97] It is not essential that the assumed agent shall have declared himself such in express terms. As stated by Lord Robertson, "Whether the unauthorized agent be marked out as an agent by what he says, or by what he wears, is, of course, a mere matter of circumstance and of evidence; but an agent he must be known to be, and as agent he must act." [98] The contrary rule is laid down in Massachusetts: "It is necessary in order to a ratification that the act should have been done by one who was in fact acting as an agent, but it is not necessary that he should have been understood to be such by the party with whom he was dealing." [99]

by C to step into the place of A, who has assumed to make a contract with B, on his own behalf, would establish privity of contract between B and C, unless based on new consideration. It is different when A assumes to contract with B on behalf of C. In such a case the contract is not changed in its terms, but is vitalized by a ratification of the unauthorized act of the agent."

In Mitchell v. Minnesota Fire Ass'n, 48 Minn. 278, *supra*, where a firm of insurance adjusters had assumed, with no claim or pretension of authority, to act for the defendants in appraising a fire loss, and the defendants had repudiated their action, it was held that there was no evidence of authority or ratification which should have gone to the jury, and no evidence that the defendant had waived the conditions of the policy.

[95] Keighley v. Durant, [1901] App. Cas. 240, 1 Br. Rul. Cas. 351, overruling Durant v. Roberts, [1900] 1 Q. B. 629.

It seems, moreover, to be sufficient that he professed to act as agent, though he had a fraudulent purpose to really take the benefit on his own account. *In re* Tiedemann, [1899] 2 Q. B. Div. 66. See also Hamlin v. Sears, 82 N. Y. 327.

[96] See Ferris v. Snow, 130 Mich. 254; Mitchell v. Minnesota Fire Ass'n, 48 Minn. 278, and other cases cited in note 94.

What is said in Clews v. Jamieson, 182 U. S. 461, at p. 483, 45 L. Ed. 1183, is believed not intended to be contrary. The person acting was known to be a broker though at the time it was not known for whom he was acting.

[97] *Ante*, § 377.

[98] In Keighley v. Durant, *supra*.

[99] Hayward v. Langmaid, 181 Mass. 426 (citing Sartwell v. Frost, 122 Mass. 184; Ford v. Linehan, 146 Mass. 283; New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381; Schendel v. Stevenson, 153 Mass. 351, no one of which, however, really involved the question. The allusion of Holmes J., in Dempsey v. Chambers, 154 Mass. 330, 26 Am. St. Rep. 249, 13 L. R. A. 219, to the "requirement that the act should be done in the name of the ratifying party" is significant. It is believed that the Massachusetts court will not be found irrevocably committed to this view). See also Leavitt v. Fairbanks, 92 Me. 521.

§ 387. ——— What the prevailing rule amounts to, when reduced to its lowest terms, is, that the act or contract to be ratified shall purport to have been done or made not merely on the agent's behalf but, by the agent, in the name and on the account of the alleged principal, so that when ratified, as it was done or made, it shall be capable of being enforced by and against that principal as an act or contract to which he was a party. The rule makes impossible a ratification by an undisclosed principal, although, as will be seen,[1] it is held that an undisclosed principal may, in general, enforce, and be held liable upon, contracts really made for him by his agent, notwithstanding there was no disclosure even of the existence of a principal at the time the contract was made. It is urged that, if this be the rule where there really was authority, it is denying the ordinary effect of ratification to refuse to permit the lacking authority to be supplied by ratification.[2] To this contention the House of Lords replies, in the language of Lord Davey, "The rule which permits an undisclosed principal to sue and be sued on a contract to which he is not a party, though well settled, is itself an anomaly, and to extend it to the case of a person who accepts the benefit of an undisclosed intention of a party to the contract would be adding another anomaly to the law, and not correcting an anomaly." [3]

§ 388. ——— Where the assumed agent has in fact purported to act as such in the execution of a written contract made in the name of the principal, it does not seem to be essential that the fact that he does so purport to act shall be recited or declared on the face of the contract itself.

Whether there may be ratification where one, who in fact intends to act as agent, conceals that fact and assumes to himself the name or characteristics of the principal and makes the contract in the principal's name, seems not to have been considered, except incidentally in the forgery cases. It would seem that, in such a case, there could be no enforcement of the contract by the principal after ratification where personal considerations were involved, or except subject to such defenses as the other party may have, based upon the assumed identity of the person who acted and the real principal.

§ 389. ——— An act may doubtless, sometimes have been done "as agent" though done in the name of the agent, especially in the case of informal dealings. It would seem to be possible also though the contract were in writing; because, as will be seen hereafter,—sealed and

[1] *Post* Book IV, Ch. V, Ch. VII.

[2] See the able article of Professor E. C. Goddard in 2 Michigan Law Review, 25.

[3] In Keighley v. Durant, *supra*.

negotiable instruments excepted,—an authorized contract may often be deemed the contract of the principal although the agent used personal terms only. And so in this case, if the assumed agent purports to act for the principal, there may be a ratifiable contract (with the same exceptions) even though the agent in making it, inadvertently used language which might ordinarily have been appropriate to bind himself.[4] Of course, as already pointed out, if the agent intended to act for himself and did not purport to act for a principal, this rule would not apply.

§ 390. ——— Although the alleged agent may have purported to act as agent for a principal, still if in fact he was acting for himself only, and did the act in his own name, the purported principal can not by ratification acquire the benefit of the act.[5] Unless he can work an estoppel against the pretended agent or can charge him as a trustee, he would be without remedy.[6]

[4] Young v. Inman, 146 Iowa, 492; Kostopolos v. Pezzetti, 207 Mass. 277.

In Robinson v. Lincoln Savings Bank, 85 Tenn. 363, one of several debtors, acting for a part of them whose land had been seized, made an arrangement with the defendant bank to obtain money with which to redeem the land and to obtain an extension of time. He acted in his own name, but his relation to the others and their interest in the matter were fully known. *Held* that these others could enforce the contract against the bank. Although the syllabus speaks of ratification, there was apparently no question of ratification in the case. The agent apparently acted with authority, and it was at most merely a case of undisclosed principal.

[5] In Garvey v. Jarvis, 46 N. Y. 310, 7 Am. Rep. 335, one M held a judgment against G and another for over $2,000. He offered to G that he would discharge it for $500. G did not then accept the offer. Later one R (through whom Jarvis claims) who was a stranger to G, by falsely representing that he was a friend of G and came for him, induced M to assign the judgment to him, R, and R then undertook to enforce the judgment for its full amount against G. *Held*, that G could not by ratification claim the benefit of the assignment as one made to him. "The essential element is wanting that the act must be done *for another*. Here it was not so done. The most that can be claimed is that the defendant said he was acting for the plaintiff, which was false. He paid his own money, and, in fact, acted for himself. He was a stranger to the plaintiff and of course under no obligation to act for him, and he deprived the plaintiff of nothing to which he was entitled."

Followed in the similar case of Virginia Pochahontas Coal Co. v. Lambert, 107 Va. 368, 122 Am. St. R. 860, 13 Am. & Eng. Ann. Cas. 277.

But where he purports to act in the name and for the benefit of a principal, but has a fraudulent intention of performing the contract on his own account, the named principal may ratify. *In re* Tiedemann & Ledermann Freres, [1899] 2 Q. B. 66.

[6] In Garvey v. Jarvis, *supra*, it was held that the alleged agent could not be charged as a trustee *ex maleficio*.

§ 391. ——— As has been seen, the agent of one party may become the agent of the other also with the knowledge and consent of the first party, or perhaps without it if the agent were merely a mechanical go-between. Where the agent of one party may thus act as the agent of the other, and purports to do so, the latter may ratify his act as in any other case. And even though, in a case in which A and B are opposite parties, the agent of B ought not to undertake to act as the agent of A also, yet if he does purport to do so, and A with knowledge ratifies the act, A cannot afterward hold B responsible for the act upon the ground that it was the act of B's agent.[7]

§ 392. ——— There may of course be other cases in which, by confirmation or adoption, results more or less similar to those following upon ratification may be reached, but which are not really cases of ratification at all, since they do not purport to adopt the transaction as done, but rest upon the basis of some new and further dealing. Thus it is said in one case, "One may wrongfully take the property of another, not assuming to act as his agent, and sell it in his own name and on his own account, and in such case there is no question of agency, and there is nothing to ratify. The owner may subsequently confirm the sale, but this he cannot do by a simple ratification. His confirmation must rest upon some consideration upholding the confirmation or upon an estoppel." [8]

There may also be other cases. Suppose, for example, that a principal directs his agent to buy goods in the principal's name and upon the principal's credit, but the agent buys in his own name and upon his own credit. He then brings the goods to his principal, tells his principal how they were acquired, and the principal accepts them as his own goods acquired through his agent. Is the principal liable as an undisclosed principal to the seller? He may be if this can be regarded as an authorized purchase, made merely in an unauthorized form, but as to which the departure from instructions has been condoned or waived. Or if it be regarded merely as a breach of secret instructions, the principal would be liable to the seller, although he would have a remedy against the agent unless he had waived the irregularity or ratified the act.

§ 393. **VI. Principal must have knowledge of material facts.**—It will be seen hereafter that the ratification of an unauthorized act may

In Virginia Pochahontas Coal Co. v. Lambert, *supra*, it was held that he might be so charged. See also Rollins v. Mitchell, 52 Minn. 41, 38 Am. St. R. 519.

[7] Ramsay v. Miller, 202 N. Y. 72.

[8] Hamlin v. Sears, 82 N. Y. 327, citing Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546.

be express or implied. It may be the intentional act of the principal, and it may also be, in a measure, an unintentional act. Upon learning of the unauthorized act of his agent, the principal, deeming the act to be to his advantage, may expressly ratify it and avail himself of its benefits; or, deeming it to be to his detriment, he may expressly repudiate it; or, as is more often the case, he may take no decisive step in either direction, but tacitly leave his intention to be determined by his subsequent acts. He is under no obligation to expressly affirm,[9] but if he decides to do so, he may fully inform himself of all the material facts, or he may intentionally assume the risk without inquiry,[10] or he may deliberately ratify upon such knowledge as he possesses without caring for more.[11] If he determines expressly to repudiate the contract he must either ascertain the facts or incur the risk of having the contract subsequently shown to be within the agent's powers and enforced against him, notwithstanding his attempted repudiation.

§ 394. ——— But by far the most numerous and troublesome class of cases is that wherein it is attempted by third persons to hold the principal liable upon the basis of an implied affirmance. The principal may in fact have had a positive intention not to ratify the contract, and yet he may have so conducted himself with reference to third parties that he will be presumed to have ratified it. What shall amount to a ratification and what shall be deemed to be sufficient evidence thereof, are questions reserved for consideration hereafter; the question here is the necessity of knowledge. Ratification means the affirmance of that which the party was at liberty to reject. It involves the idea of choice between alternatives. It presupposes knowledge of the obligations to be assumed or rejected. However freely a party may voluntarily assume liabilities of which he is not fully advised, the law ought not to force upon a man responsibility for the acts of another, unless it appears that, with full knowledge of those acts, he has done something reasonably indicative of an intention to assume them as his own.

§ 395. ——— **General rule.**—It may therefore be stated as the general rule, that, except in those cases in which the principal intentionally assumes the responsibility without inquiry, or deliberately ratifies, having all the knowledge in respect to the act which he cares to have,[12] any

[9] Combs v. Scott, 12 Allen (Mass.), 493.

[10] Lewis v. Read, 13 M. & W. 834.

[11] Kelley v. Newburyport Horse R. R. Co., 141 Mass. 496; Anderson v. Creston Land Co., 96 Va. 257; Ehrmantraut v. Robinson, 52 Minn. 333; Hunt v. Pitts Agricultural Works, 69 Minn. 539; Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43; Wilder v. Beede, 119 Cal. 646.

[12] Lewis v. Read, 13 M. & W. 834; Kelley v. Newburyport Horse R. R. Co., 141 Mass. 496; Anderson v. Cres-

ratification of an unauthorized act or contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full and complete knowledge of all the material facts connected with the transaction to which it relates;[13] and

ton Land Co., *supra;* Ehrmantraut v. Robinson, *supra;* Marsh v. Joseph, [1897] 1 Ch. 213.

[13] Brown v. Bamberger, 110 Ala. 342; Moore v. Ensley, 112 Ala. 228; Wheeler v. McGuire, 86 Ala. 398, 2 L. R. A. 808; McGlassen v. Tyrrell, 5 Ariz. 51; Valley Bank of Phoenix v. Brown, 9 Ariz. 311; Martin v. Hickman, 64 Ark. 217; Snow v. Grace, 29 Ark. 131; Mitchell v. Finnell, 101 Cal. 614; Dupont v. Wertheman, 10 Cal. 354; Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235; Miller v. Board of Education, 44 Cal. 166; Field v. Small, 17 Colo. 386; Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 2 Colo. 565 (affirmed 96 U. S. 640); Schollay v. Moffitt-West Drug Co., 17 Colo. App. 126; Dean v. Hipp, 16 Colo. App. 537; Hale v. Goodell, 49 Colo. 95; Lester v. Kinne, 37 Conn. 9; Bevin v. Conn. Mut. L. Ins. Co., 23 Conn. 244; Hardeman v. Ford, 12 Ga. 205; Mapp v. Phillips, 32 Ga. 72; Turner v. Wilcox, 54 Ga. 593; Findlay v. Hildenbrand, 17 Idaho, 403, 29 L. R. A. (N. S.) 400; International Bank v. Ferris, 118 Ill. 465; Mathews v. Hamilton, 23 Ill. 470; Reynolds v. Ferree, 86 Ill. 570; Kerr v. Sharp, 83 Ill. 199; Stein v. Kendall, 1 Ill. App. 103; Silverman v. Bush, 16 Ill. App. 437; Bensley v. Brockway, 27 Ill. App. 410; Manning v. Gasharie, 27 Ind. 399; Eggleston v. Mason, 84 Iowa, 630; Beebe v. Equitable Mut. L. Ass'n, 76 Iowa, 129; Tidrick v. Rice, 13 Iowa, 214; Sehrt-Patterson Milling Co. v. Hughes, 8 Kan. App. 514; Bohart v. Oberne, 36 Kan. 284; Fletcher v. Dysart, 9 B. Monr. (Ky.) 413; Bank of Owensboro v. Western Bank, 13 Busb (Ky.), 526, 26 Am. Rep. 211; Delaney v. Levi, 19 La. Ann. 251; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Penn. Steam Nav. Co. v. Dandridge, 8 Gill & John. (Md.) 248, 29 Am. Dec. 543; Adams Exp. Co. v. Trego, 35 Md. 47; Bannon v. Warfield, 42 Md. 22; Manning v. Leland, 153 Mass. 510; Dickinson v. Conway, 94 Mass. (12 Allen) 487; Combs v. Scott, Id. 493; Price v. Moore, 158 Mass. 524; Hurley v. Watson, 68 Mich. 531; Deffenbaugh v. Jackson Paper Co., 120 Mich. 242; Cowan v. Sargent Mfg. Co., 141 Mich. 87; Pittsburgh, etc., Mining Co. v. Scully, 145 Mich. 229; Thiel Detective Service Co. v. Seavey, 145 Mich. 674; Godfrey v. New York L. Ins. Co., 70 Minn. 224; Woodbury v. Larned, 5 Minn. 339, Gil. 271; Humphrey v. Havens, 12 Minn. 298, Gil. 196; Hunt v. Pitts Agricult. Works, 69 Minn. 539; Gund Brew. Co. v. Tourtelotte, 108 Minn. 71; Meyer v. Baldwin, 52 Miss. 263; Steunkle v. Chicago, etc., Ry. Co., 42 Mo. App. 73; Pitts v. Steele Mercantile Co., 75 Mo. App. 221; Citizens Savings Bank v. Marr, 129 Mo. App. 26; Tecumseh Nat. Bank v. Chamberlain Bank, 63 Neb. 163, 57 L. R. A. 811; McCormick v. Peters, 24 Neb. 70; Henry v. Halter, 58 Neb. 685; O'Shea v. Rice, 49 Neb. 893; Nebraska Wesleyan University v. Parker, 52 Neb. 453; Cram v. Sickel, 51 Neb. 828, 66 Am. St. Rep. 478; Fitzgerald v. Kimball, 76 Neb. 236; Hovey v. Brown, 59 N. H. 114; Bohanan v. Boston & Me. Ry. Co., 70 N. H. 526; Dowden v. Cryder, 55 N. J. L. 329; Campbell v. Nat. Bank, 67 N. J. L. 301, 91 Am. St. R. 438; Russell v. Erie R. Co., 70 N. J. L. 808, 67 L. R. A. 433, 1 A. & E. Ann. Cas. 672; Seymour v. Wyckoff, 10 N. Y. 213; Brass v. Worth, 40 Barb. (N. Y.) 648; Roach v. Coe, 1 E. D. Smith

by the principals that the subagent had been employed on their behalf was material to effect a ratification of the agent's agreement that the subagent should be paid;[87] where an agent with no written authority made a lease for a term for which the statute of frauds required written authority, and the principal allowed the tenant to go into possession and received rent under the lease, knowledge of the length of the term was held material.[88]

§ 402. ——— On the other hand in a case[89] often cited in which a lease had been executed under a power of attorney perhaps not sufficient to justify it, but there was also an additional circumstance connected with its execution which would have justified the principal in repudiating the lease, but of which she was ignorant, the court held that, by accepting the rent for several years without protest or objection, she ratified the lease as completely as she could have if she had known of two grounds upon which to disaffirm instead of only one. "Two grounds could not make the right any more effectual than one. If she had the right at all, the number of grounds upon which she could justify its exercise is unimportant. Her ratification was none the less complete, because, being unwilling to run the risk of a doubtful question of law, she did not at once act as she would have acted if she had known all of the facts."

The conclusion reached in this case however seems questionable. Grant that the additional fact is material,—and there could be no question about it in this case,—it would seem that the principal is entitled to knowledge of all the material facts, and certainly that, by not choosing to risk a repudiation upon a doubtful point, he should not be deprived of the right to repudiate upon an unquestionable ground, when he discovers it.

§ 403. ——— **Actual knowledge required.**—It must be kept in mind also that, where the law thus requires knowledge, it is ordinarily actual knowledge, and not merely the opportunity for acquiring knowl-

[87] Servant v. McCampbell, 46 Colo. 292.

[88] Clement v. Young-McShea Amusement Co., 70 N. J. Eq. 677, 118 Am. St. R. 747.

Where defendant is sought to be bound on the ground of ratification of the unauthorized act of a real estate broker in assuming to make a binding contract, knowledge that he had signed a written agreement and received a part payment, is indispensable. "It could become an existing and binding contract only upon the defendant's approval, not of a part, but of the entire instrument." Cohen v. Jackson, 210 Mass. 328, citing New England Dredg. Co. v. Rockport Granite Co., 149 Mass. 381; Revere Water Co. v. Winthrop, 192 Mass. 455.

[89] Hyatt v. Clark, 118 N. Y. 563.

edge, which is demanded.[40] As stated in one case,[41] "knowledge—not the existence of circumstances which would, by the exercise of due care result in knowledge—is essential to the ratification of an act." The principal, where nothing has occurred to put him on his guard, is not bound to distrust his agent; he has the right to assume that the agent will not exceed his authority or practice fraud or commit crime; and he is not obliged, before accepting the benefits of an authorized act, to inquire whether, in performing it, the agent has not in some way violated his trust.[42] Mere careless ignorance, or mere negligence in not discovering the departure from authority, where there is nothing to suggest it, is not enough.[43]

Neither is the principal to be charged with mere constructive notice. He is not, for example, obliged to search the public records for evidences of his agent's defaults, and he is not charged because such records would disclose that the agent was performing unauthorized acts.[44]

[40] Combs v. Scott, 12 Allen (Mass.), 493; Brown v. Bamberger, 110 Ala. 342; Haswell v. Standring, 152 Iowa, 291; Sehrt-Patterson Milling Co. v. Hughes, 8 Kan. App. 514; Oxford Lake Line v. First Nat. Bank, 40 Fla. 349; Collins v. Durward, 4 Tex. Civ. App. 339; Iron City Nat. Bank v. Fifth Nat. Bank (Tex. Civ. App.), 47 S. W. 523; Johnson v. Ogren, 102 Minn. 8; Gund Brewing Co. v. Tourtelotte, 108 Minn. 71, 29 L. R. A. (N. S.) 210; Heinzerling v. Agen, 46 Wash. 390.

[41] Iron City Nat. Bank v. Fifth Nat. Bank, *supra*. So in Combs v. Scott, *supra*, it is said: "We do not mean to say that a person can be willfully ignorant or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but our opinion is that ratification of an antecedent act of an agent which was unauthorized cannot be held valid and binding, where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them."

What might have been discovered upon inquiry where there was no duty to make it can not bind the principal. St. John & Marsh Co. v. Cornwell, 52 Kan. 712.

But in Phillips v. Phillips (Cal.), 127 Pac. 346, knowledge of facts sufficient to put a prudent person upon inquiry was held constructive notice, under § 19, Civil Code.

[42] Combs v. Scott, 12 Allen (Mass.), 493; Shepard & Morse Lumber Co. v. Eldridge, 171 Mass. 516, 68 Am. St. R. 446, 41 L. R. A. 617; Haswell v. Standring, 152 Iowa, 291; Oxford Lake Line v. First Nat. Bank, 40 Fla. 349; Lightfoot v. Horst (Tex. Civ. App.), 122 S. W. 606; Valley Bank of Phoenix v. Brown, 9 Ariz. 311; Gund Brewing Co. v. Tourtelotte, 108 Minn. 71, 29 L. R. A. (N. S.) 210.

[43] Brown v. Bamberger, 110 Ala. 342; Valley Bank of Phoenix v. Brown, *supra;* McIntosh v. Battel, 68 Hun (N. Y.), 216; Schmidt v. Garfield Bank, 64 Hun, 298 (affirmed 138 N. Y. 681).

[44] As where the records would disclose that the agent had made unau-

§ 404. ——— Wilful ignorance.—At the same time, however, the principal cannot be justified in wilfully closing his eyes to knowledge. He cannot remain ignorant where he can do so only through intentional obtuseness. He cannot refuse to follow leads, where his failure to do so can only be explained upon the theory that he preferred not to know what an investigation would have disclosed. He cannot shut his eyes where he knows that irregularities have occurred.[45] In such a case, he will either be charged with knowledge, or with a voluntary ratification with all the knowledge which he cared to have.[46]

§ 405. ——— Presumption of knowledge.—The facts, moreover, may be so patent that for the principal to profess ignorance would merely be to stultify himself. They may be so obvious that the principal, as a reasonable man, cannot be heard to say that he was ignorant of them.[47] The duty to know them may be so interwoven with the

thorized transfers by virtue of a power of attorney (Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235; Collins v. Durward, 4 Tex. Civ. App. 339); or had attempted to bind the principal by an unauthorized assumption of a mortgage. Blass v. Terry, 156 N. Y. 122. There is an intimation to the contrary in Latham v. First Nat. Bank, 40 Kan. 9; Mulford v. Rowland, 45 Colo. 172.

[45] Where the principal knows that his agent has exceeded his authority he cannot escape the consequences of knowledge by failing to inquire as to the nature or extent of the excess. Neimeyer Lumber Co. v. Moore, 55 Ark. 240; Pope v. Armsby Co., 111 Cal. 159; Johnson v. Ogren, 102 Minn. 8. In Phillips v. Phillips, —— Cal. ——, 127 Pac. 346, certain facts known to the principal were held by the court to be "circumstances which were sufficient to put a prudent person upon inquiry" and therefore to constitute "constructive notice." Under Civil Code, § 19.

[46] Where the principal learns of the material facts, *e. g.*, that his name has been signed to a bond by an assumed agent without authority, it is enough. "He may not have known its exact terms, or the extent of his liability thereon, but after knowledge of the material facts, he cannot escape the consequences of his silence by remaining wilfully ignorant, or purposely closing his eyes to means of information regarding details within his control." Lynch v. Smyth, 25 Colo. 103. "Where a principal, knowing that an unauthorized contract had been made by an agent in his behalf for the use and occupation of certain premises, enters into possession and enjoys their use without knowing or ascertaining what the terms of the lease were, he must be held to have deliberately determined to ratify the contract whatever it may be." Ehrmanntraut v. Robinson, 52 Minn. 333. To same effect: Russell v. Waterloo Threshing Mach. Co., 17 N. Dak. 248.

[47] See, for example, Ballard v. Nye, 138 Cal. 588; Scott v. Middletown, etc., R. Co., 86 N. Y. 200; Swisher v. Palmer, 106 Ill. App. 432; Bartleson v. Vanderhoff, 96 Minn. 184.

In Johnson v. Ogren, 102 Minn. 8, the court says that the principal cannot be permitted "to shut his eyes to the means of information in his possession and control," the means referred to being that "the whole transaction was entered in his account books, the money credited to his bank account which he exclusively controlled, and he personally

proper conduct of the principal's business that he must, as an ordinary business man, be presumed to know them. This latter rule is constantly applied in the case of the directors of corporations, especially of banks, who are ordinarily presumed to know that which the proper performance of their duties would disclose.[48]

§ 406. ——— Knowledge inferred from facts.—It must also be kept in mind that the existence of actual knowledge may be found by inference like any other fact. This is not "imputed" knowledge or "presumptive" knowledge; but the fact of knowledge may be found, like any other fact, either from direct evidence, or from the existence of other facts and circumstances from which the fact of actual knowledge may properly be inferred, as in other cases.[49] Any duty of the agent to inform his principal might be taken into account in determining the fact.

signed the checks whereby the money was drawn from the bank and used in paying his bills." "If he had exercised such care and oversight of his business as a person of ordinary prudence should or would have exercised, he would have had full and complete knowledge of every and all of such transactions."

In Bliven v. Lydecker, 130 N. Y. 102, the court says that such "notice as would cause a prudent person to make inquiry" is enough. But compare Brown v. Bamburger, 110 Ala. 342; Heinzerling v. Agen, 64 Wash. 390.

[48] Thus there are many cases in which it is held that the corporation, from lapse of time, general notoriety, and course of business, must be presumed to have knowledge. See Scott v. Middleton Ry. Co., 86 N. Y. 200; Central R. Co. v. Cheatham, 85 Ala. 292, 7 Am. St. R. 48; Kelsey v. National Bank, 69 Pa. 426. So in Martin v. Webb, 110 U. S. 7, 28 L. Ed. 49, it is said: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." Followed in Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 51 Am. St. R. 721; Spongberg v. First Nat. Bank, 18 Idaho, 524, 31 L. R. A. (N. S.) 736.

But a failure to discover that which inspection with ordinary care would not have discovered, will not work a ratification. Campbell v. Manufacturers' Nat. Bank, 67 N. J. L. 301, 51 Am. St. R. 438.

[49] Thus, for example, in Reid v. Miller, 205 Mass. 80, it was said that the jury might infer knowledge from the facts shown, where it appeared that the husband of the alleged principal, with whom she was living in the ordinary way, was acting as the manager of her property and affairs. "There is a broad field for legitimate inference by a jury from facts like these," said the court.

§ 407. ——— Imputed knowledge — Knowledge of agents — Knowledge of the particular agent.—The knowledge which shall bind the principal may also, of course, be the knowledge possessed by some other agent having a general authority in the matter, and which may be imputed to the principal in accordance with the general rule making notice to an agent notice to his principal.[50] But the knowledge of the particular alleged agent himself of his own unauthorized act cannot thus be imputed to the principal, in such manner as to satisfy the requirement of knowledge by the principal; for, as to the matter in question, the person acting is not agent until ratification, and it cannot be said that the principal has ratified with knowledge at the time of ratification, simply because the person who thus becomes agent had knowledge.[51] *A fortiori* is this true where the alleged agent was a mere stranger, not an agent for any purpose.

So in O'Connell v. Casey, 206 Mass. 520, the same point is held, and it was said that the jury were at liberty to refuse to credit the testimony of the parties that the wife was not told of the fact in controversy.

In Curry v. Hale, 15 W. Va. 867, it is said: "It is not necessary that such knowledge shall be shown by positive evidence; it may be deduced or inferred from the facts and circumstances of the case." Many other cases are to the same effect.

[50] As where notice comes to an agent or officer of a corporation who for this purpose may be regarded as the corporation itself. Union Mining Co. v. Rocky Mt. Nat. Bank, 2 Colo. 248; Beacon Trust Co. v. Souther, 183 Mass. 413; Hartford Deposit Co. v. Calkins, 109 Ill. App. 579.

[51] In Thomson v. Central Pass. Ry. Co., 80 N. J. L. 328, it is said that the doctrine of imputed notice rests upon a legal fiction, which might suffice in certain other cases but not here. "Knowledge as a fact is the basis of implied acquiescence or ratification." See also Britt v. Gordon, 132 Iowa, 431; Reeves v. Lewis, 25 S. Dak. 44, 29 L. R. A. (N. S.) 82. In Adams Express Co. v. Trego, 35 Md. 47, 68, it is said: "It is true, notice to an agent of facts arising from and growing out of the subject matter of his agency, is constructive notice to the principal. But this rule has no application to the case where the question is, whether the act relied on to bind the principal, was done within the limits and scope of the agent's authority or not. * * * It is true, the act of the agent, though unauthorized at the time, may become binding upon the principal by ratification and adoption. But to make such ratification effectual it must be shown that there was previous knowledge on the part of the principal of all the material facts and circumstances attending the act to be ratified."

In Long v. Poth, 16 N. Y. Misc. 85, it is said: "True, it will be presumed that an agent discloses to his principal within a reasonable time all of the material facts that come to his knowledge while acting within the scope of his authority (Hyatt v. Clark, 118 N. Y. 563, 570; Krumm v. Beach, 96 Id. 398, 404, 405; Bank v. Davis, 2 Hill, 451), but this rule cannot be extended to imply that a special agent whose powers are limited to making a lease for one year informed his principal that he had transcended

It has been held, however, that where an agent authorized to do a certain act, or to do it in a certain way, has deviated from his instructions, there is a presumption that, in reporting to his principal, he will advise him, as, it is said, would be his duty,[52] of this deviation, and that the principal who then takes the benefit of his act must be deemed to have knowledge.[53] This, however, if sound, can be no more than a presumption of fact, and may therefore be rebutted by evidence to the contrary.[54] In the great majority of the cases, the presumption is in fact rebutted by evidence showing that the principal did not know the circumstances.

his authority, and made two leases in violation of duty for longer terms. Adams Express Co. v. Trego, 35 Md. 47."

In Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731, quoted in Henry v. Allen, 151 N. Y. 1, 36 L. R. A. 653, the court emphasizes the fact that the knowledge imputed to the principal does not include the agent's own knowledge of his wrongful acts.

Especially will the notice not be imputed where the agent had an adverse interest. *Post*, Book IV, Chap. V, under the head of Notice to Agent. First Nat. Bank v. Foote, 12 Utah, 157; Barnett v. Daw, 55 N. Y. App. Div. 202.

Contrary statements.—It is true that statements opposed to the rule given in the text are occasionally to be met, *e. g.* in Hyatt v. Clark, 118 N. Y. 563; Meehan v. Forrester, 52 N. Y. 277; St. Louis Refrigerator Co. v. Vinton Washing Mach. Co., 79 Iowa, 239, 18 Am. St. R. 366; United States Fidelity Co. v. Shirk, 20 Okla. 576; Kickland v. Menasha Wooden Ware Co., 68 Wis. 34, 60 Am. Rep. 831; Windsor v. St. Paul, etc., R. Co., 37 Wash. 156, 3 A. & E. Ann. Cas. 62, but these statements are probably either mere *dicta* or inadvertent expressions. The general adoption of this view would practically abolish the entire requirement of knowledge in ratification, and it is inconsistent with a large number of cases, as is pointed out in Adams Express Co. v. Trego, *supra;* and in an article by Mr. Arthur L. Corbin in 15 Yale Law Journal, 331.

The statements concerning "constructive notice" in Andrews v. Robertson, 111 Wis. 334, 87 Am. St. R. 870, 54 L. R. A. 673, are doubtless mere inadvertent expressions.

[52] In the ordinary case of imputing notice, an exception is made of the case in which the agent is acting adversely to his principal, upon the ground that the law will not presume that the agent will do what the circumstances show that it is certain he will not do. *Post*, Book IV, Ch. V. Is this a different case?

[53] Meehan v. Forrester, *supra;* Hyatt v. Clark, *supra* (State Bank v. Kelly, 109 Iowa, 544, puts the case upon the principal's duty to inquire). The case of Francis v. Litchfield, 82 Iowa, 726, doubtless goes upon this ground.

If this is to be deemed a conclusive presumption, it is, of course, only another form of reaching the same conclusion as by imputing the knowledge directly.

[54] Long v. Poth, 16 N. Y. Misc. 85, *supra.*

In Meehan v. Forrester, 52 N. Y. 277, *supra*, an attorney who had been employed to collect a claim and who had obtained a judgment upon it, brought to his principal a deed of lands, absolute upon its face, running from the debtor to the principal, and delivered it to the prin-

In controversies between the principal and the agent, the presumption would doubtless not be invoked in the agent's favor.

§ 408. ——— Duty to inquire.—And, finally, where the alleged agent was a mere volunteer, not then agent for any purpose,—in this respect differing from the cases mentioned in § 403,—who has assumed to act for the alleged principal, it is said to be "the duty of the princi-

cipal who accepted it, apparently supposing it was in payment of the debt. As matter of fact, the attorney had received it upon parol understanding that it should be a security merely and subject to redemption. Some time later the principal sold the land to a *bona fide* purchaser. Five years later the debtor sought to redeem, and finding that redemption was impossible because of this sale, sought to recover the excess in value from the principal. The court said that it was the duty of the client to inquire and of the attorney to communicate what were the conditions upon which the deed was received and "in the absence of any evidence to the contrary, the presumption is that these duties were performed." Presumptively, then, the principal knew the condition; but, apparently, he might have shown that he did not; and, in that event, apparently a different conclusion would have been reached.

In Hyatt v. Clark, 118 N. Y. 563, Mrs. Hyatt, who was going abroad, had given to her brother, one Lake, a formal power of attorney to manage and conduct her property and affairs in the United States, to sell and dispose of real or personal property and convey the same, etc. During her absence Lake proposed to lease certain of her land to Clark for a five year period, with right in the lessee to renew for two more five year periods, at increased rent. The lease was written and signed by Lake as agent, and then some question arose as to Lake's authority under this power of attorney to make leases. Pending a communication with Mrs. Hyatt, the lease was put into Clark's hands, but he did not accept delivery of it and postponed the decision of the question until Mrs. Hyatt should be heard from. Some days later a cable message came from Mrs. Hyatt cancelling the power of attorney, and directing Lake to sign no leases. Lake showed this to Clark, and requested a cancellation of the lease. Clark, however, refused to cancel the lease, but said he would take any risk there might be about it, recorded the lease and took possession of the premises. Later Mrs. Hyatt returned and was told by Lake that the lease had been signed before her message was received, and that it was valid and could not be cancelled. He did not tell her of the conditional delivery or of any of the other circumstances attending it. She made no effort to cancel the lease upon the ground that the power of attorney did not authorize it, and received the rents for four years or more, and until Clark demanded a renewal, when, learning of the facts attending the original delivery of the lease, she brought an action for its cancellation. The court held that she had ratified the lease, that it was Lake's duty to give her notice of the facts, that she was charged with his knowledge, and "after the lapse of sufficient time, therefore, she is presumed to have acted, with knowledge of all the acts of her agent in the line of his agency." It will be observed that this case makes the presumption practically a conclusive one, and applies it in the face of the conceded facts that she was not informed upon her return, or until she attempted to secure cancellation, of the fact that the lease had never been unconditionally delivered and had been kept by Clark in face of her revocation of Lake's authority.

pal, or the person who becomes so by adopting the contract made in his name and for him, to make all needed inquiry and investigation into the facts, acts and representations of the person, who without authority has assumed to act for him, before he adopts the contract as his own." [55] Certainly if he makes no such inquiry, but blindly accepts the proceeds as his own, there is strong evidence that he has voluntarily ratified, having all the knowledge which he cared to have.[56]

The same rule has also been applied where the principal of an agent having certain authority, is advised that the agent has acted in excess of it: he is bound to ascertain the nature and extent of that excess or assume the responsibility of voluntary ignorance.[57]

§ 409. ——— **Effect of ratification without knowledge.**—Finally it must be borne in mind, though it seems often to be overlooked, that the effect of ratification without knowledge is usually to defeat the entire ratification, and not to make it good as to all matters except that as to which there was no knowledge. And also, as will be seen in later sections, that though the principal at the outset had no knowledge, he cannot later, when he acquires it, insist upon retaining or securing the fruits of the unauthorized act and rejecting the residue.

§ 410. **VII. No ratification of part of act.**—It is a fundamental rule that, if the principal elects to ratify any part of the unauthorized act, he must, so far as it is entire, ratify the whole of it. He cannot avail himself of it so far as it is advantageous to him, and reject it as to the residue. He cannot take the benefits and repudiate the obligations; and this rule applies not only when his ratification is express but also when it is implied,[58] if the requirement of knowledge is satisfied.

[55] Busch v. Wilcox, 82 Mich. 336, 21 Am. St. Rep. 563, cited with approval in State Bank v. Kelly, 109 Iowa, 544: Wilder v. Beede, 119 Cal. 646.

[56] Meehan v. Forrester, 52 N. Y. 277; Eadie v. Ashbaugh, 44 Iowa, 519: Deering & Co. v. Grundy Nat. Bank, 81 Iowa, 222; Pope v. Armsby Co., 111 Cal. 159.

[57] Neimeyer Lumber Co. v. Moore, 55 Ark. 240; Pope v. Armsby Co., 111 Cal. 159, 43 Pac. 589; Aultman Threshing, etc., Co. v. Knoll, 71 Kan. 109; Phillips v. Phillips, — Cal. —, 127 Pac. 346, is to much the same effect.

[58] See *post*, §. 434, *et seq.*; Crawford v. Barkley, 18 Ala. 270; Daniels v. Brodie, 54 Ark. 216, 11 L. R. A. 81; Mulford v. Torrey Exploration Co., 45 Colo. 81; Hodnett v. Tatum, 9 Ga. 70; Southern Express Co. v. Palmer, 48 Ga. 85; Mercier v. Copelan, 73 Ga. 636; Dolvin v. American Harrow Co., 125 Ga. 699, 28 L. R. A. (N. S.) 785; Burke, etc., Co. v. Wells Fargo & Co., 7 Idaho, 42; Henderson v. Cummings, 44 Ill. 325; Barhydt v. Clark, 12 Ill. App. 646; Swisher v. Palmer, 106 Ill. App. 432; Krider v. Western College, 31 Iowa, 547; Key v. Nat'l Life Ins. Co., 107 Iowa, 446; McKinstry v. Citizens' Nat. Bank, 57 Kan. 279; Aultman Thresh., etc., Co. v. Knoll, 71 Kan. 109; Wells v. Hickox, 1 Kan. App. 485; Loomis

same whether the instrumentality employed was fraudulent, or merely a matter of warranty or promise.[60]

§ 412. ——— Limitations—Collateral contracts.—But this rule is not to be applied without limitation. Thus it is said in a leading case,[61] though it is probably somewhat too wide, "even this responsibility for instrumentalities does not extend to collateral contracts made by the agent in excess of his actual or ostensible authority, and not known to the principal at the time of receiving the proceeds, though such collateral contract may have been the means by which the agent was enabled to effect the unauthorized contract, and the principal retain the proceeds thereof after knowledge of the fact."

Goodell, 56 Iowa, 592; Eadie v. Ashbaugh, 44 Iowa, 519; Deering Co. v. Grundy Nat. Bank, 81 Iowa, 222; Osborn & Co. v. Jordan, 52 Neb. 465; Dresher v. Becker, 88 Neb. 619; Philips, etc., Mfg. Co. v. Wild, 144 Ala. 545; Walling v. Poulsen, 160 Mich. 392; Fraternal Army of America v. Evans, 215 Ill. 629; Morse v. Whitcomb, 54 Or. 412, 135 Am. St. R. 832; Western Mfg. Co. v. Cotton, 126 Ky. 749, 31 Ky. L. R. 1130, 12 L. R. A. (N. S.) 427.

Contra: Nichols v. Bruns, 5 Dak. 28.

[60] Rackemann v. Riverbank Improvement Co., 167 Mass. 1, 57 Am. St. 427 (citing Udell v. Atherton, 7 H. & N. 172; Brady v. Todd, 9 C. B. (N. S.) 592; Western Bank of Scotland v. Addie, L. R. 1 H. L. (Sc.) 145; Houldsworth v. Glasgow Bank, 5 App. Cas. 317; Kennedy v. McKay, 43 N. J. L. 288, 39 Am. Rep. 581; Titus v. Cairo, etc., R. Co., 46 N. J. L. 393, 420; Krumm v. Beach, 96 N. Y. 398; Eberts v. Selover, 44 Mich. 519, 38 Am. Rep. 278; Knappen v. Freeman, 47 Minn. 491).

[61] The leading case in this connection is Smith v. Tracy, 36 N. Y. 79. Here the owner of bank stock put it into the hands of the president of the bank for sale. The president sold it to the plaintiff making representations concerning its value which he had no authority to make but which he believed to be true. He paid the proceeds to the owner saying nothing about the representations he had made. The seller died, apparently in ignorance of the making of the representations; the representations proved to be untrue, and the purchaser more than two years after the sale and without any previous effort to undo the transaction brought this action against the seller's executor to recover damages. The plaintiff claimed that power to warrant would be implied, but, if not, that the retention of the proceeds of the sale was a ratification of the warranty. It was held that no power to warrant would be implied and that the receipt of the proceeds was no ratification. "The receipt of the proceeds of the sale, in ignorance of any such undertaking, is neither an assent to the breach of duty nor an extension of the authority of the agent." But suppose that the purchase price had not been paid and the owner were suing the buyer for the price. Would the court then have held that he could recover the price without regard to the representations? Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137, is also to the same effect. Here it was held that a principal who gives money to an agent to loan at legal rates does not by receiving the securities ratify an illegal exaction by the agent of a bonus making the loan usurious, the principal being ignorant of it. But three judges dis-

The principal here, it is said, has authorized his agent to make a certain contract. The agent makes that contract but also makes an additional one. The latter, as the person dealing with the agent is bound to know, is not binding unless authorized or ratified. It was not authorized: was it ratified? All that can be shown is that the prin-

sented. Wheeler v. Northwestern Sleigh Co., 39 Fed. 347 (Jenkins and Gresham, JJ.) is also an important case. The owner of stock in a corporation upon which a dividend had been declared but not paid, authorized an agent to sell the stock at a certain price, expressly reserving the dividend. The agent made a sale at the price named by promising to throw in the dividend. He paid the price to the principal but did not tell him of the agreement respecting the dividend. It does not appear when the principal learned of the promise respecting the dividend. The agent denied that he made any such promise, but the finding was against him on this point. Neither party had offered or demanded a disaffirmance of the sale. It was urged, by the purchaser, that by so receiving and retaining the proceeds of the sale the principal ratified the contract that the dividend should be included, but this was held not to be true. "The plaintiff received as avails of the stock the exact amount for which he had authorized his agent to dispose of his stock. He had no reason to suppose that any false representation had been made, or that his agent had assumed to dispose of any other property than the stock as the consideration for the money paid by the purchasers and received by him. Under such circumstances, the retention of the money cannot be held to be a ratification by him of the unauthorized acts of the agent because it was retained without knowledge of the facts," citing Bell v. Cunningham, 3 Pet. 69, 7 L. Ed. 606; Hastings v. Bangor House Proprietors, 18 Me. 436; Bryant v. Moore, 26 Me. 87, 45 Am. Dec. 96; Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Navigation Co. v. Dandridge, 8 G. & J. (Md.) 248, 29 Am. Dec. 543; Smith v. Tracy, *supra;* Baldwin v. Burrows, *supra;* Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Reynolds v. Ferree, 86 Ill. 570; Roberts v. Rumley, 58 Iowa, 301; Bohart v. Oberne, 36 Kan. 284; Aetna Insurance Co. v. N. W. Iron Co., 21 Wis. 458.

Roberts v. Rumley, 58 Iowa, 301, cited *supra*, is also of interest. The defendant who lived in Indiana held certain notes against a resident of Iowa upon part of which one Roberts was a surety. Rumley put the notes into the hands of attorneys in Iowa who took judgment upon them. Roberts proposed to the attorneys that he would get the principal debtor to secure payment by a mortgage upon his homestead if certain extensions and privileges of payment were granted. The attorneys reported this to Rumley who instructed them to accept if a certain sum should also be paid to apply on fees. Roberts paid this sum and the attorneys without the knowledge or consent of Rumley agreed that it should be applied in a different way and that the mortgage should be *pro tanto* assigned to Roberts. Rumley accepted the mortgage, which was silent as to this agreement, and afterwards began foreclosure, whereupon Roberts began the suit in question to secure the performance of the agreement, claiming that Rumley by accepting the mortgage and payment ratified this contract. It was held (distinguishing Eadie v. Ashbaugh, 44 Iowa, 519, and Beidman v. Goodell, 56 Iowa, 592) that his claim could not be enforced. "To hold that the principal is bound by agreements between the

cipal, in ignorance of the additional contract, received, and has retained, what appeared to be the legitimate proceeds of the authorized contract. "It cannot, surely, be said that under such circumstances the retention of the money was an act of affirmance," declares Jenkins, J., in a case already cited.[62] "To so hold would place every principal at the mercy of his agent with respect to matters as to which he had conferred no apparent authority. So that if one should authorize his agent to sell his house for $20,000, and the agent selling the house for that sum should include in the sale certain bank stock which he was not authorized to sell, and of which he had no possession, the principal, by the mere receipt and retention of the sum which he had authorized to be taken for the house, and in ignorance of the fact that the bank stock was part of the consideration running to the purchaser, would be bound to deliver the stock. I cannot yield assent to such doctrine."

§ 413. ——— This is not to say, however, that if the principal had been seeking by action to enforce the contract as he understood and authorized it, he could have done so. The defendant in that event could show that he never consented to that contract. Nor does it follow that the principal would have been able to retain the proceeds if the other party, returning what he had received, had demanded restoration upon the ground that the minds of the parties had never met upon any proposition.

The situation appears to be this: The principal has authorized his agent to make or accept a certain offer, or an offer upon certain terms. The agent in fact has made or accepted a different offer, or an offer upon different terms. The result is that the minds of the principal and the other party have never met; no valid contract has resulted; and, subject to a possible right of the principal to force a ratification,[63] either party is at liberty to withdraw from the negotiations. As soon as the principal learns the facts, it would, in general, be incumbent upon him, unless he wishes to affirm the contract, to offer to restore what he may have received under the negotiations and of the other party likewise to restore what he has received.[64]

special agent and the person with whom he contracts, not authorized by the agent's appointment, and of which he had no knowledge when he accepted the benefits of the contract, would be entirely subversive of the whole doctrine of special agency, and instead of requiring the person dealing with the agent to ascertain, at his peril, that the agent has kept within his special authority, would require the principal to inquire, at his peril, whether the agent had gone beyond it." (But compare State Bank v. Kelly, 109 Iowa, 544.)

[62] Wheeler, v. Northwestern Sleigh Co., *supra*.

[63] As to which see *post*, § 513, *et seq*.

[64] See *post*, § 436.

If now the principal takes the initiative and endeavors to enforce the contract or secure rights under the contract, he must take the contract as he finds it, because that is the only contract or appearance of contract that has been made and to which the other party has assented. If there are unauthorized provisions in the contract, still, since they are terms in the only contract there is, the principal who would enforce that contract must be bound by them. If there are conditions or representations affecting this contract, which would equally affect an authorized contract, the principal must take subject to them.

Now, turn it about. Until the principal has done something to ratify, he is not bound. He is the only party who can ratify. Until he has ratified, the other party can not hold him upon the contract or upon any of the conditions or representations accompanying it. If the other party claims that the principal has ratified the contract, he has the burden of proving that the principal with knowledge has done so.[65] If he can establish that, he may succeed. The refusal of the principal to disaffirm upon a proper request would doubtless often be a ratification, though it is not necessarily so.[66]

If the principal does not ratify, either by seeking to enforce or otherwise, the transaction stands like any other ineffectual dealings. Disaffirmance and restoration are the ends to be arrived at. If this can not be accomplished, and there are no *quasi*-contractual remedies available, any loss sustained must either be made good by the agent who caused it, or be left to lie where it has fallen.

§ 414. ——— Collateral stipulation which makes whole contract illegal.—A distinction may also be drawn in the case in which the collateral stipulation is one which would, as the other party who now insists upon it knows, make an otherwise lawful contract illegal. He has no right to suppose that such a stipulation was authorized, or will be approved. He himself ought to be supposed to have intended to make a lawful contract and not an illegal one. He is certainly entitled

[65] Thus in Lester v. Kinne, 37 Conn. 9, specific performance was denied to a buyer to whom the defendant's agent, authorized to sell lot A, had without authority agreed to convey lot B also for the price fixed for A alone, there being no evidence of ratification except that the principal had received the consideration, which he supposed was for lot A only, in ignorance of the fact that the agent had agreed to include lot B also.

[66] Although it is sometimes said that the refusal of the principal to return what he has received or pay for it, is a ratification, this is, of course, not necessarily so. Not every benefit received must be paid for. It is not always possible to restore it. Benefits thrust upon another cannot usually be made the basis of recovery. There can usually be no liability for refusing to return what one has the right to retain. See *post*, §§ 435, 436 and notes.

to very little consideration in endeavoring to set up against an actually innocent principal who is seeking to enforce an apparently lawful contract, an illegal provision to which he was a voluntary party and which will make the whole transaction illegal; and it has been held that he will not be permitted to do it.[67]

§ 415. ——— Divisible acts—Involuntary receipt, etc.—Moreover, by the terms of the rule, it does not apply to the ratification of wholly severable and disconnected parts of a general transaction. Nor, as will be seen hereafter, to the case in which something to which the principal is entitled independent of the act in question, is so bound up with that as to make separation impossible.[68]

§ 416. Intention to ratify.—The statement is sometimes made that there can be no ratification unless the principal *intended* to ratify.[69] If by this is meant that there must always be a conscious, deliberate purpose to ratify, it is, of course, unsound. Where particular acts, alleged to be acts of approval, are relied upon, the question whether they were meant to be acts of approval or of disapproval, or whether

[67] Thus in Terry v. International Cotton Co., 138 Ga. 656, a special agent sent out with a printed form of contract to make contracts for the purchase of cotton took from the defendant and delivered to his principal an apparently regular and lawful contract upon one of the forms so furnished for the sale of defendants cotton to the plaintiff. On seeking to enforce it, plaintiff is met by defendant's contention that the contract was really made upon the terms that the cotton should not in fact be delivered, but should be settled by paying differences in value. Such a contract would be a gambling contract, illegal under the statutes of the state, and one which the agent had no authority to make. *Held*, that this collateral stipulation could not be set up. The court cites as analogous, the cases of alleged usury, where the agent and the borrower have agreed upon a total rate which would make the loan usurious. As will be seen in a later section, it is held in many cases, though not without dissent, that a collateral stipulation or act of this sort, not included in the very contract upon which the principal sues, cannot be set up to invalidate the loan. See Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Hall v. Maudlin, 58 Minn. 137, 49 Am. St. R. 492; Nye v. Swan, 49 Minn. 431; Richards v. Bippus, 18 App. D. C. 293; Franzen v. Hammond, 136 Wis. 239, 128 Am. St. R. 1079, 19 L. R. A. (N. S.) 399; McLean v. Camak, 97 Ga. 804; Clarke v. Havard, 111 Ga. 242, 51 L. R. A. 499.

[68] See *post*, § 439.

[69] Thus, for example, a statement in Ansonia v. Cooper, 64 Conn. 536, that "the acceptance of the results of the act with an intent to ratify and with full knowledge of all the material circumstances, is a ratification"—which is of course a perfectly true statement—becomes the cited authority, in Russell v. Erie R. Co., 70 N. J. L. 808, 67 L. R. A. 433, 1 A. & E. Ann. Cas. 672, for the statement "that in order to constitute a ratification there *must be* an acceptance of the results of the act with an intent to ratify and with full knowledge of all the material circumstances," which is obviously quite a different proposition.

See also Trustees v. Bowman, 136 N. Y. 521; Reid v. Warner, [1907] Transv. L. R. (Sup.) 961.

an inference of approval may or may not reasonably be drawn from them, or whether they may not be as consistent with some other conclusion as with that of approval, and the like, may well require a consideration of the intent or purpose with which the acts were done.[70]

But it is perfectly settled that, in the creation of agency or of partnership or like situations, where the question is what inference the law draws from given facts, the matter of the actual intention of the parties is not conclusive. If they voluntarily intend to do the acts from which, as a legal consequence, agency, or partnership, or contract, or the like, results, that consequence can not be defeated because the parties may not have consciously intended to produce that result. It can not be otherwise with ratification.[71]

V.

WHAT AMOUNTS TO A RATIFICATION.

§ 417. Importance of question.—It is obvious that this is the most important question to be considered in this chapter, and that within it are embraced, to a greater or less degree, all of the preliminary topics that have just been considered. Given the proper parties and the right conditions, does this writing, this conduct, this speaking, this silence, amount to a ratification of this unauthorized act or contract, is the vital question to which all the preliminary considerations lead.

§ 418. Written or unwritten—Express or implied.—As has been seen and will hereafter be more clearly seen, the ratification of an unauthorized act is deemed to be equivalent to a prior authority to perform it; and as that prior authority may have been conferred in a great variety of ways—may have been written or unwritten, express or implied,—so this ratification may be effected in the same way.[72]

1. Express Ratification.

§ 419. General rule.—It is the general rule that the act of ratification must be of the same nature as that which would be required for

[70] This is, doubtless, what is meant in such cases as Breaux v. Sarvole, 39 La. Ann. 248, and Williams v. Pullman Car Co., 40 La. Ann. 87, 8 Am. St. R. 512, by the statement "that the acts from which the ratification of a contract is sought to be deduced must evince such intention clearly and unequivocally. None will be inferred where those acts can be otherwise explained."

[71] Thus in Hazard v. Spears, 4 Keyes (43 N. Y.), 469, 2 Abb. Dec. 353, where this question was involved, it is said: "The law passes its judgment upon, and gives legal effect to, what is said and done. Intentions, except as they are manifested by the acts and statements of the parties, are of no avail."

[72] Goss v. Stevens, 32 Minn. 472; *Post*, Subd. 1 and 2; Taylor v. Conner, 41 Miss. 722, 97 Am. Dec. 419.

conferring the authority in the first instance.[74] If, therefore, sealed authority would have been indispensable, then, as a general rule, sealed ratification must be shown; and if written authority would have been required, written ratification must appear.

Each of these methods will be separately considered.

a. By Instrument Under Seal.

§ 420. Deed at common law ratified only by instrument under seal.—As authority to execute an instrument under seal could only be conferred by authority under seal,[75] it was the doctrine of the common law that the unauthorized deed of an agent—meaning by deed, of course, any instrument to whose validity a seal was essential—could only be ratified by an instrument under seal.[76]

As a rule of the common law, this generally still prevails where not changed either by express statute or as the result of general statutory provisions respecting the significance or necessity of seals.

[74] "A ratification of an act done by one assuming to be an agent relates back and is equivalent to a prior authority. When therefore the adoption of any particular form or mode is necessary to confer the authority in the first instance there can be no valid ratification except in the same manner." Parker, C. J. in Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

Where a city could authorize a given contract only by ordinance it can ratify only by ordinance. Arnott v. Spokane, 6 Wash. 442; Kroffe v. Springfield, 86 Mo. App. 530; Mulligan v. Lexington, 126 Mo. App. 715; Penn v. Laredo (Tex. Civ. App.), 26 S. W. 636.

[75] *Ante*, § 212.

[76] Despatch Line v. Bellamy Mfg. Co., *supra;* Spoffard v. Hobbs, 29 Me. 148, 48 Am. Dec. 521; Bellas v. Hays, 5 Serg. & R. (Pa.) 427, 9 Am. Dec. 385; Stetson v. Patten, 2 Greenl. (Me.) 358, 11 Am. Dec. 111; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; McDowell v. Simpson, 3 Watts (Pa.), 129, 27 Am. Dec. 338; Heath v. Nutter, 50 Me. 378; Paine v. Tucker, 21 *Id.* 138, 38 Am. Dec. 255; Hanford v. McNair, 9 Wend. (N. Y.) 54; Taylor v. Robinson, 14 Cal. 400; Ingram v. Little, 14 Ga. 173, 58 Am. Dec. 549; Drumright v. Philpot, 16 Ga. 424, 60 Am. Dec. 738; Pollard v. Gibbs, 55 Ga. 45; Neely v. Stevens, 138 Ga. 305; McCalla v. American, etc., Mtg. Co., 90 Ga. 113; Grove v. Hodges, 55 Penn. St. 504; McCracken v. San Francisco, 16 Cal. 591; Kirkpatrick v. Pease, 202 Mo. 471; Skirvin v. O'Brien 43 Tex. Civ. App. 1, but see and cp. Eastham v. Hunter, 102 Tex. 145, 132 Am. St. R. 854; Oxford v. Crow, [1893] 3 Ch. 535.

But a parol acknowledgment by the principal that an agent possessed an authority under seal is sufficient. Blood v. Goodrich, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152.

And a few cases seem to ignore the rule stated in the text. See Donason v. Barbero, 230 Ill. 138; Finch v. Gillespie, 122 App. Div. 858; Mulford v. Rowland, 45 Colo. 172; Eastham v. Hunter, *supra.*

§ 421. ——— **Rule relaxed in partnership cases.**—This rule has been greatly relaxed in partnership cases, and it is now quite universally held that the act of one partner in executing, in the name of the firm, an instrument under seal, may be ratified by the other partner by parol. Said Breese, C. J.: "We think it may be safely said that the modern rule is that one partner may, in furtherance of the partnership business and for its benefit, execute a deed under seal which will be binding on the other if he has foreknowledge, or subsequently ratifies it, and this may be proved by acts and circumstances or by his verbal declarations and admissions." [77]

§ 422. ——— **Massachusetts rule.**—And in Massachusetts the court has gone still further, and it is said that the law is settled in that commonwealth that the unauthorized execution of a deed in the name either of a partnership or of an individual may be ratified by parol.[78]

§ 423. ——— **Modern rule more liberal.**—As has been already stated, the tendency in modern times is to attach less importance to the presence of a seal, and to mitigate the severity of those technical rules of the common law which were based upon reasons no longer applicable to the conditions and methods of the present day. In many of the states statutes have been enacted by which the absence of a seal from an instrument formerly requiring it is declared to be immaterial, or by which all of the old distinctions between sealed and unsealed instruments are swept away.[79] Where such statutes prevail, the technical rule requiring a ratification under seal has no force.[80]

§ 424. ——— **Unnecessary seal may be disregarded.**—Moreover, in accordance with rules previously referred to,[81] if the instrument executed by the agent, though under seal, be one upon which no seal is

[77] Peine v. Weber, 47 Ill. 45; and to the same effect are McIntyre v. Park, 11 Gray (Mass.), 102, 71 Am. Dec. 690; Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; Holbrook v. Chamberlain, 116 Mass. 155, 17 Am. Rep. 146; Russell v. Annable, 109 Mass. 72, 12 Am. Rep. 665; Kendall v. Carland, 5 Cush. (Mass.) 79; Swan v. Stedman, 4 Metc. (Mass.) 552; Dillon v. Brown, 11 Gray (Mass.), 179; Palmer v. Seligman, 77 Mich. 305; Fox v. Norton, 9 Mich. 207.

[78] Gray, C. J. in Holbrook v. Chamberlain, 116 Mass. 155, 17 Am. Rep. 146; McIntyre v. Park, 11 Gray (Mass.), 102, 71 Am. Dec. 690.

[79] Provisions more or less complete of this nature are found in Arkansas, California, Colorado, Dakota, Indiana, Iowa, Kansas, Michigan, Mississippi, Montana, Nebraska, Tennessee, Texas, Washington and probably in other states.

[80] Rutherford v. Montgomery, 14 Tex. Civ. App. 319; Smyth v. Lynch, 7 Colo. App. 383; McLeod v. Morrison, 66 Wash. 683, 38 L. R. A. (N. S.) 783.

[81] *Ante*, § 215.

required, the seal may be disregarded and the instrument ratified as a simple contract.[82]

§ 425. ——— By power of attorney subsequently granted.—The unauthorized execution of a deed may be expressly ratified by a power of attorney subsequently executed, authorizing its execution and dated back prior to the date of the deed. Thus, where an attorney appointed by parol, executed a bond in the name of his principal, and afterwards his principal gave him a power of attorney dated prior to the bond and authorizing its execution, this was held to be a good ratification of the bond and that the principal was estopped to assert that the power of attorney was, as a matter of fact, executed subsequently to the bond.[83] So a letter from a principal authorizing certain acts, but received after the performance, will be a ratification.[84]

But a mere power to do acts in the future will not operate as a ratification of acts already done.[85]

b. By Instrument in Writing.

§ 426. Where authority must be conferred by writing, ratification in writing is necessary.—It has been seen in preceding sections that in a few cases some statute, usually but not always the statute of frauds, requires that authority for certain purposes shall be conferred by writing. Where this is true, ratification must also be by writing.[86]

[82] Bless v. Jenkins, 129 Mo. 647; Goldring v. Reid, 61 Fla. 250; Adams v. Power, 52 Miss. 828 [citing Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Lawrence v. Taylor, 5 Hill (N. Y.), 113; Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Evans v. Wells, 22 Wend. (N. Y.) 340]. And to the same effect are State v. Spartansburg, etc., R. R. Co., 8 S. C. 129; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Smyth v. Lynch, 7 Colo. App. 383.

But, *contra*, Rowe v. Ware, 30 Ga. 278; Pollard v. Gibbs, 55 Ga. 45; Hayes v. City of Atlanta, 1 Ga. App. 25; Dalton Buggy Co. v. Wood, 7 Ga. App. 477; Neely v. Stevens, 138 Ga. 305.

[83] Milliken v. Coombs, 1 Greenl. (Me.) 343, 10 Am. Dec. 70; United States Express Co. v. Rawson, 106 Ind. 215; Riggan v. Crain, 86 Ky. 249.

[84] Rice v. McLarren, 42 Me. 157. But in Moore v. Lockett, 2 Bibb (Ky.), 67, 4 Am. Dec. 683, it was held that a letter giving an agent power to sell but written subsequently to an unauthorized sale under an insufficient power, did not ratify the previous sale. Certainly not where the letter names different terms. Stillman v. Fitzgerald 37 Minn. 186.

[85] Britt v. Gordon, 132 Iowa, 431.

[86] Hawkins v. McGroarty, 110 Mo. 546; Salfield v. Sutter, etc., Co., 94 Cal. 546; Borderre v. Den, 106 Cal. 85; Miller v. Drexel, 37 Ill. App. 462; 594; Long v. Poth, 16 Misc. (N. Y.) Vaughn v. Slater, 147 Ill. App. 441: Lawler v. Armstrong, 53 Wash. 664: Moots v. Cope, 147 Mo. App. 76 (in which the court entirely refused to allow the proof of a contract for sale of realty without accompanying written authority or ratification); Matteson v. U. S. Land Co., 112 Minn. 190.

Where a statute requires that the authority of an agent to make con-

§ 427. ——— Contracts for sale or leasing of land.—Thus, as has been seen, in many of the states, authority to make contracts for the sale or leasing (for more than a certain term) of land of the principal is required to be in writing [87] and it has, therefore, been held in these states that the unauthorized making of such contracts can subsequently be ratified only by writing.[88]

In other states, however, written authority for these purposes is not required, and therefore written ratification is not necessary.[89]

§ 428. Written ratification not otherwise required.—Except in these cases wherein ratification by sealed instrument is required, or where ratification in writing is required because some statute demands authority by writing, it is the general rule that ratification, though it be express and formal, need not be in writing. Any words in any form clearly indicative of an intention to ratify will suffice. As will be seen in the following subdivisions, even express or formal ratification is not necessary; but, even if it were, it would not need to be in writing, unless some statute made it so, or unless instruments under seal were involved.

§ 429. "Lawfully authorized" under Statute of Frauds.—Thus it has been held sufficient to satisfy that provision of the Statute of Frauds

tracts of suretyship should be in writing, a subsequent parol ratification is insufficient. Ragan v. Chenault, 78 Ky. 545; English v. Dycus, 8 Ky. L. R. 331.

Where the statute requires that the agent have written authority, the writing may be a previous authority, or may be made at any subsequent time. *In re* Balfour & Garrette, 14 Cal. App. 261.

The making of a simple agreement to pay money, not a promissory note, is not required by the California statute (Civ. Code § 2309), to be in writing, and it may therefore be ratified without writing. Goetz v. Goldbaum (Cal.), 37 Pac. 646.

In Mercantile Trust Co. v. Niggeman, 119 Mo. App. 56, under a statute requiring the authority of an agent to sell real estate to be in writing, it was held that the execution of a deed and its delivery in pursuance of a contract negotiated by an agent without written authority, is a good and binding ratification. And in Kirkpatrick v. Pease, 202 Mo. 471, it was held that there might be ratification of a contract for the sale of land made by an agent acting under parol authority, by the acceptance of the price and its retention for the period of a year.

[87] See *ante*, § 223 *et seq.*

[88] Hawkins v. McGroarty, 110 Mo. 546; Miller v. Drexel, 37 Ill. App. 462; Kozel v. Dearlove, 144 Ill. 23, 36 Am. St. Rep. 416; Long v. Poth, 16 Misc. (N. Y.) 85; McDowell v. Simpson, 3 Watts (Pa.), 129, 27 Am. Dec. 838; Zimpelman v. Keating, 72 Tex. 318; Clement v. Young-McShea Amusement Co., 70 N. J. Eq. 677, 118 Am. St. R. 747; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490, is *contra* but the cases cited in it do not sustain it upon this point.

[89] See *ante*, § 229.

Authority to accept a lease need not be in writing and there may therefore be ratification without writing. Ehrmanntraut v. Robinson, 52 Minn. 333.

which requires that the contract shall be in writing, signed by the principal or by some one thereunto by him *lawfully authorized,* to show a subsequent parol ratification of the act of the agent in signing such a contract.[90]

2. Implied Ratification.

§ 430. In general.—But since, as has been seen, authority for the doing of any lawful act,—except in those cases in which an authority in writing or under seal is expressly required,—can be conferred by parol, and since the existence of such authority may be inferred from the conduct of the parties, so also, with the same exceptions, the unauthorized doing of any such act may be ratified by parol, and the fact of such ratification may likewise be inferred from the conduct of the parties.[91] In this case also, as in the other, it will be found that this is the most usual method by which the result is effected.

Ratification, like authorization of which it is the equivalent, is generally the creature of intent, but that intent may often be found by the law in cases where the principal, as matter of fact, either had no express intent at all, or had an express intent not to ratify.[92]

The acts, words, silence of the principal which are relied upon are sometimes spoken of as in themselves a ratification. As a rule, however, this is not strictly accurate. They are rather the evidence of a ratification, than the ratification itself.

§ 431. Variety of methods.—The methods by which an implied ratification may be effected are as numerous and as various as the complex dealings of human life. It is impossible to state them all. But certain forms that have often been judicially passed upon may be grouped, and instances be given which may furnish a rule for future cases.

§ 432. I. By declaring approval.—Ratification being a matter of assent to and approval of the act as done on account of the person ratifying, any words or acts which show such assent and approval are ordinarily sufficient. Thus clearly, where the principal, when informed of the act, agrees to it,[93] or says that he is glad it is done,[94] or says that it is "all right," and directs that the matter be proceeded

[90] McLean v. Dunn, 4 Bing. 722; Soames v. Spencer, 1 Dowl. & R. 32.

[91] Campbell v. Millar, 84 Ill. App. 208; O'Reilly v. Keim, 54 N. J. Eq. 418; Dixon v. Bristol Sav. Bank, 102 Ga. 461, 66 Am. St. R. 193; Fant v. Campbell, 8 Okl. 586; Hartlove v. Fait, 89 Md. 254.

[92] Campbell v. Millar, *supra.*

[93] Smith v. Schiele, 93 Cal. 144. See also Central Texas Grocery Co. v. Globe Tobacco Co., 45 Tex. Civ. App. 199.

[94] Blakeley v. Cochran, 117 Mich. 394. See also Lowman v. Nye, etc., Bank, 31 Nev. 306.

with,[95] or declares that he will assume the unauthorized contract,[96] or agrees to pay the price stipulated for,[97] or promises to perform on his part,[98] or directs that the transaction be completed,[99] and the like;[1] there is evidence of ratification.

On the contrary, where the principal distinctly repudiates the contract, there is no ratification though he accompanies the repudiation with the offer of a different contract.[2]

So, clearly, if the principal distinctly repudiates the contract, but later voluntarily does something to mitigate the other party's loss, no ratification of the contract can be inferred.[3]

§ 433. II. By proceeding to perform.—So approval and ratification are usually clearly shown where the person, on whose behalf the act was done, voluntarily recognizes it as binding upon him, and proceeds, with knowledge of the facts, to perform the obligations which it imposes. Thus, where the alleged principal voluntarily executes and delivers the deeds called for by an unauthorized contract for the sale of land,[4] or delivers material in pursuance of an unauthorized contract for its sale,[5] or makes partial payments upon an unauthorized contract,[6] or otherwise proceeds to act upon and perform it,[7] there is strong evidence of ratification.

[95] Hess v. Baar, 14 Misc. (N. Y.) 286; Brown v. Wilson, 45 S. Car. 519, 55 Am. St. Rep. 779. So also Cameron v. Mut. L. & T. Co., 121 Iowa, 477.

[96] Pope v. Armsby Co., 111 Cal. 159; Canfield v. Johnson, 144 Pa. 61.

[97] Taylor v. Bailey, 169 Ill. 181.

[98] Prine v. Syverson, 37 Neb. 860; Fenn v. Dickey, 178 Pa. 258; Porter v. Raleigh, etc., R. Co., 132 N. C. 71. But not where the man who promises is not the one for whom the agent purported to act. Roby v. Cossitt, 78 Ill. 638.

[99] Tinsley v. Dowell (Tex. Civ. App.), 24 S. W. 928.

[1] Thus where the principal negotiates the sale of a chattel mortgage executed without authority he ratifies it (Iowa State Nat. Bank v. Taylor, 98 Iowa, 631); or endorses a note executed without authority (Washington Times Co. v. Wilder, 12 App. D. C. 62; Mitchell v. Finnell, 101 Cal. 614); or gives his daughter a blank check with which to pay for goods bought her her, Brown v. Reiman, 48 App. Div. (N. Y.) 295.

[2] Hardwick v. Kirwan, 91 Md. 285.

[3] Thus in Findlay v. Hildenbrand, 17 Idaho, 403, 29 L. R. A. (N. S.) 400, the principal, when he was informed of the unauthorized contract, advised the other party that it was unauthorized, and warned him not to proceed. The other party nevertheless did so. Later the principal offered to pay the other party what the principal thought was the fair measure of any benefit conferred upon him. Held, no ratification of the entire contract.

[4] Townsend v. Kennedy, 6 S. D. 47; Short v. Stephens, 92 Mo. App. 151; Van Name v. Queen's Land & T. Co., 130 App. Div. 857.

[5] Canda v. Casey, 14 Misc. (N. Y.) 322.

[6] Manne v. Siegel-Cooper Co., 20 Misc. (N. Y.) 592.

[7] See Taylor v. Albemarle Steam Nav. Co., 105 N. C. 484; Welker v. Ap-

§ 434. III. By accepting benefits.—There is, further, ordinarily no more certain and satisfactory a method of manifesting approval of an act than by voluntarily and knowingly taking the benefits which flow from its performance; and it is a general rule, of constant application in the law of agency, that he who, voluntarily and with knowledge of the facts, accepts the benefit of an act purporting to have been done on his account, by his agent, thereby ratifies it and makes it his own as though he had authorized it in the beginning.

§ 435. ——— Must take burdens with benefits.—It is, moreover, as has been seen, a rule of quite universal application that he who would avail himself of the advantages arising from the act of another in his behalf must so far as it is entire also assume its responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act he will not afterwards be heard to say that any portion of the act was unauthorized. One, therefore, who voluntarily accepts the whole or any part of the proceeds of an act done by one assuming, though without authority, to be his agent, must ordinarily be deemed to ratify the act and take it as his own with all its burdens as well as all its benefits. He may not ordinarily take the benefits and reject the burdens, but must either accept them or reject them as a whole.[8]

pleman, 44 Ind. App. 699. See also Anheny v. Young, 52 Wash. 235; Smith v. Cologan, 2 T. R. 188, n; Tate v. Aitken, 5 Cal. App. 505; Garlick v. Morley, 147 Wis. 397.

A principal who puts the tenant into possession and receives rent under an unauthorized lease, ratifies it. Christopher v. National Brew. Co., 72 Mo. App. 121. Where one left in charge of a repair shop but without authority took in a bicycle to be repaired and shipped to the owner, if the proprietor repairs the bicycle, he ratifies the contract and is bound by the agreement to ship it as directed. Rollins v. Cycle Co., 84 App. Div. (N. Y.) 287.

[8] Florence, etc., Co. v. Louisville Banking Co., 138 Ala. 588, 100 Am. St. Rep. 50; Philips, etc., Mfg. Co. v. Wild, 144 Ala. 545; Snow v. Grace, 29 Ark. 131; Levy v. Wolf, 2 Cal. App. 491; Brown v. Holloway, 47 Colo. 461; Witcher v. Gibson, 15 Colo. App. 163; Dunn v. Hartford, etc., R. R. Co., 43 Conn. 434; Haney School Furn. Co. v. Hightown Baptist Institute, 113 Ga. 289; Dolvin v. Amer. Harrow Co., 125 Ga. 699, 28 L. R. A. (N. S.) 785; Aurora Ag. Soc. v. Paddock, 80 Ill. 263; Union Mutual L. Ins. Co. v. Kirchoff, 133 Ill. 368; Fraternal Army v. Evans, 215 Ill. 629; Hurd v. Marple, 2 Ill. App. 402; Hauss v. Niblack, 80 Ind. 407; Albany Land Co. v. Rickel, 162 Ind. 222; Hunt v. Listenberger, 14 Ind. App. 320; American Quarries Co. v. Lay, 37 Ind. App. 386; Reeves v. Miller (Ind. App.), 91 N. E. 812; Eadie v. Ashbaugh, 44 Iowa, 519; National Imp. Co. v. Maiken, 103 Iowa, 118; Casady v. Manchester Fire Ins. Co., 109 Iowa, 539; Des Moines Nat'l Bank v. Meredith, 114 Iowa, 9; Johnson v. School Corp., 117 Iowa, 319; German Savings Bank v. Des Moines Nat'l Bank, 122 Iowa, 737; Whitaker v. Hicks, 123 Iowa, 733; Continental

Like all other general rules however, this is one which must be received with caution, and applied with discrimination; for it is perfectly clear that there are many cases in which one may receive a benefit without incurring any obligation either to return or to pay for it.[9] It

Ins. Co. v. Clark, 126 Iowa, 274; Zelenka v. Port Huron Mach. Co., 144 Iowa, 592; Ormsby v. Johnson, 24 S. D. 494; Waterson v. Rogers, 21 Kan. 529; Ehrsan v. Mahan, 52 Kan. 245; Aultman Thresh. etc., Co. v. Knoll, 71 Kan. 109; Watt v. Railway Co., 82 Kan. 458; German Ins. Co. v. Emporia Ass'n, 9 Kan. App. 803; E. T. Kenny Co. v. Anderson, 26 Ky. L. R. 367; Western Mfg. Co. v. Cotton & Long, 126 Ky. 749, 12 L. R. A. (N. S.) 427; Perkins v. Boothby, 71 Me. 91; Hastings v. Bangor House, 18 Me. 436; Judik v. Crane, 81 Md. 610; Swindell Bros. v. J. L. Gilbert & Bro., 100 Md. 399; Cushman v. Loker, 2 Mass. 106; Narragansett Bank v. Atlantic Co., 3 Metc. (Mass.) 282; Ely v. James, 123 Mass. 36; Golding v. Brennan, 183 Mass. 286; Bacon v. Johnson, 56 Mich. 182; Botsford v. Plummer, 77 Mich. 31; Ripley v. Case, 86 Mich. 261; Sokup v. Letellier, 123 Mich. 640; Schmid v. Frankfort, 141 Mich. 291; Hansen v. Rolison, 156 Mich. 83; Walling v. Poulsen, 160 Mich. 392; Sherrod v. Duffy, 160 Mich. 488, 136 Am. St. Rep. 451; Payne v. Hackney, 84 Minn. 195; Johnson v. Ogren, 102 Minn. 8; Ruggles v. Washington Co., 3 Mo. 496; Matthews v. French, 194 Mo. 553; Kirkpatrick v. Pease, 202 Mo. 471; Davis v. Krum, 12 Mo. App. 279; Judd v. Walker, 114 Mo. App. 128; Rich v. State Nat'l Bank, 7 Neb. 201, 29 Am. Rep. 382; Hughes v. Ins. Co., 40 Neb. 626; Johnston v. Milwaukee, etc., Inv. Co., 49 Neb. 68; Low v. Conn., etc., R. R. Co., 46 N. H. 284; Looschen Piano Case Co. v. Steinberg, 76 N. J. L. 130, 68 Atl. 1072; Bodine v. Berg (N. J. L.), 82 Atl. 901, 40 L. R. A. (N. S.) 65; Clement v. Young-McShea Amusement Co., 69 N. J. Eq. 347; Fowler v. N. Y. Gold Exchange, 67 N. Y. 138; Clark v. Hyatt, 118 N. Y. 563; Fairchild v. McMahon, 139 N. Y. 290, 36 Am. St. R. 701; Smith v. Barnard, 148 N. Y. 420; Codwise v. Hacker, 1 Caines (N. Y.), 526; Moss v. Rossie Co., 5 Hill (N. Y.), 137; Palmerton v. Huxford, 4 Denio (N. Y.), 166; Houghton v. Dodge, 5 Bosw. (N. Y.) 326; Farmers', etc., Bank v. Sherman, 6 Bosw. (N. Y.) 181, aff'd 33 N. Y. 69; Hobkirk v. Green, 26 Misc. (N. Y.) 18; Budd v. Howard Thomas Co., 40 Misc. (N. Y.) 52; Siff v. Forbes, 63 Misc. (N. Y.) 319; Nutting v. Kings Co. Elev. Ry., 21 App. Div. (N. Y.) 72; West v. Banigan, 51 App. Div. 328, (aff'd without opinion, 172 N. Y. 622); Rosenthal v. Hasberg, 84 N. Y. Supp. 290; Brittain v. Westhall, 135 N. C. 492; Morris v. Ewing, 8 N. Dak. 99; State v. Perry, Wright (Ohio), 662; U. S. Fidelity Co. v. Shirk, 20 Okla. 576; McLeod v. Despain, 49 Oreg. 536, 124 Am. St. R. 1066, 19 L. R. A. (N. S.) 276; Mundorff v. Wickersham, 63 Pa. St. 87, 3 Am. Rep. 531; Welch v. Clifton Mfg. Co., 55 S. Car. 568; Union Trust Co. v. Phillips, 7 S. Dak. 225; Evans-Snider-Buel Co. v. Hilje (Tex. Civ. App), 83 S. W. 208; Watkins Land Mtge. Co. v. Thetford, 43 Tex. Civ. App. 536; Mayfield Woolen Mills Co. v. Long (Tex. Civ. App), 119 S. W. 908; Gutheil v. Gilmer, 27 Utah, 496; State v. Smith, 48 Vt. 266; Collins v. Fidelity Trust Co., 33 Wash. 136; Kirwin v. Wash. Match Co., 37 Wash. 285; Irwin v. Buffalo Pitts Co., 39 Wash. 346; Reid v. Hibbard, 6 Wis. 175; Parish v. Reeve, 63 Wis. 315; Schiffer v. Anderson, 76 C. C. A. 667, 146 Fed. 457; Sutherland v. I. C. Ry. Co., 81 C. C. A. 620, 152 Fed. 694; Jefferson Hotel Co. v. Brumbaugh, 94 C. C. A. 279, 168 Fed. 867.

[9] See, for example, Weatherford, etc., R. Co. v. Granger, 86 Tex. 350,

is also generally true that one cannot have benefits thrust upon him, to be afterwards made the basis of a liability.[10]

§ 436. ——— Duty to restore what he has received.—When the principal discovers that there has come into his hands the proceeds of an unauthorized act done by one who assumed therein to act as his agent, to voluntarily retain such proceeds is ordinarily to ratify the act. If he would repudiate the act in such a case he must, ordinarily, so far as it is possible, restore or offer to restore what he has received [11] (subject, of course, to a correlative obligation on the part of the other party to restore what he has received). And this he must do within a reasonable time.[12]

The voluntary retention being in these cases the evidence of ratification, an involuntary retention would not be so cogent. Hence, if return is not possible, as where it cannot be done without substantial

40 Am. St. R. 837; *In re* Rotherham, etc., Co., 50 L. T. Rep. (N. S.) 219 (where it is said: "It is said that [the claimant] has an equity against the company, because the company had the benefit of his labor. What does that mean? If I order a coat and receive it, I get the benefit of the labor of the cloth manufacturer, but does any one dream that I am under any liability to him? It is a mere fallacy to say, that because a person gets the benefit of work done by somebody else, he is liable to pay the person who did the work.")

[10] See, for example, Foote v. Cotting, 195 Mass. 55, 15 L. R. A. (N. S.) 693; Arey v. Hall, 81 Me. 17, 10 Am. St. R. 232; Spooner v. Thompson, 48 Vt. 259; Eggleston v. Mason, 84 Iowa, 630, where the principal was held not to be liable merely upon showing that he had unwittingly received the benefit of plaintiff's money, procured without authority by an agent.

Compare Perkins v. Boothby, 71 Me. 91; McDermott v. Jackson, 97 Wis. 64; First Nat. Bank v. Badger Lumber Co., 60 Mo. App. 255.

[11] First Nat. Bank v. Oberne, 121 Ill. 25; Harding v. Parshall, 56 Ill. 219; National Improvement Co. v. Maiken, 103 Iowa, 118; Higbee v. Trumbauer, 112 Iowa, 74; Deering & Co. v. Grundy Nat. Bank, 81 Iowa, 222; Johnston v. Milwaukee, etc., Invest. Co., 49 Neb. 68; McDermott v. Jackson, 97 Wis. 64; American Nat. Bank v. Cruger, 91 Tex. 446; Plano Mfg. Co. v. Nordstrom, 63 Neb. 123; Pike v. Douglass, 28 Ark. 59.

After the principal had repudiated unauthorized acts of his brokers, the fact that he did not return an account of the sale which they sent him, was held no ratification. Burhorn v. Lockwood, 71 App. Div. 301.

In Cole v. Baker, 16 S. Dak. 1, where this rule was sought to be applied because the principal had received and retained certain papers, it was held that what he had thus received was practically nothing and furnished no foundation for a ratification.

Where the other party persistently refuses to disaffirm or to restore what he has received from the principal's agent, a formal tender of restoration by the principal is not necessary before bringing replevin for his property. Roberts v. Francis, 123 Wis. 78.

[12] McDermott v. Jackson, 97 Wis. 64.

He is also entitled to a reasonable time in which to determine his course. McDermott v. Jackson, *supra*.

injury,[13] or where what has been received has been disposed of,[14] or has been consumed in the expected way, before notice of the act; or where what was received was personal services accepted before notice;[15] and the like, the rule would not apply. There being no evidence of ratification in such a case any recovery which may be had must be had upon a *quasi*-contractual basis.[16]

[13] See *post*, § 439. A principal does not ratify the unauthorized act of his agent by accepting the proceeds or fruits thereof, if knowledge of it did not come to him in time to enable him to repudiate the entire transaction without substantial injury. Clark v. Clark, 59 Mo. App. 532; Humphrey v. Havens, 12 Minn. 298; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Baldwin v. Burrows, 47 N. Y. 199. In Cooley v. Perrine, 41 N. J. L. 322, 32 Am. Rep. 210, the court states the rule still more broadly thus: "If, when he acquires knowledge, he cannot, in justice to himself, disavow the whole of his agent's contract, he is entitled to stand upon what he authorized, and repudiate the rest; the purchaser who dealt with a special agent without noting the bounds of his power, must suffer rather than the innocent principal." So in the case of unauthorized repairs or additions to property of such character that they cannot be removed and restored without serious injury. Forman v. The Liddesdale, [1900] App. Cas. 190; Young v. Board of Education, 54 Minn. 385, 40 Am. St. R. 340; Mills v. Berla (Tex. Civ. App.), 23 S. W. 910; Davis v. School District, 24 Me. 349.

In Arey v. Hall, 81 Me. 17, 10 Am. St. R. 232, it is said: "It is well settled, as a general rule, that a person who has received the benefit of the money or property of another, is not liable to such person therefor, in the absence of contract between the parties, if there be any ground upon which the money or property or its benefit may be rightfully retained by its possessor without accounting to the owner. Ratification of another's act does not result in such a case. It is the *wrongful* keeping of another's property which creates liability to him."

So, where the property can not be distinguished. Schutz v. Jordan, 32 Fed. 55, aff'd 141 U. S. 213. See Pratt v. Bryant, 20 Vt. 333.

[14] Martin v. Hickman, 64 Ark. 217; Bryant v. Moore, *supra*; Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Baldwin v. Burrows, *supra*.

In Timm v. Timm, 34 Wash. 228, it is said that the duty to make restoration is greatly modified in equitable proceedings, where remedies are more flexible.

[15] Swayne v. Union Mut. L. Ins. Co. (Tex. Civ. App.), 49 S. W. 518. In Crawford v. Insurance Co., 100 Ill. App. 454, affirmed, 199 Ill. 367, the receipt by the insured after a loss had occurred, and a claim had became fixed upon a policy of insurance, of the proceeds of a previous unauthorized surrender of the policy, was held not to be a ratification of the surrender. The insured then had a larger claim against the company. It was not possible to restore the parties to their original situation, and the retention of the smaller sum was not a waiver of the larger sum unless so agreed.

In Dempsey v. Wells, 109 Mo. App. 470, this rule was applied to a contract for a lawyer's services in saving property, made by a married woman before any statute had given her authority to contract, but when she retained the property after the statute had given her contractual ability.

[16] The distinction between a liability upon the contract itself by ratification, and a liability *quasi ex con-*

If the principal attempts to restore the thing received he must, it is held, unless this is waived, return it to the other party at the place where it was received.[17]

This duty to return, moreover, may, when it exists, be made the ground of affirmative action by the other party. Thus if the principal repudiates the undertakings which, though unauthorized, formed the substantial basis of the transaction in question, the other party may maintain an action to rescind.[18]

§ 437. ——— Principal must have received proceeds—Money apparently free of trust.—But this rule presupposes that the principal has in fact received the proceeds. If they were never intended to come into the hands of the principal himself but of some third party, it is held not enough.[19] So if they have come no further than into the hands of the very agent himself, this will not be enough, unless they stop there with the knowledge and acquiescence of the principal.[20]

tractu for the benefit received, is often of importance and frequently overlooked. In some cases there would be no practical difference in result, but in other cases the difference might be great. Many of the cases, in which ratification is said to be the reason, were cases really decided upon equitable principles. They were often actions for money had and received—which is often equitable in its scope—or its code equivalent. That this was the basis is expressly recognized in some of the cases. See, for example, Fay v. Slaughter, 194 Ill. 157, 88 Am. St. R. 148, 56 L. R. A. 564; Foote v. Cotting, 195 Mass. 55, 15 L. R. A. (N. S.) 693.

There is discussion of the question in Keener on Quasi Contract, pp. 326–334; Woodward on Quasi Contract, §§ 72, *et seq.*

[17] National Improvement Co. v. Malken, 103 Iowa, 118; Lunn v. Guthrie, 115 Iowa, 501.

Where the principal attempts to restore, and tenders back part of what was received, and is met with an unconditional refusal to accept a disaffirmance, the fact that the residue was not tendered does not defeat the principal's right. Bromley v. Aday, 70 Ark. 351.

[18] Rackemann v. Riverbank Improvement Co., 167 Mass. 1, 57 Am. St. R. 427. See also Knappen v. Freeman, 47 Minn. 491.

[19] Thus in Gulick v. Grover, 33 N. J. L. 463, 79 Am. Dec. 728, where the principal was without authority, joined as a known accommodation maker on a note, and the proceeds of it did not and were not intended to come to him, but to the principal maker, it was held that the principal, on repudiating the note, was not bound to return the proceeds, which he had never received.

So in Northwestern Life Ass'n v. Findley, 29 Tex. Civ. App. 494, where a small sum had been paid in settlement of a life insurance policy, but it had all been used to pay the debts of the deceased for which the beneficiaries were not liable, it was held that the beneficiaries, upon repudiating the settlement, were not obliged to return this sum.

[20] See, for example, Railroad Nat. Bank v. City of Lowell, 109 Mass. 214, where a city treasurer, who was already an unknown defaulter, had assumed to have authority to borrow money for the city, had received it, put it in with other money which he held for the city, and disbursed prac-

Thus, for example, if an agent without authority borrows money and wrongfully appropriates it to his own use, the principal cannot be bound to restore it before he can repudiate the act. A rule which would practically make performance by the principal of an unauthorized contract a condition precedent to its disaffirmance, is obviously not a rule which furnishes much protection to him.

Moreover where what is received is current money, it must be received by the principal as the proceeds of some act of agency, and not in some other distinct capacity in which the principal would have the right to receive and retain it. Thus it has been held that where an agent, who is indebted to his principal, brings money to him and pays it, the principal acting in good faith, the latter is not bound to restore it when he later learns that it was the proceeds of some unauthorized act which the agent had assumed to do upon the principal's account. The reason assigned for this is the absolutely negotiable character of money and its freedom from "ear-marks" or evidences of trust.[21]

tically all of it for the city's account. Under the statutes, he did not hold city funds as agent or servant of the city, but as an independent accounting officer. *Held*, that the receipt of the money by him was not such a receipt by the city as to charge it with liability.

See also First Nat. Bank v. Oberne, 121 Ill. 25, where the principals were held only to the extent of the proceeds which actually came to their business.

So in Baldwin v. Burrows, 47 N. Y. 199, it is said that, if liable at all, the principal could be held only for what he had received.

Where the money, through the agent's manipulations, has merely *passed through* the principal's account, there can not be deemed to be any benefit conferred. Fay v. Slaughter, 194 Ill. 157, 88 Am. St. R. 148, 56 L. R. A. 564 (in which the court refused to extend the doctrine of First Nat. Bank v. Oberne, *supra*).

[21] Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Penn. Co. v. Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Sanborn v. First Nat. Bank, 115 Mo. App. 50; Case v. Hammond Packing Co., 105 Mo. App. 168; Baldwin v. Burrows, 47 N. Y. 199.

In Russ v. Hansen, 119 Iowa, 375, where the question was whether the principal was liable for a sum of money received by him from his agent Lund, it was said: "We think it must be conceded, under the authorities, that if plaintiff received this $3,000 from Lund as Lund's money, in payment of Lund's debts, such receipt would not be a ratification of any transaction of Lund's which was without authority, so as to bind the plaintiff thereby. Plaintiff would not be bound, when he discovered that this money was received through fraud or by reason of an unauthorized act, to return it. There was no trust attached to the money itself, for it was paid to Lund as Lund's own money [citing cases]. On the other hand, if plaintiff was chargeable with knowledge of the fact that this money was transmitted by Lund, as the result of some transaction by Lund as plaintiff's agent, then, although plaintiff had no knowledge at the time of the nature of the transaction, or that Lund had exceeded his authority, yet, when he

So if an agent obtains money, with which to pay his debt to his principal, by disposing of his principal's property as though it were his own, the principal before reclaiming his property is held not to be obliged to restore the money so paid to him.[22]

§ 438. ——— **Knowledge of the facts indispensable.**—But here, as in other cases, it is indispensable that the principal should have had full knowledge of the material facts, or that he should have intentionally accepted the benefits without further inquiry than he chose to make. Otherwise, the receipt and retention of the benefits of the unauthorized act, is no ratification of it.[23]

§ 439. ——— **Acceptance and receipt must have been voluntary and confirmatory.**—So, as has been stated, the acceptance and receipt of the benefits must, to work a ratification, have been voluntary, and must find their warrant in rights flowing from the act. For if the principal had no choice—if the benefits could not be separated from something to which he was in any event entitled,[24] or if his act was not confirmatory, as where he would have been entitled to the same benefit independently of the act in question, the acceptance and receipt under such circumstances would not constitute a ratification.[25]

became aware that it was the result of an act in excess of authority, by which he was not willing to be bound, it was his duty to return the money to the party from whom it had been received by Lund."

[22] Wycoff v. Davis, 127 Iowa, 399. The wrongful act of the agent in selling his principal's property, is not ratified by the receipt of the money for two reasons: It was not done as agent, and there was no knowledge.

[23] Bohart v. Oberne, 36 Kans. 284; Foote v. Cotting, 195 Mass. 55, 15 L. R. A. (N. S.) 693; Spooner v. Thompson, 48 Vt. 259; Eggleston v. Mason, 84 Iowa, 630; First Nat. Bank v. Foote, 12 Utah, 157; Fargo v. Cravens, 9 S. Dak. 646; Knapp v. Smith, 97 Wis. 111; Holm v. Bennett, 43 Neb. 808; Doll v. Hennessy Mercantile Co., 33 Mont. 80; Schutz v. Jordan, 32 Fed. 55; Kelley v. Newburyport Horse R. R. Co., 141 Mass. 496; Combs v. Scott, 12 Allen (Mass.), 493; Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43, and cases cited in preceding note.

[24] *Ante*, § 435. Thus there is no ratification where the owner of a building or a ship to which unauthorized repairs have been made, uses or sells the property, the repairs not being of a character to be removed and restored without substantial injury. Forman v. The Liddesdale, [1900] App. Cas. 190; Young v. Board of Education, 54 Minn. 385; Mills v. Beela (Tex. Civ. App), 23 S. W. 910. So the use of a "skidway," built without authority, at a mill, where it was so located that its use was unavoidable in the proper use of the mill, is not necessarily a ratification. Ayer, etc., Co. v. Young, 90 Ark. 104.

See also Swayne v. Union Mut. L. Ins. Co. (Tex. Civ. App), 49 S. W. 518; Clark v. Clark, 59 Mo. App. 532; Humphrey v. Havens, 12 Minn. 298.

[25] Thus a person who takes and retains property of his own, to the possession of which he is entitled, will not thereby ratify an unauthorized agreement of an agent in procuring the property. Baldwin Fertilizer Co.,

So, as between the principal and the agent, the fact that the principal performs, and receives performance under, a contract made without actual authority but within such apparent authority that he was obliged, so far as third persons were concerned, to carry it out, will not necessarily be such a ratification as will release the agent from liability to his principal for making the contract without authority.[26] And if the principal, *e. g.*, an insurance company, performs in such a case, as by paying the amount of a policy upon which it was legally liable, though issued in violation of the agent's instructions, the principal is, as against the agent, entitled to have and retain the fruits of the other party's correlative performance, and may therefore demand the premium from the agent without ratifying his act.[27]

§ 440. ——— Mere efforts to avoid loss, no ratification.—So, as between principal and agent, the mere effort of the principal, having knowledge of the agent's deviation from his instructions, to avoid loss thereby or to make the loss as small as possible, will not necessarily constitute such a ratification as will release the agent.[28] Thus where an agent for the collection and transmission of a sum of money, who was given specific instructions by his principal to remit it by express, purchased a check drawn by parties then in good standing and credit in New York and sent the same to his principal who forwarded it to New York for collection, but before it was so forwarded the drawers had become insolvent and the check was dishonored, it was held that the agent having violated his instructions in regard to the mode of sending the money was liable to the principal for the loss sustained, and that the sending of the check to New York for collection in ignorance of the drawers' insolvency and when the retention of it might constitute laches, was not an absolute ratification of the act of the agent in transmitting the money in that way.[29] So where a seller of goods instructed his agent to sell only to people of undoubted credit, and the agent sold goods to, and accepted notes from, people notoriously insolvent, the

v. Thompson, 106 Ga. 480. See also Crooker v. Appleton, 21 Me. 131; White v. Sanders, 32 Me. 188; Forman v. Liddesdale, [1900] App. Cas. 190.

[26] Mechanics' & Traders' Ins. Co. v. Rion (Tenn. Ch.), 62 S. W. 44.

[27] Continental Ins. Co. v. Clark, 126 Iowa, 274.

[28] Triggs v. Jones, 46 Minn. 277. See also Brown v. Foster, 137 Mich. 35.

[29] Walker v. Walker, 5 Heisk. (Tenn.) 425.

But, under ordinary circumstances, the unconditional acceptance of such a check will constitute a ratification. Rathbun v. Citizens' Steamboat Co., 76 N. Y. 376, 32 Am. Rep. 321, distinguishing Walker v. Walker, *supra*

principal was held not to have lost his claim against the agent, by suing upon the notes and attempting to realize something upon them.[30]

§ 441. ——— Illustrations of general rule.—These general principles find almost countless illustrations in the decided cases, from which a few may be chosen to serve as examples of them all. Thus a principal who, with full knowledge of the facts, receives and appropriates to his own use without objection, the purchase price or rent of land or other property sold or rented by one assuming to act on his behalf as his agent, ratifies the act.[31] The receipt and retention of the proceeds of an unauthorized levy with knowledge of the facts, is a ratification of the act;[32] but the mere receipt of a portion of the money realized from an unauthorized sale by a sheriff, where the property was not subject to the writ and the party was entitled to it all, will not ratify the sale;[33] nor will the receipt of money ratify the sale where the principal would have the right to receive the money without ratifying the sale;[34] nor if the principal demand from the agent, money which the agent has misapplied, will such demand ratify the misapplication.[35] But where the owner of a judgment with knowledge of the facts retains the proceeds of an unauthorized assignment of it, he will be assumed to have ratified the assignment.[36] And so where the owner of a mortgage voluntarily accepted the proceeds of an unauthorized discharge of it, the discharge was held to be ratified.[37] And again, where the principal knowingly accepts a mortgage or other security taken

[30] Robinson Machine Works v. Vorse, 52 Iowa, 207.

[31] Lindroth v. Litchfield, 27 Fed. Rep. 894; Reynolds v. Davison, 34 Md. 662; Abbott v. May, 50 Ala. 97; Snow v. Grace, 29 Ark. 131; Turner v. Wilcox, 54 Ga. 593; Seago v. Marten, 6 Heisk. (Tenn.) 308; Roby v. Cossitt, 78 Ill. 638; Warden v. Eichbaum, 3 Grant (Penn.) Cases, 42; Lyman v. Norwich University, 28 Vt. 560; Pierce v. O'Keefe, 11 Wis. 180; Robinson v. Bailey, 19 R. I. 464; Ripley v. Case, 86 Mich. 261; Deering & Co. v. Grundy Nat. Bank, 81 Iowa, 222; Auge v. Darlington, 185 Pa. 111; Kelly v. Carter, 55 Ark. 112.

Collecting a check with knowledge that it was the proceeds of a sale made by the agent, ratifies the sale. Nicholson v. Doney, 37 Ill. App. 531.

Allowing an agent to sell, on the principal's behalf, property purchased for him without authority, ratifies the purchase. Russell v. Waterloo Machine Co., 17 N. D. 248.

See also Walworth, etc., Bank v. Farmers,' etc., Co., 16 Wis. 629; Powell v. Gossom, 18 B. Monroe (Ky.), 179; Baines v. Burbridge, 15 La. Ann. 628; Breithaupt v. Thurmond, 3 Rich. (S. C.) 216; Harris v. Simmerman, 81 Ill. 413.

[32] Cole v. Edwards, 52 Neb. 711.

[33] Harris v. Miner, 28 Ill. 135.

[34] White v. Sanders, 32 Me. 188.

[35] Blevins v. Pope, 7 Ala. 371.

[36] Wallace v. Lawyer, 90 Ind. 499. And where a bank appropriates to its own use, bonds purchased by its cashier without authority, it cannot afterwards repudiate the cashier's act. Logan County Bank v. Townsend (Ky.), 3 S. W. 122.

[37] Tooker v. Sloan, 30 N. J. Eq. 394.

by an agent in pursuance of an arrangement made with a debtor, the arrangement so made will be deemed to be ratified;[38] and so the voluntary acceptance of the avails of a compromise made by an agent will ratify the compromise,[39] and the voluntary retention of a conveyance of lands which an agent has taken from a debtor in payment of a debt, will sanction such payment.[40] So where a principal shipped cotton to his broker with instructions not to sell at less than a certain price, and the broker sold for less than that rate and immediately notified his principal, it was held that the principal by drawing the proceeds of the sale without objection, ratified the act of the broker in selling at the smaller price.[41] And where the instructions are to sell property for cash only, but the agent sells for part cash and part credit, the principal by knowingly receiving and retaining the cash payment ratifies the sale as made.[42]

§ 442. ——— An insurance company which accepts, and issues a policy upon, an application taken by an unauthorized person, thereby makes that person its agent in procuring the application.[43] So the acts and representations of the agent of the insured in obtaining policies, are ratified where the insured, with knowledge, insists upon retaining and enforcing the policies.[44] A lease executed by an agent without authority is ratified where the principal for several years accepts and retains the rent, and allows the tenant to make repairs without dis-

[38] Keeler v. Salisbury, 33 N. Y. 648; Sokup v. Letellier, 123 Mich. 640; Hartley State Bank v. McCorkell, 91 Iowa, 660; Donovan Real Estate Co. v. Clark, 84 Mo. App. 163.

[39] Strasser v. Conklin, 54 Wis. 102; West v. Banigan, 51 N. Y. App. Div. 328; Fleischman v. Ver Does, 111 Iowa, 322; Dowagiac Mfg. Co. v. Hellekson, 13 N. Dak. 257; Warshawsky v. Bonewur, 130 N. Y. App. Div. 250.

Where the principal accepts and retains the proceeds of a check known to have been received by his agent in full settlement of a disputed claim, he ratifies the settlement, even though he informs the other party that he does not approve it and proposes to apply the proceeds of the check merely upon account. Stetson-Preston Co. v. Dodson (Tex. Civ. App.), 103 S. W. 685.

See also Fleischman & Co. v. Ver Does, 111 Iowa, 322.

[40] Miles v. Ogden, 54 Wis. 573.

[41] Meyer v. Morgan, 51 Miss. 21, 24 Am. Rep. 617.

[42] Horst v. Lightfoot, 103 Tex. 643, 132 S. W. 761. Where an agent was authorized to buy for cash and the principal received and used goods bought upon credit, the purchase on credit will be deemed to be ratified, unless the principal can show that he was without knowledge of the facts and will be prejudiced by being compelled to pay for them. Brittain v. Westhall, 135 N. C. 492.

[43] Germania Ins. Co. v. Wingfield, 22 Ky. L. Rep. 455; Farmers', etc., Ins. Co. v. Wiard, 59 Neb. 451; Terry v. Provident Fund Society, 13 Ind. App. 1, 55 Am. St. R. 217.

[44] Davis Lumber Co. v. Hartford F. Ins. Co., 95 Wis. 226, 70 N. W. 84; Samo v. Fire Ins. Co., 26 Up. Can. C. P. 405; Hughes v. Ins. Co., 40 Neb. 626.

sent.[45] Payment to an agent, not authorized to receive it, becomes effectual as payment to the principal upon the appropriation by him, with full knowledge of the facts, of the money so paid.[46]

So where an agent made a loan without authority, but the principal for several years received the interest, it was held that the act was ratified;[47] and so where an agent, without authority, borrowed money and gave the principal's notes for it, but the latter with full knowledge received and used the proceeds, there was held to be ratification.[48] And where judgment creditors attended an unauthorized execution sale and bought a portion of the property, it was held that they had ratified the sale.[49]

So where an agent had collected money without authority, but the principal took security from him for a portion of it, and made claim against his estate for the residue, it was held that the payment to him was ratified.[50] But where one without authority collected money, the fact that the principal tried to obtain the money by a draft upon the man who collected it, does not ratify his act in collecting and make the payment to him a good discharge.[51]

§ 443. ——— Where an agent sold his principal's property without authority and embezzled the proceeds, and the principal, with full knowledge of the facts, took from the agent something in satisfaction of the wrong, it was held that the principal had ratified the sale made by the agent, and could not afterwards pursue the property sold.[52] But where a principal without full knowledge of the facts, took from an agent security for money collected by the agent from debtors of the principal, and wrongfully appropriated to his own use, it was held that this would not ratify the payments to the agent because done without full knowledge of the facts;[53] and for the same reason where one who was in the possession of the plaintiff's horse sold it without authority to the defendant, receiving in payment therefor a check which he in-

[45] Clark v. Hyatt, 118 N. Y. 563. To like effect: Burkhard v. Mitchell, 16 Colo. 376.

[46] Payne v. Hackney, 84 Minn. 195. To same effect: Ladenburg, etc., Co. v. Beal-Doyle Dry Goods Co., 83 Ark. 440.

[47] Angel v. Miller, 16 Tex. Civ. App. 679, 39 S. W. 1092.

[48] Bank of Lakin v. National Bank, 57 Kan. 183, 45 Pac. 587. So where an agent, authorized to give his principal's note, made the paper in form of a bill and the principal who had received the money, afterwards saw the paper, examined it, and made no objection to its form. Ward v. Williams, 26 Ill. 447, 79 Am. Dec. 385.

[49] Streeter v. Johnson, 23 Nev. 194.

[50] Bissell v. Dowling, 117 Mich. 646, 76 N. W. 100.

[51] Missouri, etc., Ry. Co. v. Wright, 47 Tex. Civ. App. 458.

[52] Ogden v. Marchand, 29 La. Ann. 61.

[53] Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Day v. Miller, 1 Neb. Unof. 107.

dorsed and gave to the plaintiff in payment of a debt he owed him, but did not inform him of its origin, it was held that the plaintiff by collecting the check, and applying the proceeds to the payment of the debt, without knowledge of the sale of the horse, had not ratified such sale.[54]

And where the principal accepted from his agent who had violated his instructions, a transfer voluntarily made by the agent of his own property to secure the principal against loss, it was held that such acceptance did not constitute a ratification.[55]

§ 444. ——— Other instances.—So where one, on whose account an agent has bought goods without authority, with full knowledge of the facts, accepts, uses and sells them, he will be deemed to have ratified the purchase and will be liable for the price.[56] In such a case the court said: "If one purchase goods for another without authority, and the person for whom they are purchased receives them and uses or sells them on his own account, after being informed that they were purchased for him, this is an implied ratification of the agency. And if, on receiving the goods, and being informed that they were purchased in his name, he merely informs the seller that the purchase was unauthorized, this is not enough. He should either restore the goods to the seller or pay for them if he converts them to his own purpose." [57]

[54] Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480. And to the same effect are Penn., etc., Co. v. Dandridge, 8 Gill & John. (Md.) 248, 29 Am. Dec. 543; Gulick v. Grover, 33 N. J. L. 463, 79 Am. Dec. 728; Baldwin v. Burrows, 47 N. Y. 199; Sanborn v. First Nat. Bank, 115 Mo. App. 50; Case v. Hammond Packing Co., 105 Mo. App. 168. See also Russ v. Hansen, 119 Iowa, 375. Compare Johnston v. Milwaukee Investment Co., 49 Neb. 68.

[55] Lazard v. Merchants' & Miners' Transp. Co., 78 Md. 1, 26 Atl. 897. Where the agent has made a sale upon unauthorized terms, the efforts of the principal to compromise and settle the matter with the third person, do not operate as a ratification of the agent's acts as between the principal and the agent. Brown v. Foster, 137 Mich. 35.

[56] Pike v. Douglass, 28 Ark. 59; McDowell v. McKinzie, 65 Ga. 630; Hastings v. Bangor House, 18 Me. 436; Moffitt-West Drug Co. v. Lyneman, 10 Colo. App. 249; Smith v. Holbrook, 99 Ga. 256. See also Minnich v. Darling, 8 Ind. App. 539.

[57] Pike v. Douglass, *supra*. See also Ketchum v. Verdell, 42 Ga. 534, where it was said by McKay, J., "The general rule, as I understand it, is that where one professes to act as agent of another, even if he has no authority at all, and as such agent obtains goods which in fact go to the use and benefit of the principal, the seller may at any time before the principal has settled with the pretended agent, notify the principal of the truth of the case and demand payment. If the principal accepts the property, knowing all the facts, that is a ratification of the agency; but even if he knows nothing of the facts, but accepts the property as sold him by the agent, yet if the agent was not in fact the true owner and the seller so notifies the purchaser before any settlement, the right of action in the seller exists."

But where an agent had purchased goods without authority and added them to his principal's stock, and the principal, upon discovering the fact, attempted to select such of the goods as remained unsold, for the purpose of returning them to the vendor, but was unable to identify them, it was held that his retention of the goods under such circumstances was no ratification of the agent's purchase.[58]

§ 445. ——— And where one, to whom certain goods were sent by an agent's order on approval, claimed to be the owner of the goods at the time of an attempted levy upon them as the property of another, he was held to have ratified the agent's act and accepted the goods.[59] So where an agent exchanged a mule for a horse without authority, the principal's subsequent assertion of title to the horse was held to be a ratification of the trade.[60] So in a case involving the ratification of a loan made by a committee of an agricultural association, Brickell, C. J., said: "It is shown very fully that the association ratified and approved all the acts of the executive committee in this transaction, not only the mode adopted in borrowing the money but the execution of the mortgage. We do not mean that it was shown that there was assent to, and confirmation of the transaction expressed in words. That is not essential, for ratification is more often implied from the acts and conduct of parties having an election to avoid or confirm than found expressed in words. And it is implied, whenever the acts and conduct of the principal having full knowledge of the facts are inconsistent with any other supposition than that of previous authority or an intention to abide by the act though it was unauthorized. Here the association accepted all the benefits of the transaction, received and appropriated to its own uses the money obtained on the promissory notes and has acquiesced in all that was done by the executive committee, not even now objecting that it was unauthorized. A corporation has as full capacity as a natural person to ratify the unauthorized or defectively executed act of its agents and the ratification is the equivalent of a prior authority. Having received and retained the benefits of the transaction with full knowledge of all the facts, the association has ratified and confirmed it unless intentional fraud is shown for which there is neither room nor reason." [61]

[58] Schutz v. Jordan, 32 Fed. 55. See also Knapp v. Smith, 97 Wis. 111.

[59] Brooks v. Fletcher, 56 Vt. 624.

[60] Jones v. Atkinson, 68 Ala. 167. See also Cochran v. Chitwood, 59 Ill. 53; Nichols-Shepard & Co. v. Shaffer, 63 Mich. 599.

[61] Taylor v. A. & M. Association, 68 Ala. 229. And to the same effect are Maddux v. Bevan, 39 Md. 485; Perkins v. Boothby, 71 Me. 91, in which the principal accepted the benefit by accepting the agent's application of the borrowed money to payment of the principal's debts.

§ 446. IV. By bringing suit based on validity of agent's act.—One of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action at law based upon the validity of such act.[62] The bringing of such an action manifests very clearly a determination to abide by the act, to regard it as valid, to enforce its performance. If the voluntary acceptance of the benefits of the act will ordinarily work a ratification, as it has been seen to do, *a fortiori* will the endeavor by legal process to secure those benefits—to compel performance, accomplish that result.

The basing of a defense upon the act is, of course, equally within the spirit of the rule.[63]

Here, as elsewhere, the principal must have knowledge of the facts, but it suffices for this purpose that he has such knowledge at any time before he demands judgment of performance.[64] A disclosure of the facts by the other party's pleadings [65] or evidence [66] may, it is held, be

[62] Phillips Mfg. Co. v. Wild, 144 Ala. 545; Shoninger v. Peabody, 57 Conn. 42, 14 Am. St. R. 88; Curnane v. Scheidel, 70 Conn. 13; Bailey v. Pardridge, 134 Ill. 188; Pells v. Snell, 31 Ill. App. 158; Warder v. Cuthbert, 99 Iowa, 681; Aultman Threshing, etc., Co. v. Knoll, 71 Kan. 109; Garten v. Trobridge, 80 Kan. 720; Edgar v. Breck, 172 Mass. 581; City of Worcester v. Worcester St. Ry. Co., 194 Mass. 228; Johnston Harvester Co. v. Miller, 72 Mich. 265, 16 Am. St. R. 536; Leffel v. Platt, 126 Mich. 443; Watson v. Southern Ins. Co. (Miss.), 31 So. 904; Alexander v. Wade, 106 Mo. App. 141; Shinn v. The Guyton Co., 109 Mo. App. 557; Daugherty v. Burgess, 118 Mo. App. 557; Beagles v. Robertson, 135 Mo. App. 306; Osborn v. Jordan, 52 Neb. 465; Tootle, etc., Co. v. Otis, 1 Neb. Unoff. 360; Anderson v. Scott, 70 N. H. 350; German American Bank v. Schwinger, 75 App. Div. (N. Y.) 393, aff'd 178 N. Y. 569; Wheeler & Wilson Co. v. Aughey, 144 Pa. 398, 27 Am. St. R. 638; Plano Mfg. Co. v. Millage, 14 S. Dak. 331; Pickle v. Muse, 88 Tenn. 380, 17 Am. St. R. 900, 7 L. R. A. 93; Arnold v. Ins. Co., 106 Tenn. 529; Whiting v. Doughton, 31 Wash. 327; Twentieth Century Co. v. Quilling, 136 Wis. 481; Park Bros. v. Kelly Axe Mfg. Co., 49 Fed. 618, 6 U. S. App. 26, 1 C. C. A. 395.

In Davis v. Severance, 49 Minn. 528, it is held that a mere precautionary action brought to hold matters in *statu quo* and until the facts could be determined was not necessarily a ratification.

[63] Edgar v. Breck, 172 Mass. 581; Tingley v. Boom Co., 5 Wash. 644.

[64] Shinn v. The Guyton Co., 109 Mo. App. 557.

[65] Thus in Edgar v. Breck, 172 Mass. 581, it is held that where the principal is apprised by the other party's declaration that an unauthorized warranty had been given by his agent, he ratified the act by pleading a set off for the price of the warranted article.

[66] A principal sued upon an unauthorized contract made by his agent may on the trial disaffirm the agent's act if at that time such act is first brought to his knowledge. Farmers' Bank of Elk Creek v. Farmers' Bank of Auburn, 49 Neb. 379.

enough, if sufficiently definite and certain,[67] to put him to an election either to repudiate or ratify.

Here, as elsewhere, also, if he ratifies, he must ratify *in toto*,—he must take the burdens with the benefits, and, by demanding performance to himself, he assumes responsibility for the instrumentalities,—the frauds, misrepresentations, promises and conditions—through which the act was induced, so far as they affect the enforceability of the contract upon which his action is founded.[68]

§ 447. ——— Illustrations of this rule are numerous. Thus a demand made by an agent will be deemed to be ratified by the principal, if he brings an action founded upon such demand,[69] and ratification by a bank of its cashier's indorsement of a note is established by the fact that the bank prosecutes an action on the note in the name of the indorsee.[70] So if the principal appear in court and prosecute an action of attachment begun in his name by one assuming to act as his agent,

[67] In Owensboro Wagon Co. v. Wilson, 79 Kan. 633, where the principal was suing upon a note taken by an agent, and the defense was a special contemporaneous contract made by the agent to induce the giving of the note,—which contract the plaintiff contended was unauthorized,—the court said, that, if the plaintiff first learned of this contract upon the trial, "it was incumbent on the plaintiff either to abandon its claim so far as it was based upon the note and rely upon proving the account which was merged therein, or else take the chances of being able to disprove that the note was given in pursuance of the agreement alleged. In continuing to rely on the note, after being advised of the defendant's claim, the plaintiff must be deemed to have elected to pursue the latter course, and thereby to have waived the question of the agent's authority if in fact the note should be shown to have been the fruit of such agreement."

But in Shoninger v. Peabody, 59 Conn. 588, 14 Am. St. R. 88, where the principal was suing for the price of a piano sold by an agent to the defendant, and these two parties alone knew the terms of the sale, and the agent testified to one version while the defendant testified to a wholly different one, it was held that the plaintiff, by pressing his suit to judgment, had not necessarily thereby adopted the defendant's version. Said the court: "Knowledge of a fact is one thing; knowledge that one man claims the fact to exist, and another denies it, is another. The two things may be followed by very different legal consequences."

See also Peters v. Ballister, 3 Pick. 495; Dolvin v. American Harrow Co., 125 Ga. 699; Morris v. Butler, 133 Mo. App. 378.

[68] Wheeler & Wilson Mfg. Co. v. Aughey, 144 Pa. 398, 27 Am. St. R. 638; Anderson v. Scott, 70 N. H. 350; Edgar v. Breck, *supra;* Shoninger v. Peabody, 57 Conn. 42, 14 Am. St. R. 88; Johnston Harvester Co. v. Miller, 72 Mich. 265, 16 Am. St. R. 536; Eberts v. Selover, 44 Mich. 519, 38 Am. Rep. 278; Phillips Mfg. Co. v. Wild, 144 Ala. 545.

[69] Ham v. Boody, 20 N. H. 411, 51 Am. Dec. 235; Payne v. Smith, 12 N. H. 34; Town of Grafton v. Follansbee, 16 N. H. 450, 41 Am. Dec. 736.

[70] Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753.

he will be held to have ratified the act of such agent in signing his name to the attachment bond.[71] And where a vendor who has been defrauded in a sale of his goods made by an agent, proceeds to judgment against the vendee after being fully apprised of the fraud, he ratifies the sale.[72] And where an agent without authority had consigned his principal's goods for sale, and the principal brought an action against the agent for the price and value of the goods so consigned, it was held a *prima facie* ratification of the consignment,[73] and an action to enforce a contract made by an agent, is sufficient evidence of the agent's authority to make it.[74] And an action to recover, upon a note or otherwise, the price of land or goods sold by an agent, without authority, ratifies the sale,[75] and with it, in cases where such an agent would have authority to warrant, a warranty made by the agent as a part of the sale.[76] And bringing an action on a mortgage taken by an agent, ratifies his act in taking it.[77] So a principal's abandonment of a suit, upon a compromise of the cause of action by an agent ratifies the compromise.[78]

§ 448. ——— Suing to enforce a stock subscription secured by an assumed agent ratifies his act, and imposes liability for false representations made by him in procuring the subscription.[79] An action to enforce notes taken by an assumed agent ratifies his act in taking them, and opens the door to a defense based upon his misrepresentations in obtaining them,[80] or charges the principal with knowledge which the agent possessed concerning their consideration.[81] Suing to recover the price of goods, sold without authority or on unauthorized terms or conditions (instead of repudiating the sale and suing to recover the

[71] Bank of Augusta v. Conrey, 28 Miss. 667; Dove v. Martin, 23 Miss. 588.

So of enforcement of an unauthorized confession of judgment. Tootle v. Otis, 1 Neb. Unoff. 360.

[72] Lloyd v. Brewster, 4 Paige (N. Y.), 537; Bank of Beloit v. Beale, 34 N. Y. 473.

[73] Frank v. Jenkins, 22 Ohio St. 597.

[74] Dodge v. Lambert, 2 Bosw. (N. Y.) 570; Benson v. Liggett, 78 Ind. 452; Whiting v. Doughton, 31 Wash. 327 (where the suit was one for rescission but sought likewise to enforce a forfeiture clause). Daugherty v. Burgess, 118 Mo. App. 557. See also Alexander v. Wade, 106 Mo. App. 141.

[75] Bailey v. Pardridge, 134 Ill. 188; Plano Mfg. Co. v. Millage, 14 S. Dak. 331.

[76] Franklin v. Ezell, 1 Sneed (Tenn.), 497; Cochran v. Chitwood, 59 Ill. 53; Edgar v. Breck, 172 Mass. 581.

[77] Partridge v. White, 59 Me. 564. And see Beidman v. Goodell, 56 Iowa, 592; Roberts v. Rumley, 58 Iowa, 301. So of a lease. Shinn v. Guyton Co., 109 Mo. App. 557.

[78] Holt v. Cooper, 41 N. H. 111.

[79] Anderson v. Scott, 70 N. H. 350.

[80] Wheeler & Wilson Mfg. Co. v. Aughey, 144 Pa. 398, 27 Am. St. R. 638.

[81] Johnston Harvester Co. v. Miller, 72 Mich. 265, 16 Am. St. R. 536.

goods), ratifies the sale and charges the principal with liability for the terms and conditions upon which the goods were sold.[83] Suing to enforce a policy of insurance, obtained by an unauthorized agent, imposes liability upon the assured for the terms and conditions of the policy as though taken out by him in person.[84]

Where a bank sues upon a bond, taken by its cashier in substitution for an earlier bond, it is held to have ratified the cashier's act in accepting the new one and cancelling and surrendering the first, and is thereafter precluded from making a claim upon the first one.[84]

But though, by suing upon a check taken without authority the principal ratifies the taking of the check, he does not also thereby ratify the payment of its amount to such agent, since not even an agent authorized to receive checks in payment would have thereby authority to collect them.[85]

§ 449. ——— Suits based on the invalidity of agent's acts, no ratification.—Where the action, instead of being based upon the validity of the agent's act is based upon its invalidity, there can ordinarily be found no evidence of ratification. Where the action is directly aimed at the disaffirmance of the act, the case, of course, is clear. But it has also been held that, where third persons have colluded with the agent to defraud the principal, the fact that the latter has brought an action against the agent to recover for his misconduct does not amount to a ratification of the act so as to release the third persons from liability, nor is the recovery against the agent necessarily a bar to the action against the third parties, since the causes of action are not necessarily the same.[87]

§ 450. ——— Delay in suing in disaffirmance of the act.—If the principal has expressly repudiated an unauthorized act, mere delay in bringing a necessary suit to enforce his rights cannot, it is held, be construed into a ratification.[88]

And where payment of a note had been made to an agent not authorized to receive it, the delay of the principal, who was ignorant of the payment, in suing upon the note, for any period short of that fixed by the statute of limitations, was held to be no ratification.[89]

[83] Shoninger v. Peabody, 57 Conn. 42, 14 Am. St. R. 88; Billings v. Mason, 80 Me. 496; Eberts v. Selover, 44 Mich. 519, 38 Am. Rep. 278.

[84] Arnold v. Ins. Co., 106 Tenn. 529. See also Watson v. Southern Ins. Co. (Miss.), 31 So. 904.

[84] German American Bank v. Schwinger, 75 App. Div. 393, aff'd 178 N. Y. 569.

[85] Pickle v. Muse, 88 Tenn. 380, 17 Am. St. R. 900, 7 L. R. A. 93.

[87] Barnsdall v. O'Day, 67 C. C. A. 278, 134 Fed. 828.

[88] McClure v. Evartson, 82 Tenn. (14 Lea) 495.

[89] Holland v. Van Bell, 89 Ga. 228.

§ 451. V. By acquiescence.—Finally, the doing of the unauthorized act may be ratified, as it is frequently declared, by "acquiescence" in it. It has been already seen how, by his active steps of express approval, accepting benefits, suing to enforce, and the like, the principal may manifest his approval. The matters now to be dealt with have to do rather with his inaction,—his passivity, his quiescence, or, to use the word in question, his acquiescence.

§ 452. ——— What meant by acquiescence.—In dealing with the subject of acquiescence, a difficulty at once arises in determining what is meant by it. For, while it might be thought at first view that it is a word of well settled signification, an examination of the cases will indicate that it is often used with quite widely varying shades of meaning. It seems particularly difficult to keep it free from considerations of estoppel, although the two things are entirely distinguishable.

It will be of aid to keep constantly in mind what the situation is. An unauthorized act has been done, which does not bind the principal. What is needed is therefore something to make it valid, not something to make it invalid. In other words, what is needed is affirmance, not disaffirmance. By the hypothesis which brings the case to this point, it has not been *actively* affirmed. Has it been affirmed in any other way? That is a question of fact, upon which any competent evidence is admissible. What is said here is that it has been affirmed by *acquiescence,* and, since there is no evidence of *active* acquiescence, tacit acquiescence is referred to. This tacit acquiescence usually presents itself either as mere silence, or a failure to disaffirm, or as conduct inconsistent with disapproval. May an inference of affirmance be properly drawn from any of these? Or, taking them up severally, when the alleged principal learns of the unauthorized act, and merely keeps silent about it, neither actively assenting nor dissenting, may an inference of his assent be properly drawn? Putting it into other words, is the silence of the principal, or his failure to disaffirm, a fact from which, according to the ordinary conduct of men, an affirmance may be inferred?

§ 453. ——— Mere silence or failure to repudiate.—There is a popular notion,—finding expression in a familiar adage,—that silence gives consent. This, however, is true in law only to a very limited extent. No legal liability can result from silence alone, unless one owes a duty to speak.[90] On the other hand, it is a maxim of the law of es-

[90] See Royal Ins. Co. v. Beatty, 119 Pa. 6, 4 Am. St. R. 662; Whittemore v. Hamilton, 51 Conn. 153. Compare Hobbs v. Massasoit Whip Co., 158 Mass. 194.

toppel that he who remains silent when in conscience he ought to speak, will be debarred from speaking when in conscience he ought to remain silent, and this rule is frequently invoked in determining whether or not an alleged principal has set the seal of his sanction upon a transaction assumed to have been done in his behalf. But estoppel is not now involved.

But even though silence may not be *per se* conclusive, and even though estoppel be for the time being excluded, it is entirely safe to say that silence or a failure to repudiate may often be *evidence* of an assent, more or less strong under the circumstances, from which, as a matter of fact, an inference of assent may be drawn.[91] The question seems to be this: From the failure to dissent under the circumstances, would the ordinary intelligent man be justified in inferring that the principal assented? Like other similar questions, this would be for the jury, unless reasonable men could fairly draw only one inference from the facts, and in that case the court may decide it.

§ 454. ——— How differs from estoppel.—The question here, as has been pointed out, is not one of estoppel. Estoppel depends upon the fact that the other party has done, or refrained from doing, something to his prejudice in reasonable reliance upon the silence or failure to dissent; and such cases frequently arise. But here it is a matter of inferring facts from conduct, and the question is whether a reasonable man may fairly infer assent from the circumstances, and not whether the other party, in reasonable reliance upon the conduct, has changed his situation to his detriment.

It very frequently happens that both elements are present in a given case, and courts often unconsciously slip from one to the other and mingle them into an indistinguishable mass,—perfectly justifiably usu-

In Whittemore v. Hamilton, *supra*, it was said that the principal is bound by failure to dissent only where he has received a direct benefit from the act of the alleged agent, or where his silence appears to have prejudiced the other party. But in that case, the party who acted was not really an agent; he was a lender of money to whom a note and mortgage had been assigned as collateral security. He had released the security without the borrower's consent. It was held that, as between borrower and lender, mere silence of the borrower after knowledge did not amount to ratification. "If one holding property pledged to secure a debt should destroy it, or convert it to his own use, or give it away to another, whereby it becomes lost to the owner, does he ratify the act by mere neglect to give notice to the wrongdoer of his dissent? As well might the principle be applied to a trespass or any other tort."

[91] See the excellent discussion in Philadelphia, etc., R. Co. v. Cowell, 28 Pa. 329, 70 Am. Dec. 128.

ally, so far as the results in the particular case are concerned, but often disastrously to clear expression.

The distinction is the same as in the matter of the appointment of an agent,—there, the fact of appointment may be inferred from conduct, or there may be estoppel, resulting from conduct, to deny appointment.

§ 455. ——— Same subject.—This distinction is so clearly put in a case before the court of civil appeals of Texas[92] as to justify a full quotation. Here the question was whether a bank had ratified the act of its cashier in a certain matter, and the trial court had instructed the jury that, if the other party immediately notified the bank of the act, and the bank did not within a reasonable time thereafter repudiate the act, the jury should find against the bank. Upon appeal the court, through James, C. J., said: "This charge is not correct, unless mere silence on the part of a principal for an unreasonable time, after knowledge of an unauthorized act of its agent, amounts to ratification of this act as a matter of law. There is no express ratification here, and that relied upon was an implied ratification. The very fact that it was a matter to be implied, there being no act in this case amounting *per se* to a ratification, would make it an issue that only the jury should decide, and then only in a case where the facts and circumstances in connection with such silence are such as would admit of a reasonable inference that the silence or inaction meant a ratification. Silence simply in itself is no evidence of anything; but the conditions under which it occurs, and accompanying it, may show it to be a ratification. We commend the expression of Mr. Justice Collard in Meyer v. Smith:[93] 'Mere delay in repudiating will not, in our opinion, have the effect of ratifying. It would be evidence, along with other facts, from which, if it should be unreasonable, the jury might infer that there was a ratification. The court should not instruct the jury to find a ratification in case of unreasonable delay after notice of the facts, but he should leave the jury free to act upon such fact, and to determine from all of the facts whether a ratification should be inferred.' We are not speaking now of an estoppel by conduct which proceeds upon other principles, and which we shall discuss hereafter. The rule is so obviously sound, particularly in a jurisdiction where inferences of fact

[92] Iron City Nat. Bank v. Fifth Nat. Bank (Tex. Civ. App.), 47 S. W. 533. This case was affirmed in 92 Tex. 436, but rather upon the ground there was evidence upon which the question of estoppel should have been submitted to the jury.

[93] Meyer v. Smith, 3 Tex. Civ. App. 37.

On the other hand, the St. Louis Court of Appeals seems to think that the question is always one of estoppel. St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. App. 270.

are committed to the jury, that we deem citation of authorities on the subject unnecessary. The instruction that silence alone for an unreasonable time, was in law a ratification, was erroneous."

§ 456. ——— Elements of estoppel may be present.—Thus far the attempt has been to exclude the element of estoppel. Theoretically the distinction between an inference of approval in fact deduced from apparent acquiescence, and an estoppel to deny approval because of some special circumstances, is not difficult to make. The former is the inference which *any* reasonable man may fairly draw under the circumstances. The latter, however, is the inference which a *particular* reasonable man may fairly draw in view of the special facts which concern him. Suppose that, from such facts as those in question, there would, ordinarily, be no inference of approval drawn from the silence of the principal. If we then add to those facts, the further one that the other party, as the alleged principal knows, is about to change or is likely to change, his position in reliance upon the supposed authority, in such a way that he will suffer serious injury if that authority proves not to exist, is then the silence of the principal legally permissible if he expects to deny the authority? If it would not be permissible, do we not then say that the principal is estoppel to deny his approval?

In the ordinary case, perhaps, the other party will have parted, with whatever he is to part with in mere reliance upon the assumed authority, at the time he made the contract. For that loss, if any, the principal by the hypothesis is not responsible; but how about new or further changes of position later made, in reliance upon both the assumed authority and the principal's knowledge and failure to object?

In some cases, perhaps, the principal's knowledge of special circumstances may simply serve to accelerate the passage of the time within which it would be deemed necessary for him to act, if he proposes to repudiate the act.

In a large number of the cases, if not in a majority of them, there are present some elements of estoppel, as well as circumstances from which pure inferences of approval in fact may be drawn; and any conclusion will be likely to be one in which both elements are more or less inseparably mixed.[94] Courts and writers—sometimes carelessly, sometimes unavoidably,— pass in apparent unconsciousness from one field to the other. It is perhaps true, also, that our whole process of drawing inferences of fact springs from the same root as that from which estoppel springs. At any rate, it is entirely clear that, in the various

[94] See the discussion in Heyn v. O'Hagen, 60 Mich. 150.

rules and statements of principle made respecting this matter of ratification by acquiescence, the element of estoppel is constantly found, and that it plays a large part in the actual determination of the cases.

In any case which must rest upon the theory of estoppel, there must, of course, as in other cases of estoppel, be shown the facts of special reliance and prejudice upon which that doctrine rests.

§ 457. ——— Other statements of the rule.—This subject is of so much importance as perhaps to warrant a somewhat fuller exposition of the different statements which judges have made in attempting to declare the rule which governs it. It cannot fail to be observed that estoppel rather than ratification is the key note in the first two.

Thus it was said by a distinguished judge, "We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after the knowledge of the committal of it, whereby innocent third parties may have been led to put themselves in a position from which they cannot be taken without loss. It is the doctrine of equitable estoppel." [95]

And by another, "The rule as to what amounts to ratification of an unauthorized act is elementary and may be safely stated thus: Where a person assumes in good faith to act as agent for another in any given transaction, but acts without authority, whether the relation of principal and agent does or does not exist between them, the person in whose behalf the act was done, upon being fully informed thereof, must within a reasonable time disaffirm such act, at least in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified such unauthorized act." [96]

And again, "The correct rule seems to be that when the principal has full knowledge of the acts of his agent from which he receives a direct benefit he must dissent and give notice of his non-concurrence within a reasonable time, or his assent and ratification will be presumed. * * * It is true that mere knowledge, on the part of the principal, of an agent's unauthorized action, will not make silence or non-interference in all cases amount to ratification. But it would where the party dealing with the agent is misled or prejudiced, or where the usage of trade requires, or fair dealing demands, a prompt reply from the principal. In all such cases, the principal, if dissatisfied with the act of the agent and fully informed of what has been done, must express his dissatisfaction within a reasonable time." [97]

[95] Folger, J., in Kent v. Quicksilver Mining Co., 78 N. Y. 137.

[96] Lyon, J., in Saveland v. Green, 40 Wis. 431; cited with approval, except as to the element of good faith, in Heyn v. O'Hagen, 60 Mich., at p. 157.

[97] Mobile & Montgomery Ry. Co. v.

§ 458. ——— Relations of the parties.—The situation of the parties may be significant in determining conclusions. Suppose the question arises between the other party and the principal. At the time the act was done, the other party knew he was dealing with a special agent, but took no steps to ascertain whether the proposed act was within the scope of the authority. Does the principal owe him a greater duty of protection than the third party owes to himself? Suppose that, at the time the act was done, the other party knew that it was at least doubtful whether the act was within the authority. Does that fact impose any duty upon him to ascertain? Suppose that, at the time the act was done, the other party knew that the act was unauthorized, but counted upon the possibility or the probability that the principal would ratify. How much protection is the principal bound to afford him in such a speculation?

Suppose next that the question arises between the agent and the principal. If the agent knew his act was unauthorized, or that it was in the face of positive instructions, is he in a favored situation to contend that the mere silence of his principal is an acquiescence?

Suppose again that the principal knows that the other party or the agent believes the act authorized, and is apparently relying confidently upon it. May not that fact be material in determining what inferences should be drawn from the principal's silence?

§ 459. Failure to dissent as between principal and agent.—While it has been said in a few cases that no inference of approval can be drawn from the principal's failure to notify his agent of his dissent from his unauthorized acts,[98] the general rule is undoubtedly to the contrary. It is, of course, not difficult to understand that an agent, who intentionally and wilfully does unauthorized acts, should not be permitted to impose upon his principal, for the agent's protection, a constant duty of repudiation so far as the agent is concerned. But, on the other hand, there are many cases,—where the agent is acting at a distance,—where the authority is more or less ambiguous,—where the agent is clothed with something of discretion,—where he is seeking *bona fide* to benefit the principal,—and the like, in which different considerations may apply, and the rule seems in general to be well settled that, when the agent advises the principal that he has done some act not warranted by his authority, the principal must repudiate it

Jay, 65 Ala. 113, modifying Powell's Admr. v. Henry, 27 Ala. 612.

[98] Thus in Lewin v. Dille, 17 Mo. 64, it is said that there is no duty upon the principal to notify the agent that he disapproves his breach of instructions. The agent must look to his instructions for his own safety and departs from them at his own risk.

within a reasonable time, or the agent will be justified in assuming that the principal assents.[99] Judge Story bases the rule upon commercial usage, and says that "if the principal, having received information by a letter from his agent of his acts touching the business of his principal, does not, within a reasonable time, express his dissent to the agent he is deemed to approve his acts and his silence amounts to a ratification of them."[1]

§ 460. ——— Mere inaction on the part of the principal may not always be so potent evidence of approval in the case of the agent as in the case of the third person. The agent himself usually knows, what the third person usually does not, that his act was unauthorized; as between the principal and the agent it may sometimes be to the latter's advantage to let the matter lie open a little; he may urge the principal to wait; and he cannot complain of inaction "especially if such inaction or failure to immediately disaffirm was induced by the assurances or persuasion of the agent himself."[2]

After revoking an agent's authority, however, a principal is not bound, as between himself and the agent, to notify the latter of his dissent from acts done by such agent in pursuance of the original authority.[3]

§ 461. ——— **As between the principal and the other party.**— As between the principal and the other party, the rule is not so clear. If the principal has received some tangible benefit from the act which he retains, there is, as has been seen, ordinarily little difficulty.[4] But if he has not, and the case is simply one of unauthorized action, known to the principal, and followed by mere silence on his part, is there ratification? For his own protection the other party is bound to ascertain the agent's authority: he has not done so. The alleged principal had done nothing to mislead him. Is the principal bound to inform him of that which he should have ascertained for himself? In one case[5] it was said, "It is the duty of one trading with an agent who has only a limited and special authority, to make inquiry as to the extent of the

[99] Prince v. Clark, 1 B. & C. 186, 2 D. & R. 266; Bell v. Cunningham, 3 Pet. (U. S.) 69, 7 L. Ed. 606; Law v. Cross, 1 Black (U. S.), 533, 17 L. Ed. 185; Courcier v. Ritter, 4 Wash. C. C. 549, 6 Fed. Cas. 644; Norris v. Cook, 1 Curtis, 464, 18 Fed. Cas. 313; Richmond Mfg. Co. v. Starks, 4 Mason, 296, 20 Fed. Cas. 747; Cairnes v. Bleecker, 12 Johns. (N. Y.) 300; Vianna v. Barclay, 3 Cow. (N. Y.) 281; Bray v. Gunn, 53 Ga. 144; Clay v. Spratt, 7 Bush (Ky.), 334; Bredin v. Dubarry, 14 Serg. & R. (Pa.) 27; Halloway v. Milling Co., 77 Kans. 76; Allen v. McAllister, 39 Wash. 440.

[1] Story on Agency, § 258.

[2] Triggs v. Jones, 46 Minn. 277.

[3] Kelly v. Phelps, 57 Wis. 425.

[4] See *ante*, § 436.

[5] White v. Langdon, 30 Vt. 599.

agent's authority; if he omits inquiry, he does so at his peril. It is not the duty of the principal, upon hearing of the sale by the agent [which was here the unauthorized act], to seek the purchaser and give him notice of his claim, and his omission to do so and his mere silence, are not ordinarily to be construed as a ratification of the sale. If special circumstances may be supposed to exist, which would make it the duty of the principal to give such notice, none such are proved in this case." It has been said that this case is not in accord with the weight of authority,[6] and there are certainly many *dicta* to the contrary; but in the absence of the special circumstances referred to, so far as it holds that mere silence is not *per se* a ratification, it is believed to be sound.[7] If the question is whether an inference of assent may be drawn from silence, the case does not deny it. If the other party has changed his situation to his detriment in reliance upon the principal's conduct, he may establish an estoppel.[8]

§ 462. ——— It is not to be denied that many cases state the obligation of the principal in a very positive way. It is sometimes said that the principal owes to the other party a "duty" to dissent, but this

[6] By Mr. Greenough, editor of the ninth edition of Story on Agency, § 256, note.

[7] This is well brought out in the recent case of Smith v. Fletcher, 75 Minn. 189. See also the rules quoted in the following section. There is also a good statement of the situation in Curry v. Hale, 15 W. Va. 867, 875. In Lynch v. Smyth, 25 Colo. 103, it is said: "Silence of the alleged principal when fully advised of what has been done in his behalf, by one who attempts to act as his agent without authority, may be sufficient from which to infer a ratification of the unauthorized act (2 Greenl. Ev. § 67; King v. Rea, 13 Colo. 69); which, however, is not conclusive except the party affected by such silence has been misled or injured (King v. Rea, *supra*); so that it does not necessarily follow that one seeking to enforce a liability by ratification arising from silence, or a failure to repudiate an unauthorized act after knowledge thereof, must also show that by such silence he has been misled to his prejudice, although it is proper to do so, as silence of the alleged principal under such circumstances may of itself be sufficient to establish a ratification of such act. Union M. Co. v. Rocky Mt. Bank, 2 Colo. 248. Where, however, after knowledge of the unauthorized act comes to the alleged principal, the party affected by such act has an opportunity to improve his position, the alleged principal is bound to disapprove within a reasonable time after notice of such act, and a failure to do so is conclusive evidence of assent." To same effect: Meyer v. Smith, 3 Tex. Civ. App. 37; Iron City National Bank v. Fifth National Bank (Tex. Civ. App.), 47 S. W. 533 (affirmed on somewhat different grounds in 92 Tex. 436). See also Norden v. Duke, 120 App. Div. 1; Stiebel v. Haigney, 134 App. Div. 516; Ilfeld v. Ziegler, 40 Colo. 401.

[8] See the discussions in Steffens v. Nelson, 94 Minn. 365; Ilfeld v. Ziegler, *supra;* Stiebel v. Haigney, *supra;* Mobile, etc., Ry. Co. v. Jay, 65 Ala. 113.

expression can scarcely be used in any strict legal sense. It can doubtless mean no more than that, if the principal does not dissent, he runs the risk of the inferences that may legally be drawn, or of the consequences which estoppel may impose, as the result of his inaction.

To that extent, however, the situation is very clear, and the cases are now exceedingly numerous which hold that the principal's failure to dissent after knowledge may, under the circumstances, justify the jury or other triers of the fact in inferring that what he has thus failed to repudiate he at least tacitly affirms, or, upon a showing of the proper facts, that he may be estopped to assert his dissent where the appearances of assent have reasonably misled the other party to his prejudice.[9]

Moreover, as has been pointed out, the facts may be such as to reasonably warrant but one inference, and then, as in other cases, the court may draw that inference without the aid of the jury.

§ 463. Principal must act within a reasonable time.—The time within which the principal must act in order to avoid the inference of assent cannot be determined by any hard and fast rule, though numerous attempts have been made to declare one. Many cases assert that the principal is bound to act "at once," "immediately," "promptly" or "as soon as he can" upon receiving knowledge of the act;[10] but the better rule, and the one supported by the weight of authority and reason, is that which determines the matter by allowing a reasonable time in which to decide and which draws inferences only after its expira-

[9] Among the more recent cases see Dover v. Pittsburg Oil Co., 143 Cal. 501; Owens Pottery Co. v. Turnbull Co., 75 Conn. 628; Whitley v. James, 121 Ga. 521; Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561; Henderson v. Beatty, 124 Iowa, 163; Hartwell v. Loveland, 78 Kan. 259; Wheeler v. Citizens' Bank, 32 Ky. L. Rep. 939; Hix v. Eastern S. S. Co., 107 Me. 367; Clippinger v. Starr, 130 Mich. 463; Lowe v. Benz, 107 Minn. 562; Russell v. Waterloo Thresh. M. Co., 17 N. Dak. 248; Minneapolis Thresh. Mach. Co. v. Humphrey, 27 Okla. 694; Reid v. Alaska Packing Co., 47 Oreg. 215; Standard Leather Co. v. Allemannia F. Ins. Co., 224 Pa. 186; Keyes v. Union Pac. Tea Co., 81 Vt. 420; Ankeny v. Young, 52 Wash. 235; Smith v. Collins, 91 C. C. A. 132, 165 Fed. 148.

[10] Ward v. Williams, 26 Ill. 447, 79 Am. Dec. 385; Johnston v. Berry, 3 Ill. App. 256; Pitts v. Shubert, 11 La. 286, 30 Am. Dec. 718; Kehlor v. Kemble, 26 La. Ann. 713; Foster v. Rockwell, 104 Mass. 167; Harrod v. McDaniels, 126 Mass. 413; Crane v. Bedwell, 25 Miss. 507; Bredin v. Dubarry, 14 Serg. & R. (Pa.) 27; Kelsey v. National Bank of Crawford Co., 69 Pa. 426; Williams v. Storm, 6 Cold. (Tenn.) 203; Fort v. Coker, 11 Heisk. (Tenn.) 579; Hart v. Dixon, 5 Lea (Tenn.), 336; Meister v. Cleveland Dryer Co., 11 Ill. App. 227; Manhattan Fire Ins. Co. v. Harlem, etc., Co., 26 N. Y. Misc. 394; Bement v. Armstrong (Tenn.), 39 S. W. 899.

tion.[11] What shall be deemed a reasonable time depends here, as in other cases, upon the situation of the parties and the facts and circumstances of the case.[12]

[11] Mobile, etc., Ry. Co. v. Jay, 65 Ala. 113; Central R. & B. Co. v. Cheatham, 85 Ala. 292, 7 Am. St. R. 48; Gold Mining Co. v. Rocky Mt. Nat'l Bank, 2 Colo. 565, aff'd 96 U. S. 640, 24 L. Ed. 648; Breed v. Central City Bank, 6 Colo. 235; King v. Rea, 13 Colo. 69; Lynch v. Smyth, 25 Colo. 103; Bray v. Gunn, 53 Ga. 144; Booth v. Wiley, 102 Ill. 84; Connett v. Chicago, 114 Ill. 233; International Bank v. Ferris, 118 Ill. 465; Miller v. Stone Co., 1 Ill. App. 273; Terre Haute, etc., Ry. Co. v. Stockwell, 118 Ind. 98; Farwell v. Howard, 26 Iowa, 381; Alexander v. Jones, 64 Iowa, 207; Clay v. Spratt, 7 Bush (Ky.), 334; Givens v. Cord, 44 S. W. 665, 19 Ky. Law Rep. 1893; Oliver v. Johnson, 24 La. Ann. 460; Lafitte v. Godchaux, 35 La. Ann. 1161; Raymond v. Palmer, 41 La. Ann. 425, 17 Am. St. R. 398; Johnson v. Wingate, 29 Me. 404; Brigham v. Peters, 1 Gray (Mass.), 139; Heyn v. O'Hagen, 60 Mich. 150; Dana v. Turlay, 38 Minn. 106; Smith v. Fletcher, 75 Minn. 189; Meyer v. Morgan, 51 Miss. 21, 24 Am. Rep. 617; Swartz v. Duncan, 38 Neb. 782; Alexander v. Culbertson Irrigation Co., 61 Neb. 333; Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319; Baldwin v. Howell (N. J.), 30 Atl. 423; Keim v. Lindley (N. J.), 30 Atl. 1063; Lyle v. Addicks, 62 N. J. Eq. 123; Hamlin v. Sears, 82 N. Y. 327; Kelsey v. National Bank, 69 Pa. 426; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Higginbotham v. May, 90 Va. 233; Lynch v. Richter, 10 Wash. 486; Saveland v. Green, 40 Wis. 431; Cooper v. Schwartz, 40 Wis. 54; Parish v. Reeve, 63 Wis. 315; Hepburn v. Dunlop, 1 Wheat. (U. S.) 179, 4 L. Ed. 65; Law v. Cross, 1 Black (U. S.), 533, 17 L. Ed. 185; Gold Mining Co. v. National Bank, 96 U. S. 640, 24 L. Ed. 648; Norris v. Cook, 1 Curt. (U. S. C. C.) 464; Abbe v. Rood, 6 McLean (U. S. C. C.), 106; Lorie v. North Chicago City Ry. Co., 32 Fed. 270.

On the other hand, in Mallory v. Mallory Wheeler Co., 61 Conn. 131, it is said: "Ratification ordinarily requires some positive assertive act. In order that acquiescence alone should become ratification the delay must be so long continued that it can be accounted for only on the theory that there has been some affirmative act. Town of Derby v. Alling, 40 Conn. 410; Evans v. Smallcombe, L. R. 3 Eng. & Ir. App. 249." Compare, however, Owens Pottery Co. v. Turnbull Co., 75 Conn. 628.

[12] McDermid v. Cotton, 2 Ill. App. 297; Philadelphia, etc., R. R. Co. v. Cowell, 28 Penn. St. 329, 70 Am. Dec. 128; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611.

How information communicated.—The information may come from the agent (Foster v. Rockwell, 104 Mass. 167), or the other party.

Information from letter.—Though omitting to answer a written communication is in general no evidence of the truth of the facts therein stated. Commonwealth v. Eastman, 1 Cush. (Mass.) 189; Fearing v. Kimball, 4 Allen (Mass.), 125; Learned v. Tillotson, 97 N. Y. 1; Canadian Bank of Commerce v. Coumbe, 47 Mich. 358 (none of these being a case of agency); Irwin v. Buffalo Pitts Co., 89 Wash. 346; yet the information as to the acts of the assumed agent may be imparted to the principal by letter as well as by any other means. Foster v. Rockwell, 104 Mass. 167; Cooper v. Schwartz, 40 Wis. 54; Ruffner v. Hewitt, 7 W. Va. 585; Keim v. Lindley (N. J.), 30 Atl. 1063. See also Searing v. Butler, 69 Ill. 575; Ward v. Williams, 26 Ill. 447, 79 Am. Dec. 385; Kehlor

Where commercial matters or fluctuating values or sudden exigencies are involved hours or days may be as important as weeks or months might be in other cases.[13]

§ 464. Same rule applies to private corporations.—And, as has been seen, these rules apply as well to corporations within the scope of their corporate powers as to individuals.[14]

"It seems to be now well settled," says Chief Justice Shaw, "since the great multiplication of corporations, extending to almost all the concerns of business, that trading corporations, whose dealings embrace all transactions from the largest to the minutest and affect almost every individual in the community, are affected like private persons with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and generally by those legal and equitable considerations which affect the rights of natural persons." [15]

§ 465. ——— And to municipal and quasi-municipal corporations.—The same rules as to ratification by acquiescence or retention of benefits within the sphere in which they have power to act apply in general also to municipal and *quasi*-municipal corporations, although from their nature, a ratification by acquiescence is not so readily to be inferred as in the case of individuals or of private corporations.[16]

Liability by ratification, however, cannot be established by acquiescence or informal acts in the face of express statutory requirements

v. Kemble, 26 La. Ann. 713; Pittsburgh, etc., R. R. Co. v. Woolley, 12 Bush (Ky.), 451; Jennison v. Parker, 7 Mich. 355.

[13] Halloway v. Arkansas City Milling Co., 77 Kan. 76.

[14] Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Co., 90 N. Y. 607; Kelsey v. National Bank of Crawford Co., 69 Penn. St. 426; Nutting v. Kings Co. Elev. Co., 21 App. Div. 72; Kirwin v. Wash. Match Co., 37 Wash. 285; Clement v. Young-McShea Amusement Co., 69 N. J. Eq. 347; German Sav. Bank v. Des Moines Nat. Bank, 122 Iowa, 737; American Quarries Co. v. Lay, 37 Ind. App. 386.

And the same rule applies to an unincorporated association. Siff v. Forbes, 63 N. Y. Misc. 319.

[15] Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59.

[16] School District v. Aetna Ins. Co., 62 Me. 330; Chamberlain v. Dover, 13 Me. 466, 29 Am. Dec. 517; Davis v. School District, 24 Me. 349; White v. Sanders, 32 Me. 188; Fisher v. School District, 4 Cush. (Mass.) 494; Bliss v. Clark, 16 Gray (Mass.), 60; Johnson v. School Corp., 117 Iowa, 319; Matheney v. El Dorado, 82 Kan. 720, 28 L. R. A. (N. S.) 980; Forrest City v. Orgill, 87 Ark. 389; Roberts v. St. Marys, 78 Kan. 707; Chicago v. Nicholson, 130 Ill. App. 466; Colorado Springs v. Colorado City, 42 Colo. 75; Gallup v. Liberty Co., 57 Tex. Civ. App. 175.

that liability shall only be created in some express manner pointed out by the statute.[17]

§ 466. **How when assumed agent is a mere stranger.**—While it is abundantly settled that acquiescence may result in the ratification of the act of an agent, it has been much questioned whether the same result would follow if the person assuming to act for the other was a stranger. All of the authorities agree that the relations of the parties have much to do in determining whether or not there has been a ratification, but it is held by several of the courts that, when he who assumes to act for another is not one sustaining to him the relation of an agent but is a mere volunteer, no duty exists on the part of the other to repudiate the act on its being brought to his notice, and that nothing short of a positive affirmance will make it binding upon him. Thus it is said in an Illinois case, "In general where an agent is authorized to do an act and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name by the agent, else he will be bound by the act as having ratified it by implication; but where a stranger, in the name of another, does an unauthorized act, the latter need take no notice of it, although informed of the act thus done in his name, and he shall only be bound by an affirmative ratification." [18] And this view is supported by eminent judges and text writers.[19]

§ 467. ——— **The contrary view** is also maintained by judges of great ability. Thus it is said by Woodward, J., "If the party to be charged has been accustomed to contract through the agency of the individual assuming to act for him, or has intrusted property in his keeping, or if he were a child or servant, partner or factor, the relation *conjunctionis favor* would make silence strong evidence of assent. On

[17] Cook v. Cameron, 144 Mo. App. 137; Roemheld v. Chicago, 231 Ill. 467; Agawam National Bank v. South Hadley, 128 Mass. 503.

[18] Ward v. Williams, 26 Ill. 447, 79 Am. Dec. 385, approved in Searing v. Butler, 69 Ill. 575.

[19] Evans' Agency, 68; Livermore's Agency, §§ 255, 258; Duer, Vol. II, 151–154; Merritt v. Bissell, 155 N. Y. 396; Britt v. Gordon, 132 Iowa, 481.

In Robbins v. Blanding, 87 Minn. 246, it is said: "A failure to disavow the acts of a mere volunteer, who meddlingly assumes to act without authority as the agent of another, will not constitute a ratification. But where a person in good faith assumes to act as the agent of another but without authority in fact, in any particular transaction, the latter, upon being fully informed thereof, must, in cases where his silence might prejudice the assumed agent or innocent third parties, disavow the act within a reasonable time, or he will be held to have ratified it. As to such third persons it would seem that the element of good faith of the assumed agent is not essential."

the other hand, if there had been no former agency and no peculiarity whatever in the prior relations of the parties, silence,—a refusal to respond to mere impertinent interference,—would be very inconclusive but not an absolutely irrelevant circumstance. The man who will not speak when he sees his interests affected by another must be content to let a jury interpret his silence. It is a clear principle of equity that where a man stands by knowingly and suffers another person to do acts in his own name without any opposition or objection, he is presumed to have given authority to do those acts. * * * If mental assent may be inferred from circumstances, silence may indicate it as well as words or deeds. To say that silence is no evidence of it is to say that there can be no implied ratification of an unauthorized act—or at the least to tie up the possibility of ratification to the accident of prior relations. Neither reason nor authority justifies such a conclusion. A man who sees what has been done in his name and for his benefit, even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar contract for himself and if the power to ratify be conceded to him the fact of ratification must be provable by the ordinary means." [20]

§ 468. ——— The true rule.—Keeping in mind that the question in these cases is, not whether the silence is of itself a ratification, but whether it is any evidence from which, in connection with other facts, a ratification may be inferred, it is undoubtedly the better rule that while the relations of the parties are very significant they are not conclusive, and that even in the case of a mere stranger a ratification may be established by the same kind of evidence that is admissible in other cases, although the presumptions arising from acquiescence are much stronger in a case where an agency exists than in the case of a stranger.[21]

[20] Philadelphia, etc., R. R. Co. v. Cowell, 28 Penn. St. 329, 70 Am. Dec. 128.

[21] Union Gold Mining Co. v. Rocky Mt. Nat. Bank, 2 Col. 248; Lynch v. Smyth, 25 Colo. 103; Ladd v. Hildebrant, 27 Wis. 135, 9 Am. Rep. 445; Saveland v. Green, 40 Wis. 431; Southern Ex. Co. v. Palmer, 48 Ga. 85; Ralphs v. Hensler, 97 Cal. 296; Williams v. Moore, 24 Tex. Civ. App. 402; Harrod v. McDaniels, 126 Mass. 418; Taylor v. Herron, 72 Kan. 652; Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 23 Ann. Cas. (1912 B.) 148; Robbins v. Blanding, 87 Minn. 246; Greenfield Bank v. Crafts, 4 Allen (Mass.), 447; Heyn v. O'Hagen, 60 Mich. 150. See also Hurley v. Watson, 68 Mich. 531; Carson v. Cummings, 69 Mo. 325; Dierks Lumber Co. v. Coffman, 96 Ark. 505.

In Merritt v. Bissell, 155 N. Y. 396, 50 N. E. 280, it is said: "While it is the duty of a principal to disavow the unauthorized act of his agent within a reasonable time after it comes to his knowledge, or, otherwise, in some cases, he makes the act his own, still, where one who has assumed to act as an agent for another has no authority to do so but

§ 469. ——— Silence does not ratify if stranger acts in his own name.—Where, however, the stranger does not assume to act in the behalf of the alleged principal but in his own name and behalf, the silence of the alleged principal will not be evidence of a ratification of the stranger's act.[22]

§ 470. ——— How when former agent continues to act.—Where the person acting is a former agent whose authority has been revoked, the principal who knows that he is still assuming to act must, it is held, repudiate the authority or his assent will be inferred.[23]

§ 471. Acquiescence coupled with conduct inconsistent with disapproval.—Many of the cases present evidence, not only of mere failure to dissent, but also of that fact coupled with conduct inconsistent with disapproval, as where the principal, with knowledge of the facts, has not dissented, has found no fault, made no complaint and entered no protest, but, on the contrary, has tacitly accepted the situation, condition, obligation or restriction resulting from the act, and adjusted himself to it, acted upon it, entered upon its performance, and the like. These cases, from their infinite variety of facts, do not lend themselves readily to any precise rule. "It is sufficient to say that a ratification will be implied from the conduct of the person, in whose behalf another has assumed to act, clearly inconsistent with any intention other than a purpose to adopt such act as his own." [24]

§ 472. Illustrations of ratification by acquiescence.—The cases in which this principle has been applied are very numerous, but a few of them are given here as illustrations of its nature and effect. Thus

is a mere volunteer, a failure to disavow his acts will not amount to a ratification, unless under such circumstances as indicate an intention to do so."

As between the principal and the alleged agent who claims compensation for his act, it is said that the principal is not as to a mere stranger, bound to dissent. Kelly v. Phelps, 57 Wis. 425.

[22] Hamlin v. Sears, 82 N. Y. 327; Garvey v. Jarvis, 46 N. Y. 310, 7 Am. Rep. 335.

[23] Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138.

[24] Oberne v. Burke, 50 Neb. 764. To like effect: Creson v. Ward, 66 Ark. 209; Smith v. Schiele, 93 Cal. 144; Allin v. Williams, 97 Cal. 403; Welch v. Brown, 46 Colo. 129; Curnane v. Scheidel, 70 Conn. 13; Kaffer v. Walters, 9 Kan. App. 291; Gemberling v. Spaulding, 104 Mich. 217; Blakley v. Cochran, 117 Mich. 394; Clippinger v. Starr, 130 Mich. 463; Singer Mfg. Co. v. Flynn, 63 Minn. 475; Gillett v. Whiting, 141 N. Y. 71, 38 Am. St. Rep. 762; Williams v. Crosby Co., 118 N. C. 928; Fenn v. Dickey, 178 Pa. 258; Valley Glass Co. v. American Ins. Co., 197 Pa. 254; Brown v. Wilson, 45 S. Car. 519, 55 Am. St. Rep. 779; McCulloch, etc., Co. v. Whitefort, 21 Tex. Civ. App. 314; Roundy v. Erspamer, 112 Wis. 181; Johnson v. Weed, etc., Mfg. Co., 103 Wis. 291; Fintel v. Cook, 88 Wis. 485.

where one in the presence of the principal sold the goods of the principal as his agent without objection, the tacit consent of the principal was presumed.[25] And where a son without authority exchanged his father's horse for another with a near neighbor and the father, although he saw the neighbor frequently, kept the horse so acquired and used it as his own for about three months without expressing any dissent, it was held that a ratification of the exchange must be presumed.[26] And so where a son assuming to act for his father, but without authority, sold a half interest in his father's mowing and reaping machine, and for two years thereafter the father and the purchaser used and kept the machine in repair as joint owners, it was held that the father could not complain that the sale was unauthorized.[27] And so where a son who was left to manage his father's store was told not to buy goods of the plaintiff, but did so from time to time, and the father knew that the goods were being received and saw the boxes with the plaintiff's name on them but gave no notice and made no dissent, there was held to be clear evidence of ratification.[28] So where an agent without authority made a contract for the sale of land and notified his principal of the fact, saying that he would also send a deed for execution which he did some days later, and the principal made no objection, acknowledged the receipt of the papers and said that he would return them as soon as his attorney had examined them, it was held that there was such evidence of ratification as would sustain the sale as against a later repudiation.[29]

§ 473. ——— Again, where a note had been indorsed without authority, but the principal afterwards wrote over the indorsement a waiver of demand and protest, it was held that he had sufficiently adopted the indorsement.[30] So, where an agent without authority sold the land of the principal to the knowledge of the latter, who made no objections for more than four years, during which time the purchaser had been occupying and improving the land, the principal was held to have acquiesced in the sale.[31] So where a railroad company used and partly paid for a quantity of material purchased by one assuming to be

[25] Owsley v. Woolhopter, 14 Ga. 124; Gillinger v. Lake Shore Traffic Co., 67 Wis. 529.

[26] Hall v. Harper, 17 Ill. 82.

[27] Swartwout v. Evans, 37 Ill. 442.

[28] Roundy v. Erspamer, 112 Wis. 181.

[29] Dana v. Turlay, 38 Minn. 106. See also Stuart v. Mattern, 141 Mich. 686; Sleeper v. Murphy, 120 Iowa, 132.

[30] Allin v. Williams, 97 Cal. 403. So where the note had been altered without authority. Montgomery v. Crossthwait, 90 Ala. 553, 24 Am. St. Rep. 832, 12 L. R. A. 140.

[31] Alexander v. Jones, 64 Iowa, 207.

its agent, the purchase was held to be ratified;[32] and under like circumstances it was held that knowledge of the purchase on the part of the company would be presumed.[33] And where the president of a railroad company, without authority, made a sale of property belonging to the company, in part payment of a debt owed by it, and the fact of the sale was communicated to the board of directors and talked over publicly at one of their meetings, but they did nothing to disaffirm it, it was held to be ratified.[34] And where, after an accident, a conductor employed a physician to care for an injured person and both the conductor and the physician notified the general superintendent of such employment, but the company gave no notice of dissent, it was held that the employment was ratified.[35] And where an agent without authority procured work to be done, and the principal on receiving the bill objected to the amount of the charge but not to the work or the authority to procure it, it was held that ratification might be inferred.[36] So where the principal continues the prosecution of an action begun by an agent, his approval of the action and of the steps necessary to institute it, may be inferred.[37]

Other cases involving the same principle are cited in the note.[38]

§ 474. ——— But, on the other hand, ratification is not to be found without reason or presumed without cause. There must be confirmatory conduct, or at least conduct inconsistent with disapproval. Facts are not to be stretched, or ambiguous, inconclusive or independent acts made the basis of a ratification. Thus, where an unauthorized lease had been given, but the principal formally repudiated it as soon as he heard of it, the fact that he afterwards permitted the tenant to re-

[32] Evans v. Chicago, etc., R. R. Co., 26 Ill. 189.

[33] Scott v. Middletown, etc., Ry., 86 N. Y. 200.

See, also, that knowledge by the corporation may be inferred from length of time and general notoriety. Central R. Co. v. Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48; Kelsey v. National Bank, 69 Pa. 426.

[34] Walworth County Bank v. Farmers, etc., Co., 16 Wis. 629.

[35] Terre Haute, etc., R. Co. v. Stockwell, 118 Ind. 98.

[36] Hill v. Coates, 84 (N. Y.) Misc. 535.

[37] Cook v. Buchanan, 86 Ga. 760.

[38] Schmidt v. Rankin, 193 Mo. 254; Williams v. Merritt, 23 Ill. 623; Bogel v. Teutonia Bank, 28 La. Ann. 953; Matthews v. Fuller, 123 Mass. 446; Marshall v. Williams, 2 Biss. (U. S. C. C.) 255; Hanks v. Drake, 49 Barb. (N. Y.) 186; Maddux v. Bevan, 39 Md. 485; Farwell v. Howard, 26 Iowa, 381; Pittsburgh v. Woolley, 12 Bush (Ky.), 451; Lafitte v. Godchaux, 35 La. Ann. 1161; Meyer v. Morgan, 51 Miss. 21, 24 Am. Rep. 617; Hawkins v. Lange, 22 Minn. 557; Johnston v. Berry, 3 Ill. App. 256; Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. Ed. 482; Hoyt v. Thompson, 19 N. Y. 218; Law v. Cross, 1 Black (U. S.), 533, 17 L. Ed. 185.

main from month to month at the rate fixed by the lease, and accepted such rent, does not constitute a ratification of the lease.[39] And a railroad company will not be held to have ratified the unauthorized hiring, by one of its station agents, of a person to assist in the detection of a thief who had stolen property in the company's possession, merely by reason of the fact that the company's regular detectives made use of information, furnished by such person, which led to the detection and arrest of the thief and the recovery of the property.[40] And so, where the principal sent his agent to obtain a team and carriage from liveryman P, but the agent procured them from O, and on the way back the horses, while driven by the agent ran away and did injury, after which O attached the horses to another carriage and took them to the principal who used them, it was held that such use did not ratify the procuring of the first conveyance, so as to make the principal responsible to O for the injury done.[41] And so where the foreman of a laundry, without authority, employed a physician to attend an employee injured in the laundry, it was held that the principal, who expressed a willingness to pay for the first visit but protested against further obligation, did not thereby ratify the employment so as to become liable for the whole.[42] So where one, acting as agent without authority, ordered goods, upon the receipt of which the principal notified the seller of the agent's lack of authority, and her readiness to return the goods, a subsequent offer to take the goods at one-half of the price asked by the vendor will not be a ratification.[43] So where an agent sent to his principal the copy of a written contract, entered into by the agent without adequate authority, and the principal wrote a letter in reply, calling attention to terms in the contract that he did not understand, asking their meaning, and proposing that the agent endeavor to get better terms, it was held that this was not sufficient evidence of ratification.[44] So where an agent to make arrangements for the sale of his principal's goods had, without authority, undertaken to give a certain person the exclusive right of dealing in the principal's goods in a given territory, the fact that the principal afterwards recognized that person as one of an unlimited number having the right to sell goods in that territory, did not amount to a ratification of the unauthorized agreement

[39] Owens v. Swanton, 25 Wash. 112.

[40] Somerville v. Wabash R. Co., 109 Mich. 294.

[41] Oglesby v. Smith, 88 Mo. App. 67.

[42] Holmes v. McAllister, 123 Mich. 493, 48 L. R. A. 396.

[43] American Silk Label Mfg. Co. v. Wolf, 123 N. Y. Supp. 923.

[44] Larson v. Newman, 19 N. D. 153, 23 L. R. A. (N. S.) 849.

that he should have the exclusive right.[45] Similar cases are cited in the note.[46]

§ 475. Retaining in employment as ratification.—Whether a master or principal, who retains in his employment a servant or agent who has committed an unauthorized act, thereby ratifies the act, especially where that act was a tort committed upon a third person, has been discussed in several cases. It is often said that such retention, with knowledge of the facts, is evidence of an approval of the act; but it is clear that the weight of it must, at best, vary greatly with the circumstances. The certainty of the facts, the nature of the offense, and the question whether disapproval may not be shown as well or better by some other means, should all be taken into account. Where there can be no doubt that the servant has done a serious wrong which would justify his immediate dismissal, his retention in employment, in the face of such a fact, may be very strong evidence of approval; but where the fact of the wrong is doubtful—where, for example, a previously trustworthy and competent servant plausibly denies that he was guilty of the wrong alleged—or points to justifying circumstances—to retain him in his employment until the matter can be properly investigated may be, not only no evidence of ratification, but simply, as was said in one case, "an act of courageous justice."[47] And even where the servant was clearly in the wrong, it does not follow that the master, who has actively disapproved the act in other ways, necessarily expresses his approval by not discharging the servant,[48] only where the circumstances are such as to reasonably warrant an inference of approval, should the matter be left to the jury, and then under proper instructions from the court, to determine the extent of the approval indicated.[49]

[45] White Sewing Machine Co. v. Hill, 136 N. C. 128.

[46] Chicago Cottage Organ Co. v. Stone (Ark. no opinion), 73 S. W. 392; Findlay v. Hildenbrand, 17 Idaho, 403, 29 L. R. A. (N. S.) 400; McGowan v. Treacy, 84 N. Y. Supp. 497; Hale v. Goodell, 49 Colo. 95; Thiel Detective Service Co. v. Seavey, 145 Mich. 674; Bromley v. Aday, 70 Ark. 351; Foss Investment Co. v. Ater, 49 Wash. 446; Craver v. House, 138 Mo. App. 251.

[47] Williams v. Pullman Car Co., 40 La. Ann. 87, 8 Am. St. Rep. 512.

[48] Deacon v. Greenfield, 141 Pa. 467.

[49] See Everingham v. Chicago, etc., R. Co., 148 Iowa, 662, Ann. Cas. 1912 C. 848; Kwiechen v. Holmes, etc., Co., 106 Minn. 148, 19 L. R. A. (N. S.) 255; Woodward v. Ragland, 5 App. Cas. D. C. 220; Smith v. Sibley Mfg. Co., 85 Ga. 333; Grattan v. Suedmeyer, 144 Mo. App. 719; Dillingham v. Russell, 73 Tex. 47, 15 Am. St. R. 753, 3 L. R. A. 634; Gulf, etc., Ry. Co. v. Reed, 80 Tex. 362, 26 Am. St. R. 749; International, etc., R. Co. v. McDonald, 75 Tex. 41; Robinson v. Superior, etc., R. Co., 94 Wis. 345, 59 Am. St. R. 897, 34 L. R. A. 205.

§ 476. Rule as to ratification by acquiescence applies only to principals.—The doctrine of ratification by acquiescence applies only to the principals in the transaction, and cannot therefore operate to effect a ratification upon the ground of the acquiescence of one of two joint agents in the act of his coagent in which the former ought to have joined in order to effectually exercise the power.[50]

VI.

MANIFESTATION OF RATIFICATION.

§ 477. Manifestation of ratification necessary.—It is, of course, usually essential that the ratification be manifested in some way. Treating it merely as assent, the fact of assent must still usually be made manifest. A mere determination to approve, or a mere approval kept for ever concealed in the principal's breast, can have no legal effect. It must in some way appear, so as to be acted upon where action is necessary, and must at least be capable of being established by the ordinary means of proof.[51] Where the other party is suing the

In Cobb v. Simon, 119 Wis. 597, 100 Am. St. R. 909, it is said: "Retention of a servant in his employment after notice to the principal of a tort committed by the servant is evidence of ratification of the act by the principal. Bass v. C. & N. W. Ry. Co., 42 Wis. 654, 24 Am. Rep. 437; Robinson v. Railway Co., *supra*. The information to the principal should be full and complete, in order to justify the conclusion of ratification on this ground. Patry v. Chicago, etc., Ry. Co., 77 Wis. 218. It is not essential that the information should come from the plaintiff, but, however it comes, it should be more than mere idle rumor, and should be so convincing and persuasive as to convince the mind of an ordinarily prudent employer that the facts exist which call for the servant's discharge. Any other rule would necessitate the discharge of faithful employees whenever their conduct is assailed by irresponsible, unfounded gossip, and such a rule would be plainly unjust both to employer and employee. The question is generally one for the jury, in view of all the information which came to the employer."

But see the comments upon this in Kwiechen v. Holmes, etc., Co., and in Everingham v. Chicago, etc., R. Co., *supra*, where it is said: "The fact that an employee is retained, after knowledge of a negligent act for which the master is already liable, is sometimes important as bearing upon the right to recover exemplary damages, and this is evidently all the Wisconsin court intended to hold in Cobb v. Simon."

[50] Penn v. Evans, 28 La. Ann. 576. See *ante*, § 198.

[51] "A ratification, though it must be evidenced by external demonstrations, is merely an act of the mind. It is a volition or determination to abide by and adopt the act of another. The validity of a ratification, where no act of another is founded upon it, does not depend upon its being communicated." Bayley v. Bryant, 24 Pick. (Mass.) 198. See also Sheffield v. Ladue, 16 Minn. 388, 10 Am. Rep. 145.

principal, in reliance upon the alleged ratification, he must come prepared to establish the fact by legal evidence, which will usually be the words or conduct of the principal having a tendency to prove it. Where the mere fact of assent is to be proved, the other party may doubtless, if he is able, establish it even by the reluctant admission of the principal as a witness that he then approved it, without any outward act.

When the principal, in reliance upon his own ratification, is suing the other party, he also, of course, must show that he has ratified. Usually the mere commencement of suit is a sufficient manifestation.[52] Where, however, he relies upon a prior act, it must be an act manifested. He could not, for example, rely upon a written document, kept constantly in his own possession, and never given legal efficacy by delivery.[53] And where his purpose is to require an act of performance by the other party, it would seem that notice of the ratification must be brought home in some authentic way to the latter.

§ 478. ——— To whom.—The persons to whom the ratification must be manifested are, of course, usually the parties involved in the transaction, or their agents for this purpose, though doubtless what is said or otherwise manifested to third persons may often be competent as evidence. Ratification by conduct will also often present different aspects than express ratification. In a well considered case of the latter sort before the Transvaal supreme court,[54] it was said by Innes, C. J., "The plaintiffs' case is that there has been an express ratification; and it seems to me, on principle, that such ratification must be addressed either to the agent or to the person with whom the agent had dealings. All other persons are outsiders, and communications addressed to them, with reference to the agent's conduct, are *res inter alios acta.*"

VII.

PROOF OF THE RATIFICATION.

§ 479. Burden of proof.—Ratification is not a matter to be presumed; it must be proved. And the burden of proof rests upon him who alleges it.[55]

[52] See Warder, etc., Co. v. Cuthbert, 99 Iowa, 681; Bolton Partners v. Lambert, 41 Ch. Div. 295.

[53] See Dickinson v. Wright, 56 Mich. 42; Baldwin v. Schiappacasse, 109 Mich. 170.

[54] Reid v. Warner, [1907] Transv. L. R. 961.

[55] Moore v. Ensley, 112 Ala. 228; De Vaughn v. McLeroy, 82 Ga. 687; Davis v. Talbot, 137 Ind. 235; Servant v. McCampbell, 46 Colo. 292;

§ 480. Amount of proof—Liberal interpretation of facts.—No rule can be laid down by which to determine the amount of proof required in this, any more than in other similar cases. It has been said in several cases hereafter noted[56] that, as between the principal and agent, the conduct of the principal will be liberally interpreted in favor of ratification; and the rule has latterly been stated generally as applicable to all cases.[57] It is difficult to see any very satisfactory reason for such a rule in any case. As between the principal and third persons, the principal is under no obligation to ratify; there is no *a priori* reason why he should be considered more at fault than the other party who has trusted without discovering the agent's lack of authority; and it would seem that the case should be dealt with like any other. Judge Story has, indeed, said that "slight circumstances and small matters will sometimes suffice to raise a presumption of ratification," but that is no more true of ratification than of many other things.

§ 481. Court or jury.—Where written instruments of ratification are to be construed, the question is for the court. So, if the facts are undisputed and only one inference can reasonably be drawn from them, the question whether they constitute ratification or not, is one of law for the court; but where the facts are in dispute, or where the inferences to be deduced from them are such that men may reasonably differ concerning them, the question of ratification or not is for the jury.[58] This is especially true where ratification is sought to be implied from conduct, or deduced from acts of alleged acquiescence.

Dean v. Hipp, 16 Colo. App. 527; Brown v. Henry, 172 Mass. 559; Minter v. Cupp, 98 Mo. 26; Detroit, etc., Ry. Co. v. Harts, 147 Mich. 354; Hopkins v. Clark, 7 N. Y. App. Div. 207 (aff'd 158 N. Y. 299); Sanford v. Fountain, 49 Misc. 301; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Lightfoot v. Horst (Tex. Civ. App.), 122 S. W. 606; Skirvin v. O'Brien, 43 Tex. Civ. App. 1.

[56] See *post*, § 498.

[57] Carlson v. Stone-Wells Co., 40 Mont. 434; Hartlove v. Fait Co., 89 Md. 254.

In Washington Savings Bank v. Butchers,' etc., Bank, 107 Mo. 133, 28 Am. St. R. 405, it is said on the authority of Morawets on Corporations, that where acts done in behalf of a corporation are clearly beneficial to it, ratification may be inferred on slight evidence. Same: Davis v. Neuces Valley Irr. Co., 103 Tex. 243.

In Bement v. Armstrong (Tenn. Ch.), 39 S. W. 899; McLeod v. Morrison, 66 Wash. 683, 38 L. R. A. (N. S.) 783; Triggs v. Jones, 46 Minn. 277; it is said that less evidence is required to establish ratification as between principal and third person than as between principal and agent; the rule is also not infrequently said to be precisely the opposite.

In Trustees, etc., v. Bowman, 136 N. Y. 521, it is said: "The proof of knowledge of the facts should be reasonably clear and certain, particularly in a case like this, where, so far as the record discloses no substantial harm has come to the defendant from the delay or the acts of the principal."

[58] Swartwout v. Evans, 37 Ill. 443;

Where the question is left to the jury, the court should properly instruct the jury as to what constitutes ratification, and what are the methods by which it may be effected.[59]

VIII.

THE RESULTS OF RATIFICATION.

§ 482. What for this subdivision.—Having thus considered the preliminary questions, it remains to determine what are the results of a ratification made in conformity to the rules heretofore laid down It is obvious that there are several parties whose rights and obligations may be affected by a ratification, and we shall consider the question,—1. In general. 2. As between principal and agent. 3. As between the principal and the other party. 4. As between the agent and the other party.

1. In General.

§ 483. Usually equivalent to precedent authority.—By ratifying the unauthorized act the principal assumes and adopts it as his own, and as has been seen, this adoption extends to the whole of the act,—it goes back to its inception and continues to its legitimate end. Subject therefore to an exception to be immediately noticed, it is the universal rule that as against the principal the ratification is retroactive and equivalent to a prior authority,[60] or to use the language of a distinguished writer and judge, "No maxim is better settled in reason and

Trustees v. McCormick, 41 Ill. 323; Marine Co. v. Carver, 42 Ill. 66; Paul v. Berry, 78 Ill. 158; Henderson v. Cummings, 44 Ill. 325; Pohl v. Davenport Malt Co., 46 Ill. App. 513; Stokes v. Mackay, 140 N. Y. 640; Murray v. Mayo, 157 Mass. 248; Hopkins v. Clark, 7 N. Y. App. Div. 207, (aff'd 158 N. Y. 299); Quale v. Hazel, 19 S. Dak. 483.

[59] Morrill v. McNeill, 74 Neb. 291.

[60] Fleckner v. Bank of U. S., 8 Wheat. (U. S.) 338, 5 L. Ed. 631; Cook v. Tullis, 18 Wall. (U. S.) 332, 21 L. Ed. 933; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Clealand v. Walker, 11 Ala. 1058, 46 Am. Dec. 238; McMahan v. McMahan, 13 Penn. St. 376, 53 Am. Dec. 481; Daughters of American Revolution v. Schenley, 204 Pa. 572; Pearsons v. McKibben, 5 Ind. 261, 61 Am. Dec. 85; Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612; Planters' Bank v. Sharp, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470; Starks v. Sikes, 8 Gray (Mass.), 609, 69 Am. Dec. 270; Goss v. Stevens, 32 Minn. 472; United States Express Co. v. Rawson, 106 Ind. 215; Bronson v. Chappell, 12 Wall. (U. S.) 681, 20 L. Ed. 436; Lawrence v. Taylor, 5 Hill (N. Y.), 107; Lowry v. Harris, 12 Minn. 255; Hankins v. Baker, 46 N. Y. 666; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; McIntyre v. Park, 11 Gray (Mass.), 102, 71 Am. Dec. 690; Louisville, etc., Ry. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770; Cassidy v. Saline Co. Bank, 14 Okla. 532; Welker v. Appleman, 44 Ind. App. 699; Griffith v. Stewart, 31 App. D. C. 29; Hickox v. Fels, 86 Ill. App. 216; Garten v. Trobridge, 80 Kan. 720.

law than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur;* at all events where it does not prejudice the rights of strangers." [61]

"The ratification operates upon the act ratified precisely as though the authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification." [62] And this rule applies as well to corporations as to individuals.[63]

It has been seen also, that the principal cannot avail himself of the benefits of the act and repudiate its obligations.[64] Having with full knowledge of all the material facts ratified, either expressly or impliedly, the act assumed to be done in his behalf, he thenceforward stands responsible for the whole of it to the full extent to which the agent assumed to act, and he must abide by it whether the act be a contract or a tort,[65] and whether it results to his advantage or detriment.[66]

§ 484. ——— Scope and duration.—Ratification, by its very nature, is naturally and normally retroactive. It does not ordinarily create agency or give authority for the future. It usually presents itself as a matter of the approval of some particular act or transaction already done or happened. It is, moreover, ordinarily confined to that particular past act only, and does not affect prior unauthorized acts not connected with that one;[67] but there would seem to be no reason why—granting sufficient knowledge—there may not, by the ratification of a particular act, be approval of prior acts naturally and usually connected with it, or why even subsequent acts closely following and naturally connected may not be included. There would seem also to be no reason why the ratification of even a single past act may not be so full and comprehensive in its scope as to amount either to a general

[61] Story, J., in Fleckner v. Bank, *supra.*

[62] Field, J., in Cook v. Tullis, *supra.*

[63] Planters' Bank v. Sharp, *supra;* Despatch Line v. Bellamy Mfg. Co., *supra;* Leggett v. N. J. Mfg. and Banking Co., 1 Saxt. Ch. (N. J.) 541, 23 Am. Dec. 728; Frankfort S. T. Co. v. Churchill, 6 T. B. Monroe (Ky.), 427, 17 Am. Dec. 159; Everett v. United States, 6 Port. (Ala.) 166, 30 Am. Dec. 584.

[64] *Ante,* § 410.

[65] Cooley on Torts, 127.

[66] Wood v. McCain, *supra;* Dempsey v. Chambers, 154 Mass. 330, 26 Am. St. R. 249, 13 L. R. A. 219.

[67] In Baldwin v. Burrows, 47 N. Y. 199, it is said: "Although such ratification [here ratification of specific acts] is, as to the act specifically ratified, equivalent to a previous authority, it is not retroactive to the extent of binding the principal for other acts in excess of the authority of the agent, though the principal might have been bound for such other unauthorized acts, if they had been done under color of a previous authority actually given."

declaration of agency or at least to raise an estoppel as to the future. As has been already seen, inferences of authority may arise from the approval of acts already done, and estoppels may arise from apparent acquiescence in such acts.[68]

Where an apparently general or continuing agency has been established in this way, it would, as in other cases, presumptively go on until notice of its termination.[69]

It is, however, to be kept in mind, that ratification is merely confirmatory. It does not make a new contract, nor change the existing one in question. It must be taken as it exists, and if, for reasons other than lack of authority, the contract is not good, ratification will not help it.[70]

§ 485. ——— May be so treated in pleading.—So completely is ratification regarded as equivalent to prior authority that it is generally held not necessary to expressly plead it as such: it may be shown under the general allegations that the act was done or the contract made for the principal or by his agent, and the like.[71]

§ 486. Cannot affect intervening rights of third persons.—Until ratification the principal has not been a party to the transaction. Although done in his name, the act has no binding force as to him until he sanctions it. And although in ordinary cases the ratification extends back to the beginning and operates upon all that has since been done, yet it is obviously just and reasonable that where prior to his ratification,—before he has given his sanction,—third persons have in good faith acquired such substantial rights or have been placed in such position in reference to the same transaction that they will be prejudiced by such retroactive effect, the ratification should not be allowed to overreach and defeat those rights. And such is the rule of law. The intervening rights of third persons cannot be defeated by the ratification. If prior to the ratification the principal has put it out of his

[68] "An unauthorized act may be made to operate by ratification as an estoppel upon the person in whose behalf it was done." Steffens v. Nelson, 94 Minn. 365.

[69] Hartjen v. Reubsamen, 19 Misc. 149.

[70] See Atlanta Buggy Co. v. Hess Spring and Axle Co., 124 Ga. 638, 4 L. R. A. (N. S.) 431.

[71] Goetz v. Goldbaum (Cal.), 37 Pac. 646; Blood v. La Serena L. & W. Co., 113 Cal. 221; Smyth v. Lynch, 7 Colo. App. 383; Long v. Osborn, 91 Iowa, 160; Johnston v. Milwaukee, etc., Co., 49 Neb. 65, 68 N. W. 383.

Missouri.—In Lipscomb v. Talbott, 243 Mo. 1, 147 S. W. 798, it is said: "The rule seems to be, in this jurisdiction (whatever it may be generally), that if a party relies on ratification, he should tender such issue in his pleading," citing Wade v. Hardy, 75 Mo. at p. 399; Noble v. Blount, 77 Mo. p. 242; Loving Co. v. Cattle Co., 176 Mo. p. 353-354; McClanahan v. Payne, 86 Mo. App. p. 292.

power to perform the contract ratified, by conveying the subject-matter thereof to a third person who took the same in good faith,[72] or if third parties have in good faith acquired an estate or interest in, or a lien or claim upon the subject-matter by attachment, garnishment, judgment or otherwise,[73] these rights cannot be cut off at the mere volition of the principal.[74] Nor will the principal by ratifying be permitted to impose substantial duties or obligations upon third persons which would not exist if ratification had not taken place.

[72] McCracken v. City of San Francisco, 16 Cal. 591; Borderre v. Dan, 106 Cal. 594 (attempt to ratify a prior lease, made by an agent, so as to cut off one given by the principal); McDonald v. McCoy, 121 Cal. 55; Clendenning v. Hawk, 10 N. Dak. 90.

[73] In Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612, it was held that, after a principal's creditor has served garnishment process upon the principal's debtor, the principal could not, by ratification of a previous unauthorized assignment of the claim, defeat the rights of the garnisheeing creditor. Norton v. Alabama Nat. Bank, 102 Ala. 420, and Dalton Buggy Co. v. Wood, 7 Ga. App. 477, are attachment cases of the same type.

In Taylor v. Robinson, 14 Cal. 396, an agent to collect, without authority received the debtor's goods in satisfaction of the principal's claim. It was held that, after the property had been levied upon as that of the debtor, the principal could not by ratification defeat the rights under the levy. Pollock v. Cohen, 32 Ohio, 514, is a case of the same kind. See also Hartman Steel Co. v. Hoag, 104 Iowa, 269.

See the discussion of the question, not decided, as to who is entitled to avail himself of the rule, in Lindauer v. Meyberg, 27 Mo. App. 181.

Subsequent ratification by a married man, of an unauthorized conveyance of land while he was unmarried, cannot cut off wife's right of dower. Britt v. Gordon, 132 Iowa, 431.

[74] Fiske v. Holmes, 41 Me. 441 (in a suit upon an account, defendants could not upon the trial, by ratifying a previous unauthorized payment made on their behalf, so destroy the plaintiff's cause of action as to put costs upon him); Parmelee v. Simpson, 72 U. S. (5. Wall.) 81, 18 L. Ed. 542 (where a deed was executed and put upon record, in the absence and ignorance of the grantee, he could not ratify the delivery and the recording so as to hold the land free from a mortgage executed and recorded after the recording of the deed, but before ratification); Stoddard's case, 4 Ct. Cl. 511 (an agent in the south, to collect claims and settle up the business of a northern principal, made an unauthorized purchase of cotton with his principal's funds; but before any acts of ratification occurred, the civil war broke out and the goods were seized by the United States; ratification after that was too late; the United States stood in the position of a creditor with an intervening attachment); Cook v. Tullis, 85 U. S. (18 Wall.) 332, 21 L. Ed. 933 (suit by trustees in bankruptcy to recover a note and a mortgage which, without authority, the bankrupt had substituted for property belonging to the defendant in his hands. After the failure but before the adjudication of bankruptcy, the defendant had learned of and ratified the substitution. The recovery is denied upon the ground that, until the adjudication of bankruptcy, the insolvent is free to deal with his property, so long as he re-

No case has been discovered dealing with the rights of a mere heir or personal representative, but if all that the unratified act amounts to is a mere offer, it doubtless would not affect them.

What would be held in any of the cases above referred to under the English doctrine in Bolton Partners v. Lambert,[75] that there is some sort of a conditional contract created, seems not to have been discussed.

§ 487. ——— Defenses, conditions, rights of cancellation.—The doctrine of the preceding section has also been applied, in a number of cases, to prevent the loss by third persons, through the principal's ratification, of existing defenses against liability, conditions affecting liability, rights to escape liability, and the like. Thus, for example, where an agent has obtained a policy of insurance for his principal, and later, without the authority or knowledge of the principal, has assumed to surrender that policy and take another in its place,—the latter containing the usual provision that it should be void in case of undisclosed prior insurance—it has been held that, after a loss has occurred before the principal has consented to the surrender of the first policy, the principal cannot by the ratification of such surrender deprive the second company of its right to make the defense of other insurance.[76]

§ 488. Law of what place governs.—Where the act is done or the contract is made at one place, while the act of ratification occurs at another, interesting questions arise as to the place whose law is finally to control. Where an agent does not assume to make a binding contract, but is known only to solicit orders or proposals which must go to his principal in another place for acceptance or approval,—as in the familiar case of the "commercial traveler"—the contract ordinarily is deemed to be made where the acceptance or approval is given.[77]

But where the agent purports to make a present, binding contract, though without authority, and that contract is subsequently ratified, the logic of the doctrine of ratification requires that the contract be held good as of the time and place of its original negotiation. As said

ceives a fair value for what he transfers, and that, until the adjudication, the trustees acquire no right to control any specific property).

[75] See *post*, § 576.

[76] See Johnson v. North British Ins. Co., 66 Ohio St. 6; Hartford F. Ins. Co. v. McKenzie, 70 Ill. App. 615; Larsen v. Thuringia Am. Ins. Co., 108 Ill. App. 420, aff'd 208 Ill. 166.

[77] Kling v. Fries, 83 Mich. 275; Tegler v. Shipman, 33 Iowa, 194, 11 Am. Rep. 118; Kelwert v. Meyer, 62 Ind. 587, 30 Am. Rep. 206; Claflin v. Meyer, 41 La. Ann. 1048; State Mut. F. Ins. Co. v. Brinkley Stave & Heading Co., 61 Ark. 1, 54 Am. St. R. 191, 29 L. R. A. 712; De Bary v. Souer, 101 Fed. 425, 41 C. C. A. 417; Sarbecker v. State, 65 Wis. 171, 56 Am. Rep. 624. Compare Wilson v. Lewiston Mills Co., 150 N. Y. 314, 55 Am. St. R. 680; Ivey v. Kern County Land Co., 115 Cal. 196.

in one instance, "In case of a contract made in a foreign country, by an agent without authority, which the principal at home afterwards ratifies, the contract is considered as made in that foreign country, because the ratification relates back *tempore et loco*, and is equivalent to an original authority." [78] Other courts, however, have said that the unauthorized contract, though in form complete, was, in effect, only an offer or proposal inoperative until the principal assented, and that therefore the contract was made where such assent was given.[79]

§ 489. Ratification irrevocable—Changing repudiation to ratification.—As has been seen, the principal upon being fully informed of the unauthorized act of one assuming to be his agent has the right to elect whether he will ratify such act or not; but when he has once exercised this right the election is final. If therefore he adopts the act, even for a moment, it is said, he adopts it forever, and he will not be allowed, at least where the rights of other parties may be affected thereby, to revoke his ratification.[80]

With respect of repudiation the rule seems to be somewhat different. Though the principal at first disapprove, he may, it is held, afterwards change his disapproval to an affirmance,[81] though doubtless not where such a change would prejudice rights or actions based upon the previous rejection.[82]

2. As Between Principal and Agent.

§ 490. In general.—The general result of a ratification has already been stated. It is now to be considered what special results ensue

[78] Dord v. Bonnaffee, 6 La. Ann. 563, 54 Am. Dec. 573. To like effect: Golson v. Ebert, 52 Mo. 260; *In re* Insurance Co., 22 Fed. 109; Compare Findlay v. Hall, 12 Ohio, 610.

[79] Shuenfeldt v. Junkermann (C. Ct.), 20 Fed. 357. In *In re* Insurance Co., *supra*, it is said that the court in the Shuenfeldt case "strained the rule to uphold the contract and prevent the success of an unfair proceeding."

[80] Jones v. Atkinson, 68 Ala. 167; Whitfield v. Riddle, 78 Ala. 99; Smith v. Cologan, 2 T. R. 188n; Clarke v. Van Reimsdyk, 9 Cranch (U. S. C. C.), 153; Hazelton v. Batchelder, 44 N. Y. 40; Brock v. Jones, 16 Tex. 461; Beall v. January, 62 Mo. 434; Sanders v. Peck, 87 Fed. 61, 30 C. C. A. 530; Hunter v. Cobe, 84 Minn. 187; Kirkpatrick v. Pease, 202 Mo. 471; Mutual Auto Accessories Co. v. Beard, 59 Misc. 174; Lutjeharms v. Smith, 76 Neb. 260.

[81] Woodward v. Harlow, 28 Vt. 338; Neely v. Jones, 16 W. Va. 625, 37 Am. Rep. 794; Warder, etc., Co. v. Cuthbert, 99 Iowa, 681; Sloan v. Johnson, 20 Pa. Super. 643; Pickles v. Western Assur. Co., 40 Nova Scotia, 327.

[82] See Warder, etc., Co. v. Cuthbert, *supra*. Where an agent without authority has sold land of which the purchaser takes possession and makes improvements, and the principal on being informed refuses to approve whereupon the buyer abandons the land, the principal cannot subsequently ratify and enforce the contract. Wilkinson v. Harwell, 13 Ala. 660.

affecting the mutual rights and obligations of the principal and the agent. It will readily be seen that these results are of great consequence to the agent. Whether he was an agent who had exceeded the authority conferred upon him, or whether he was a mere stranger with no semblance of authority at all, his acts were not binding upon the assumed principal. He had undertaken to act for another from whom he had no authority at all, or with authority insufficient to justify the act assumed to be done, and he would himself be liable either to the parties to whom he had failed to bind the principal, or to that principal for damages occasioned by exceeding the authority with which he was invested. From this dilemma, however, the ratification ordinarily relieves him. Thenceforward the principal assumes the responsibility of the transaction with all of its advantages and all of its burdens.

§ 491. General effect of ratification—Releases agent from liability to principal.—The general rule, between the principal and the agent, therefore is, that by such ratification the principal absolves the agent from all responsibility for loss or injury growing out of the unauthorized transaction,[83] and also, as will be seen, gives the principal the same claim to benefits, and to the agent the same right to compensation, reimbursement and indemnity, that they would respectively have had, if the act had been previously authorized.

§ 492. ——— Limitations.—While, as has been stated, it is ordinarily true that the ratification by the principal not only perfects the relations between the principal and the third person, but also releases the agent from liability to the principal, the latter consequence does not invariably follow. Thus, for example, it is possible that the principal may, as to third persons, be held to have ratified because of delay in disaffirmance, when that delay was not unnecessarily or unreasonably caused by his efforts to ascertain from his agent the real state of the case; his delay as pointed out in one case may have been "induced by the assurances or persuasion of the agent himself;"[84] the principal

[83] See Lunn v. Guthrie, 115 Iowa, 501; Wann v. Scullin, 235 Mo. 629; Aetna Ins. Co. v. Sabine, 6 McLean (U. S. C. C.), 393, Fed. Cas. No. 97; Osborne v. Durham, 157 N. Car. 262; Bray v. Gunn, 53 Ga. 144; Clay v. Spratt, 7 Bush (Ky.), 334; Ward v. Warfield, 3 La. Ann. 468; Flower v. Downs, 6 La. Ann. 538; Oliver v. Johnson, 24 La. Ann. 460; Towle v. Stevenson, 1 Johns. (N. Y.) 110; Cairnes v. Bleecker, 12 Johns. (N. Y.) 300; Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; Vianna v. Barclay, 3 Cow. (N. Y.) 281; Green v. Clark, 5 Den. (N. Y.) 497; Hazard v. Spears, 4 Keyes (N. Y.), 469; Hanks v. Drake, 49 Barb. (N. Y.) 186; Woodward v. Suydam, 11 Ohio, 360; Pickett v. Pearsons, 17 Vt. 470; Courcier v. Ritter, 4 Wash. C. C. 549, Fed. Cas. No. 3,282.

[84] Thus in Triggs v. Jones, 46 Minn. 277, an agent had been given a deed

may have relied, until it was too late, upon the untrue reports or representations of the agent; or the principal may, in reasonable endeavours to extricate himself from the dilemma in which the agent's unauthorized act has placed him, and to save himself and all parties from unnecessary loss, have done acts which, as to third persons, might be construed as ratification, but which it would be very unjust to construe as an approval of the act so far as the agent himself is concerned.[85]

It is also possible, of course, that the principal may, at the express or implied request of the agent, have proceeded with the transaction so far as the other party is concerned, for the purpose of saving the agent from loss, and without waiving or intending to waive his claim against the agent. There may also be cases in which the principal, for the purpose of saving greater loss, has performed the contract with the other party, and in which, while the agent may not be liable to the principal, the agent should not be allowed to recover compensation or commissions for the unauthorized act.

§ 493. ——— So where the agent, in violation of instructions, has bound the principal to third parties, the fact that the principal performs or receives performance so far as the other party is concerned, is not such a ratification as will release the agent from his liability to the principal for his breach of duty.[86] And where the principal in such a

to deliver only when a certain corporation should be organized and shares of stock in it delivered to the agent for the principal, but the agent made an immediate absolute delivery of the deed, the principal was allowed damages against the agent, although he had helped in the subsequent attempts to organize the corporation, and had failed to repudiate the transaction for so long a time that the court thought that, as to the grantee, he should have been held to a ratification, and that the property had already been mortgaged to a *bona fide* purchaser.

[85] See also *ante*, § 440.

In Brown v. Foster, 137 Mich. 35, in which an agent had made a sale of a machine upon the condition, not authorized by his principal, that the machine might be returned if the purchaser should not find it satisfactory, and the principal had upon the purchaser's complaint offered to substitute another machine, the principal was allowed to treat the agent's unauthorized delivery as a conversion and to recover the value of the machine from the agent.

See also Goodale v. Middaugh, 8 Colo. App. 223; White v. Sanders, 32 Me. 188; Pacific Vinegar, etc., Works v. Smith, 152 Cal. 507.

[86] In Mechanics' & Traders' Ins. Co. v. Rion (Tenn.), 62 S. W. 44, an agent who had been instructed to issue no policy upon a particular risk, did issue such a policy, and before the principal's letter in reply to the agent's report, ordering cancellation of the policy was received, the loss occurred. The principal settled with the insured and received the premium from the agent. The court said that this was not a ratification of the agent's act in disobeying instructions, that in as much as the agent

case has performed to the other party as he was bound to do, the fact that he demands, or sues to recover, from the agent, who has received it, the fruit of the correlative performance of the other party, does not amount to a ratification or release the agent. It does not belong to the agent, giving it up does him no wrong, the other party is not entitled to it, it belongs to the principal, and his recovery of what is thus his own is no ratification of the original wrongful act of the agent which was the cause of the principal's unwarranted liability.[87]

§ 494. ——— **Methods of ratification.**—With reference to the methods by which the principal may ratify, what has been said in the preceding subdivision, with reference to the methods of ratification in general, applies here as well as where the principal and the third person are involved. Thus, there may be express ratification, or implied ratification by taking the benefits of the act[88] or bringing suits to enforce it,[89] while the rule, which deduces a ratification from the principal's failure to dissent when informed of an unauthorized act, has often been thought to find its clearest exemplification in the cases in which the question arose between the principal and the agent.[90]

§ 495. ——— **Ratification of entire act.**—Here also the general rule so fully discussed in the preceding subdivision applies that the principal cannot ratify a portion of an entire act and reject the resi-

had the power to bind the principal upon the contract, the principal was bound and his performance of the contract and claim to the benefits incident to it, concerned only the relation between the principal and the insured.

Where an agent is authorized to sell goods on credit but up to a certain amount only, and he sells and gives credit for more than that amount, taking the buyer's notes, the fact that the principal seeks to collect upon the notes, does not relieve the agent. Pacific Vinegar & Pickle Works v. Smith, 152 Cal. 507.

Where an agent, having authority to lend money, lends it upon a prohibited kind of security, the mere fact that the principal recognizes it as a valid loan to the borrower, does not relieve the agent from liability if the money be lost by reason of the defective security. Bank of St. Mary's v. Calder, 3 Strob. (S. Car.) 403.

[87] In Continental Ins. Co. v. Clark, 126 Iowa, 274, an insurance agent had issued a policy at a rate of premium lower than the company allowed, and the loss occurred before the insurance company had been informed of the issuance of the policy. The company paid the claim made by the insured and demanded of the agent the premium which the insured had paid. The suit was against the agent by the company to recover for the loss which the company had suffered through the issuance of the policy, and it was held, that there was no ratification of the agent's wrongful conduct either in the demand for the premium or the fact that the premium was again claimed in the declaration.

[88] See *ante*, § 434.

[89] See *ante*, § 446.

[90] See *ante*, §§ 459, 460.

due.[91] But even under this rule the approval of one unauthorized act does not necessarily carry with it the ratification of a further act, following after but not an inseparable consequence of the prior one. Thus where an agent without authority had collected money for his principal and applied it to his own use, it was held that an action by the principal against the agent to recover the money, while it might operate as a ratification of his collection of it, did not necessarily amount to an approval of his retention of it.[92]

§ 496. ——— Knowledge of the facts.—Here, as in other cases, the ratification must have been made with full knowledge of all the material facts, or with the equivalent thereof within the rules already discussed.[93] If the agent has kept back or suppressed any such facts, the ratification of the principal made in ignorance of them is no defense to the agent.[94] And even if the agent communicate to his principal all the facts known to him at the time, but if afterwards it turns out that the facts so communicated were not the real facts of the case, the agent is not relieved by a ratification made under such a misapprehension,[95] although the facts and circumstances may have been innocently concealed or inadvertently misrepresented.[96] In such a case the assumed condition is not that claimed to have been ratified.

§ 497. ——— Agent's motives unimportant.—The motives of the agent in the transaction are of no importance. If he has deviated from his duty he becomes liable to his principal for such losses as are the direct and natural consequences of such deviation, whether his motives

[91] See *ante*, § 410.

[92] Schanz v. Martin, 37 Misc. 492. Same effect: Knowlton v. School City, 75 Ind. 103.

So in Bank of St. Mary's v. Calder, 3 Strob. (S. C.) 403, it is held that where an agent's power to lend money is clear, a recognition of the loan as between the principal and the borrower does not necessarily amount to a ratification of the agent's act in taking insufficient security.

The principal by suing the agent to secure moneys collected by him without authority does not ratify the act but on the contrary repudiates it. Holland Coffee Co. v. Johnson, 38 Misc. 187.

[93] See *ante*, § 398 *et seq.*

A principal who receives knowledge of facts indicating a breach of duty by his agent and who suspects him of it, while the transaction is still executory and he can then protect himself, will not be permitted to then proceed to consummate the transaction and sustain a loss, and afterward recover damages from the agent. Bartelson v. Vanderhoff, 96 Minn. 184 (quoting Thompson v. Libby, 36 Minn. 287; Ballard v. Nye, 138 Cal. 588).

[94] Bell v. Cunningham, 3 Pet. (U. S.) 69, and cases last cited; Bank of Owensboro v. Western Bank, 13 Bush (Ky.), 526, 26 Am. Rep. 211.

[95] Bank of Owensboro v. Western Bank, *supra;* Bank of Commerce v. Miller, 105 Ill. App. 224.

[96] Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516.

were good or bad; and he is only released from such liability where the principal with full knowledge of all the material facts ratifies such departure from his duty.[97]

§ 498. ——— Acts of ratification liberally construed.—The conduct of the principal will, it is often said, be liberally construed in favor of the agent in effecting a ratification, especially if the alleged agent was already an agent for some purpose and not a mere stranger.[98] On the other hand, as has been pointed out, it is often said that the rule is not so liberal in favor of the agent as in favor of third persons.[99] There is really no reason for *liberality* in either case. It should be merely a matter of making fair and reasonable inferences under the circumstances.

§ 499. ——— Ratification of appointment of subagent.—If the agent without authority has employed a subagent, the ratification will embrace the appointment and acts of the subagent.[1]

§ 500. Gives agent claim against principal for compensation and reimbursement.—On the other hand, an unqualified ratification gives the agent in general the same rights against the principal which he would have had if the act had originally been authorized. The agent may therefore claim compensation for the performance of the act,[2] or demand reimbursement for outlays,[3] in the same way and to the same extent as any duly authorized agent.

§ 501. Entitles principal to benefits as against agent.—And not only does the principal by ratifying assume liability to the agent, but the agent also is liable to the principal like an authorized agent. The

[97] Bank of Owensboro v. Western Bank, *supra*.

[98] Szymanski v. Plassan, 20 La. Ann. 90, 96 Am. Dec. 382; Flower v. Jones, 7 Martin (La.), N. S. 143; Johnson v. Carrere, 45 La. Ann. 847, 13 So. 195; Terril v. Flower, 6 Mart. (La.) O. S. 583; Codwise v. Hacker, 1 Caines (N. Y.), 526; Byrne v. Doughty, 13 Ga. 46; Plummer v. Knight, 156 Mo. App. 321. See also Carlson v. Stone, etc., Co., 40 Mont. 434; Hartlove v. Fait Co., 89 Md. 254.

[99] See *ante*, § 480.

[1] Eggleston v. Boardman, 37 Mich. 14, 20; Blantin v. Whitaker, 11 Humph. (Tenn.) 313; Sheldon v. Sheldon, 3 Wis. 699; Hornbeck v. Gilmer, 110 La. 500; Bellinger v. Collins, 117 Iowa, 173; Nichols v. Berning, 37 Ind. App. 109.

[2] United States Mortgage Co. v. Henderson, 111 Ind. 24; Goss v. Stevens, 32 Minn. 472; Nesbitt v. Hesler, 49 Mo. 383; Gelatt v. Ridge, 117 Mo. 553, 38 Am. St. Rep. 683; Wilson v. Dame, 58 N. H. 392; Beagles v. Robertson, 135 Mo. App. 306.

Many other cases of the same sort will appear in the chapter upon Brokers, particularly real estate brokers.

[3] Frixione v. Tagliaferro, 10 Moore P. C. 175 (where it is held that if the agent has incurred expenses in departing from his authority and the principal afterwards ratify such departure, the agent is entitled to be reimbursed for the expenses so incurred).

principal is therefore entitled to the benefits and profits of the transaction and to all of the advantages which would flow from an authorized performance, and can compel an accounting therefor from the agent.[4]

He may recover from the agent property or money received from the other party by virtue of the transaction ratified;[5] and after ratification the agent may not return to the other party money or property so received: if he does so, he is liable for it to the principal.[6]

3. As Between Principal and the Other Party.

§ 502. In general.—The question of the effect of ratification as between the principal and the other party to the transaction involves two aspects: *a.* What are the rights of the other party against the principal based upon the ratification? *b.* What rights does the principal by his own ratification acquire against the other party to the transaction ratified? Each of these also may be considered from the standpoint of actions based upon contract or sounding in tort.

a. Other Party Against Principal.

§ 503. What considerations involved.—The aspect presented when the other party is seeking to enforce rights against the principal, based upon his ratification of an unauthorized act, is the typical one. In this field, the doctrine of ratification had its origin. Here it has full sway. The great majority of the cases upon the subject involve this form of it. Two general classes of cases are found: those involving some kind of liability in contract and those based upon tort.

§ 504. 1. In contract.—Where a contract has been made by one person in the name of another, of a kind that the latter might lawfully make himself and the only defect is the lack of authority on the part of the person acting, the subsequent ratification of that contract, while still in that condition, by the person on whose behalf it was made and who is fully apprised of the facts, operates to cure that defect and to establish the contract as his contract as though he had authorized it in

[4] Starks v. Sikes, 8 Gray (Mass.), 609, 69 Am. Dec. 270; Hormann v. Sherin, 6 S. D. 82; Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122; Conant v. Riseborough, 139 Ill. 383; Roller v. man, 58 W. Va. 340; White v. Cooper, 3 Pa. St. 130; Walters v. Bray (Tex. Spilmore, 13 Wis. 26; Siers v. Wise-Civ. App.), 70 S. W. 443.

There can not be *ratification* unless the act was done as agent, but there may perhaps be a *trust* established. See Garvey v. Jarvis, 46 N. Y. 310, 7 Am. Rep. 335 (no ratification and no trust); Virginia Pocahontas Coal Co. v. Lambert, 107 Va. 368, 122 Am. St. R. 860, 13 Ann. Cas. 277 (no ratification but trust).

[5] Hormann v. Sherin, *supra;* Snow v. Carr, 61 Ala. 363, 22 Am. Rep. 3; Miltenberger v. Beacom, 9 Pa. St. 198.

[6] Montgomery v. Pacific Coast Land Bureau, *supra.*

the first instance. From this time on, he is subject to all the obligations that pertain to the transaction in the same manner and to the same extent that he would be had the contract been made originally by him in person, or by his express authority. The other party therefore may demand and enforce on the part of the principal the full performance of the contract entered into by his agent.[7] If the contract of the agent was tainted or procured by fraud, the principal by ratification assumes responsibility for the fraud.[8] Statements or admissions made or knowledge possessed by the agent which would charge the principal if the agent had been previously authorized will charge him after the relation has been established by ratification.[9] It is unnecessary to cite instances of this. What has been or may be hereafter said of the obligations of the principal, applies as well to one who became such by ratification as to one who was such by original agreement.

§ 505. ——— In order that these results shall ensue, however, it is essential, as has been seen, that the contract shall have been made on account of the person ratifying, and that he shall have had full knowledge of the facts.[10] The attempted contract must also still continue, for there must be something to ratify; it must still be capable of performance on both sides, for clearly the other party cannot call upon the principal to perform when performance of his own correlative obligation has become impossible; and the attitude of the parties must have remained unchanged, for the principal cannot be compelled to assume relations to new parties to any greater extent than the contract originally contemplated.

§ 506. 2. In tort.—The doctrine of liability by ratification in tort cases is abundantly established. Indeed this seems to have been the earliest form of it. By whatever methods the act be adopted and approved in accordance with the rules already discussed, the principal

[7] No attempt is here made to gather together the cases upon this subject. They will be found under every head in the preceding sections.

[8] See National Life Ins. Co. v. Minch, 53 N. Y. 144; Elwell v. Chamberlin, 31 N. Y. 611; Smith v. Tracy, 36 N. Y. 79; Lane v. Black, 21 W. Va. 617; and many other cases cited *ante*, § 411.

[9] Lampkin v. First Nat. Bank, 96 Ga. 487; Haas v. Sternbach, 156 Ill. 44. Compare Smith v. Savings Bank, 1 Tex. Civ. App. 115.

[10] Although the plaintiff may not be able to prove ratification with knowledge of a particular term of the contract, still if the law would otherwise supply a term he may recover upon that basis, *e. g.*, although plaintiff cannot show ratification of a term fixing delivery of goods sold at a certain time, he may nevertheless recover for not delivering within a reasonable time. Langlands Foundry Co. v. Worthington Pumping Eng. Co., 22 Victoria L. R. 144.

becomes liable for the tort as though he had previously directed it.[11] And it is not always necessary that the approval shall look to the particular act. In the case of master and servant, for example, if the approval, with knowledge, establishes the relation, the master becomes responsible for any torts committed within its scope for which he would have been responsible had the relation been regularly created. As said in such a case,[12] "The ratification goes to the relation and establishes it *ab initio*. The relation existing, the master is responsible for torts which he has not ratified specifically just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden."

In the case of principal and agent, also, the principal who ratifies the act is not only, as has been seen, affected in the enforcement of the contract by the instrumentalities through which it was procured,[13] but he also becomes personally liable for such of the frauds, misrepresentations and deceits of the agent, and for those only, which would, under similar circumstances and in like forms of action, impose liability upon the principal of a previously authorized agent.[14]

[11] Saunderson v. Baker, 2 W. Black. 832, 3 Wils. 309; Wilson v. Tumman, 6 M. & G. 236 (dictum); Buron v. Denman, 2 Exch. 167; Eastern Counties Railway Co. v. Broom, 6 Exchequer 314; Bishop v. Montague, Croke, Eliz. 824; Exum v. Brister, 35 Miss. 391; Dempsey v. Chambers, 154 Mass. 330, 26 Am. St. R. 249, 13 L. R. A. 219; Gulf, etc., Ry. Co. v. Donahoe, 56 Tex. 162; Murray v. Lovejoy, 2 Clifford (U. S. C. C.), 191, s. c. 70 U. S. (3 Wall.) 1, 18 L. Ed. 129.

[12] In Dempsey v. Chambers, 154 Mass. 330, 26 Am. St. Rep. 249, 13 L. R. A. 219, a volunteer delivered coal which the plaintiff had ordered of the defendant, and broke a window in making the delivery. The defendant, with full knowledge of the accident, presented and collected a bill for the coal so delivered. In an action in tort to recover for the breaking of the glass it was held that the ratification accomplished through accepting the benefits of the unauthorized act established the relation of master and servant *ab initio* and made the defendant liable in tort as principal.

[13] See *ante*, § 411.

[14] It is true that statements apparently to the contrary are sometimes met. Thus Keefe v. Sholl, 181 Pa. 90, is sometimes cited as holding the contrary, but it in fact does not. It was an action of trespass for deceit which could be maintained in Pennsylvania against any principal only upon a showing of some participation or knowledge on the part of the latter, as the case of Freyer v. McCord, 165 Pa. 539, cited by the court, had previously held. In the case at bar, even if there were evidence of ratification, there was no evidence of knowledge of the misrepresentations, and therefore in accordance with the Pennsylvania doctrine the action could not be maintained.

Garrett Co. v. McComb, 58 N. Y. App. Div. 419, is also sometimes cited, but that case is easily distinguishable. It does not appear that the person who made the representations purported to act as agent,

Ratification in tort cases is a distinct gain to the other party, giving him a remedy against the principal while not depriving him of his remedy against the wrongdoer himself.[15]

§ 507. ——— Unique character of doctrine.—Although the doctrine of ratification is established in these cases, it is none the less unique and striking. As stated by Justice Holmes, in a case in Massachusetts already cited:[16] "If we were contriving a new code to-day, we might hesitate to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the com-

and if not there could be no ratification. Hamlin v. Sears, 82 N. Y. 327. But even if there could be ratification, the representations were held not to be such as would impose liability upon the principal of an authorized agent. Lansing v. Coleman, 58 Barb. 611; Smith v. Tracy, 36 N. Y. 79.

Day v. Building Ass'n, 96 Va. 484, also sometimes cited is an inconclusive case apparently proceeding upon the same theory as Keefe v. Sholl, *supra*.

Libel.—In Penn. Iron Works v. Voght Mach. Co. (Ky.), 96 S. W. 551, where an agent in the course of his employment wrote a letter purposing to divert business from the plaintiff, a competitor, to the defendant, and in it made many libelous charges against the plaintiff, the defendant was held, by its acquiescence and its failure to repudiate the libelous terms of the letter, when it had full knowledge of them, to have ratified the publication, so as to be liable for them.

Slander.—In Lindsey v. St. Louis, etc., Ry. Co., 95 Ark. 534, it was held that the defendant railroad corporation was not liable for an alleged slander by a person whose general act was alleged to have been ratified, but with nothing to indicate approval of the particular slander, because under the rule adopted in that state (contrary to the rule prevailing in some others, see Rivers v. Yazoo, etc., Ry. Co., 90 Miss. 196, 9 L. R. A. (N. S.) 931; Empire Cream Separator Co. v. De Laval Dairy Co., 75 N. J. L. (46 Vroom) 207; Hypes v. Southern Ry. Co., 82 S. C. 315, 21 L. R. A. (N. S.) 873, 17 Ann. Cas. 620), a corporation cannot be held liable for slander "unless it authorized, approved or ratified the act of the agent in uttering the particular slander."

Usury.—In Nye v. Swan, 49 Minn. 431, where an agent authorized to buy lands with his principal's money had loaned the money without authority, and taken and delivered to his principal a deed of lands absolute in form but really intended as a security for the money loaned, it was held that though the principal, if he accepted the deed, must do so subject to the right to redeem, he did not thereby become responsible for the agent's unknown act of demanding usurious interest in the transaction. Had the agent made the loan with authority, the principal, it was said, would not have been liable for unauthorized and unknown usury. Jordan v. Humphrey, 31 Minn. 495. On this question, see *post*, Book IV, Chap. V.

[15] See *post*, § 546.

[16] Dempsey v. Chambers, 154 Mass. 330, 26 Am. St. R. 249, 13 L. R. A. 219, *supra*.

mon law, simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society. It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are 'fained to be all one person' by a fiction which is an echo of the *patria potestas* and of the English frank pledge.[17] Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way.[18] The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another.[19] But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might justify it also.[20] This decision is qualified in Fitzherbert's Abridgement [21] and doubted in Brooke's Abridgement; [22] but it has been followed or approved so continuously, and in so many later cases, that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne.[23]

"If we assume that an alleged principal by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers and the

[17] Citing Byington v. Simpson, 134 Mass. 169, 170, 45 Am. Rep. 314; Fitz. Abr. Corone, pl. 428.

[18] Citing New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381, 382; Fuller & Trimwell's Case, 2 Leon. 215, 216; Sext. Dec. 5, 12, De Reg. Jur., Reg. 9; D. 43, 16, 1, § 14 gloss. See also cases next cited.

[19] Citing Y. B. 30 Ed. I, 1, 128 (Rolls Ed.); 38 Lib. Ass. 228, pl. 9; s. c. 38 Ed. III, 18, Engettement de Garde. See Plowd. 8 ad. fin., 27, 31; Bract. fol. 158b, 159a, 171b; 12 Ed. IV, 9, pl. 23.

[20] Citing Y. B. 7 Hen. IV. 34, pl. 1.

[21] Citing Fitz. Abr. Baillye, pl. 4.

[22] Citing Bro. Abr. Trespass, pl. 86.

[23] Citing Godbolt, 109, 110, pl. 129; s. c. 2 Leon. 196, pl. 246; Hull v. Pickersgill, 1 Brod. & Bing. 282; Muskett v. Drummond, 10 B. & C. 153, 157; Buron v. Denman, 2 Exch. 167, 188; Secretary of State in Council of India v. Kamachee Boye Sahaba, 13 Moore, P. C. 22, 86; Cheetham v. Mayor of Manchester, L. R. 10 C. P. 249; Wiggins v. United States, 3 Ct. of Cl. 412.

earlier cases [24] has been changed to the dogma *aequiparatur* ever since the days of Lord Coke.[25] Doubts have been expressed, which we need not consider, whether this doctrine applied to the case of a bare personal tort.[26] If a man assaulted another in the street out of his own head, it would seem rather strong to say that, if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the Canon law excommunicated the principal if the assault was upon a clerk.[27] Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit.[28] As in other cases it has been on the ground that they did not amount to such a ratification as was necessary.[29] But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present when the ratification is established." [30]

b. Principal Against the Other Party.

§ 508. **What considerations involved.**—Where, however, instead of the ordinary case wherein the third person is endeavoring to hold the principal on the ground of the latter's ratification of the act, the principal takes the initiative and attempts, by means of his own ratification, to build up and enforce affirmative rights against the other party, different considerations apply. Does the doctrine of ratification work both ways? May the principal avail himself of it for his benefit as well as the other party? It will be convenient to discuss this question

[24] Citing D. 46, 3, 12, § 14; D. 43, 16, 1, § 14; Y. B. 30 Ed. I, 128.

[25] Citing 4 Inst. 317. See Bro. Abr. Trespass, pl. 113; Co. Lit. 207a; Wingate's Maxims, 124; Com. Dig. Trespass, C. 1; Eastern Counties Railway v. Broom, 6 Exch. 314, 326, 327; and cases hereafter cited.

[26] Citing Adams v. Freeman, 9 Johns. (N. Y.) 117, 118; Anderson and Warberton, JJ., in Bishop v. Montague, Cro. Eliz. 824.

[27] Citing Sext. Dec. 5, 11, 23.

[28] Citing Wilson v. Barker, 1 Nev. & Man. 409; s. c. 4 B. & Ad. 614 *et seq.*; Smith v. Lozo, 42 Mich. 6.

[29] Citing Tucker v. Jerris, 75 Me. 184; Hyde v. Cooper, 26 Vt. 552.

[30] Citing Perley v. Georgetown, 7 Gray, 464; Bishop v. Montague, Cro. Eliz. 824; Sanderson v. Baker, 2 Bl. 832; s. c. 3 Wils. 309; Barker v. Braham, 2 Bl. 866, 868; s. c. 3 Wils. 368; Badkin v. Powell, Cowper, 476, 479; Wilson v. Tumman, 6 Man. & G. 236, 242; Lewis v. Read, 13 M. & W. 834; Buron v. Denman, 2 Exch. 167, 188; Bird v. Brown, 4 Exch. 786, 799; Eastern Counties Railway v. Broom, 6 Exch. 314, 326, 327; Roe v. Birkenhead, Lancashire & Cheshire Junction Railway, 7 Exch. 36, 41; Ancona v. Marks, 7 H. & N. 686, 695; Condit v. Baldwin, 21 N. Y. 219, 225, 78 Am. Dec. 137; Exum v. Brister, 35 Miss. 391; Galveston, etc., Ry. v. Donahoe, 56 Tex. 162; Murray v. Lovejoy, 2 Cliff. 191, 195; see Lovejoy v. Murray, 3 Wall. 1, 9, 18 L. Ed. 129; Story on Agency, §§ 455, 456.

under the three heads of (1) contracts, (2) torts, and (3) other acts creating rights or duties.

§ 509. I. In contract—May principal ratify and enforce unauthorized contract?—Where the contract made by an unauthorized agent involves mutual acts of performance, the other party who, in reliance upon the principal's ratification, has called upon the latter to perform or who has accepted performance from him, must also assume responsibility for the duties of performance which the contract imposes upon himself; and there can be no doubt that the principal who has thus performed or stands ready to perform in pursuance of such a demand, may require the other party to perform on his part.[31]

But where acts are to be done upon but one side only and that the other side, or where the acts first due are those of the other party, or where acts of performance are contemporaneously due,—may the assumed principal who deems the contract advantageous to himself voluntarily come forward, declare his approval, promise or tender performance on his side, as the contract may require and insist upon performance by the other party? If so, within what time and subject to what conditions?

§ 510. ——— Before the principal has acted, the matter stands in this condition: Here is what was intended to be and what purports to be, not an option or an offer, but a *contract* between parties. One of these parties—the principal—is not bound by it, or, at least, he may repudiate all liability.[32] Is the other party bound? What is the consideration for his promises? Where is the mutuality? May he withdraw? If he is not then bound, may the principal approve the contract and, without any further act or assent on the part of the other, hold the latter to its performance? If the other party, before the principal has acted, discovers the lack of authority and expressly dissents, may he still be held if the principal is willing to ratify?

[31] See Soames v. Spencer, 1 Dowl. & Ry. 32; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Andrews v. Aetna L. Ins. Co., 92 N. Y. 596; 24 American Law Review, 580.

[32] *How when agent guarantees performance by the principal.*—In Weiseger v. Wheeler (1861), 14 Wis. 101, it was held that, where the agent personally guaranteed that the alleged principal would perform the contract, the other party when sued by the principal cannot defend upon the ground of the agent's lack of authority. "The respondents," said Dixon, C. J., "are in no position to take advantage of an original want of power on the part of [the agents] to execute the agreement as agents of the appellants, if such want of power were shown. At the time of its execution [the agents] guaranteed its performance by the appellants as their principals, and upon that guaranty the respondents must be presumed to have acted."

Or, again, suppose that, before the principal has intervened, the other party and the agent have consented to undo what has been done; may the principal nevertheless ratify and enforce the contract?

These questions have recently aroused much interesting discussion [33] though the cases which are directly in point are comparatively few.

It will conduce to convenience to dispose of the question last suggested first.

§ 511. If agent and other party have previously consented to cancel the contract.—Before the principal has intervened to ratify the contract, may the agent and the other party consent to cancel it in such wise as to prevent subsequent ratification? If the contract were an authorized one, of course the agent could not cancel it, but it is as yet unauthorized. The agent here is usually an interested party. If he has made a contract without authority, he ordinarily incurs a personal liability. Suppose then that, having made a contract in good faith which he believed he had authority to make, he discovers that he had no such authority: may he go to the other party, explain the situation, and, with the latter's consent, undo what has been done at least so far as to release the agent? This question seems not to have been adjudicated, but there would seem to be no doubt that such a release could be given.

§ 512. ——— But may the agent and the other party by their consent release the latter from any future liability to the principal? Mr. Wharton has expressed the view, relying upon certain German authorities, that this may not be done.[34] But the English courts seem to hold that it may be. Thus where a former agent without authority had paid a debt for his former principal, but afterwards and before the latter had ratified it went to the latter's creditor and requested him to return the money, which he did, and then sued the principal, it was held that the latter could not by ratifying avail himself of the payment in defense.[35] *"Prima facie"* said Kelly, C. B., "we have here a ratification of the payment by the defendant's plea; but whether the payment was then capable of ratification depends on whether previously it was competent to the plaintiff and Southall [the agent], apart from the defendant, to cancel what had taken place between them. I am of opinion that it was competent to them to undo what they had done. The evidence shows that the plaintiff received the money in satisfac-

[33] See, for example, note, 5 Am. St. R. 190; 24 American Law Review, 580; 25 American Law Review, 74; 9 Harvard Law Review 60; 35 American Law Review, 864.

[34] Wharton on Principal and Agent, § 77, citing Seuff. Archiv. XIV, pp. 210, 211; Windscheid, Pandektenrecht, § 74.

[35] Walter v. James, L. R., 6 Exch. 124.

tion under the mistaken idea that Southall had authority from the defendant to pay him. This was a mistake in fact, on discovering which he was, I think, entitled to return the money, and apply to his debtor for payment. If he had insisted on keeping it, the defendant might at any moment have repudiated the act of Southall, and Southall would then have been able to recover it from the plaintiff as money received for Southall's use. I am, therefore, of opinion that the plaintiff, who originally accepted this money under an entire misapprehension, was justified in returning it, the position of the parties not having been in the meantime in any way altered, and that the defendant's plea of payment fails."

So in a New York case it was held that a person who had voluntarily procured insurance for his own and another's benefit might, before the latter had ratified the act, cancel or surrender the policy. "So long as the option of the owner of the goods to adopt or reject the policy continues, so long must the absolute control of the agent over the policy remain." [36]

§ 513. If the other party has attempted to withdraw from the contract.—May the other party, before ratification, withdraw from the contract? If it be a contract, he may break it but he can not withdraw from it. If it be not a contract, but an option or an offer, he may withdraw his offer at any time before its acceptance, at least where it was not under seal or given for a consideration. Where the other party thought it a contract, it is difficult to see how it can be regarded as a mere offer. If, on the other hand, he knew or believed that the agent had no authority to make the contract, and that ratification was therefore necessary, it would not be so difficult.

The discussion of this question, in view of the cases actually decided, is so interwoven with other aspects, that it seems desirable to postpone it for a little.

§ 514. If agent and other party have done nothing to cancel the contract.—Returning now to the other question, where no such act of the agent has intervened, what is the right of the principal to ratify and enforce the contract against the other party? Conceivably the other party in the meantime may have remained passive, or he may, before or after the principal's attempted ratification, have himself

[36] Stillwell v. Staples, 19 N. Y. 401. In Mason v. Caldwell, 10 Ill. 196, 48 Am. Dec. 330, it is said: "If a person professing to act on behalf of another, but without authority, enters into a contract which, for the want of such authority, would render the professed agent personally liable, such contract may be adopted by the principal *while it is still in force as between the professed agent and the other party.*"

sought to escape the contract. So far as the adjudicated cases go upon this question, they represent three distinct views which will now be considered.[87]

§ 515. ——— The Wisconsin cases.—The earliest cases involving this precise question arose in Wisconsin,[88] and that court has denied that ratification alone can in such a case suffice to charge the other party. Referring to the general principle that subsequent ratification

[87] This discussion, of course, presupposes that there is evidence of ratification sufficient in form. Thus, where ratification under seal is necessary, the principal could not succeed here if he could not show such a ratification. Neely v. Stevens, 138 Ga. 306.

[88] Dodge v. Hopkins, 14 Wis. 630, affirmed in Atlee v. Bartholomew, 69 Wis. 43, 5 Am. St. R. 103. Similar views were also expressed in Clews v. Jamieson, 89 Fed. 63 (but they were overruled in 182 U. S. at p. 483); and Cowan v. Curran, 216 Ill. 598. See also Wilkinson v. Heavenrich, 58 Mich. 574, 55 Am. Rep. 708; Wilkinson v. Harwell, 13 Ala. 660; Atlanta Buggy Co. v. Hess Spring & Axle Co., 124 Ga. 338, 4 L. R. A. (N. S.) 431.

In Dodge v. Hopkins, *supra*, a person assuming to act as plaintiff's agent, had, without authority, entered into a contract with defendant, by which defendant agreed to purchase of plaintiff certain real estate. Plaintiff seeking to enforce the contract, brought an action against the defendant to recover certain installments of the purchase price which defendant had refused to pay. Defendant resisted upon the ground that as the contract, owing to the agent's lack of authority, did not bind the plaintiff to sell, defendant was not bound to purchase. Dixon, C. J., said: "It is very clear, in the present condition of the case, that the plaintiff was not bound by the contract and that he was at liberty to repudiate it at any time before it had actually received his sanction. Was the defendant bound? And if he was not, could the plaintiff by his sole act of ratification, make the contract obligatory upon him? We answer both these questions in the negative. The covenants were mutual—those of the defendant for the payment of money being in consideration of that of the plaintiff for the conveyance of the lands. The intention of the parties was that they should be mutually bound—that each should execute the instrument so that the other could set it up as a binding contract against him, at law as well as in equity, from the moment of its execution. In such cases it is well settled both on principle and authority, that if either party neglects or refuses to bind himself, the instrument is void for want of mutuality, and the party who is not bound cannot avail himself of it as obligatory upon the other. Townsend v. Corning, 23 Wend. 435, and Same v. Hubbard, 4 Hill, 351, and cases there cited. * * *

"I am well aware that there are *dicta* and observations to be found in the books, which, if taken literally, would overthrow the doctrine of the cases to which I have referred. It is said in Lawrence v. Taylor, 5 Hill, 113, that 'such adoptive authority relates back to the time of the transaction, and is deemed in law the same to all purposes as if it had been given before.' And in Newton v. Bronson, 3 Kern. 594, (67 Am. Dec. 87), the court says: 'That a subsequent ratification is equally effectual as an original authority, is well settled.' * * *

is equivalent to a prior authority, the court declares it to be inaccurate as a rule of universal application. "The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as the *foundation of a right in favor* of the party who has ratified, and those where it is made the basis of a demand *against* him. There is a broad and manifest difference between a case in which a party seeks to avail himself, by subsequent assent, of the unauthorized act of his own agent, in order to enforce a claim against a third person, and the case of a party acquiring an inchoate right against a principal by an unauthorized act of his agent to which validity is afterwards given by the assent or recognition of the principal. The principal in such a case may, by his subsequent assent, bind himself, but, if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent *against* the principal, which if he does, the contract, by virtue of such *mutual* ratification, becomes *mutually* obligatory. There are many cases where the acts of parties, though unavailable for their own benefit, may be used against them."

§ 516. The English cases.—In 1889, the question came before the English court of appeal in Bolton Partners v. Lambert.[89] It appeared that the defendant had written to one Scratchley, who was managing director of an incorporated company, an offer to lease certain works belonging to that company. Scratchley replied that he would refer the offer to the directors. Before the directors met there was a meeting of "the work committee" of the directors of which Scratchley was a member and this committee voted to accept the offer. This committee however had no such power. Scratchley then wrote to the defendant saying that the directors had accepted his offer, and that the company's solicitor would prepare the papers. While correspondence over the form of the documents was pending, the defendant wrote withdrawing his offer, though not upon the ground of Scratchley's want of authority. Afterwards the board of directors met and formally

"Lawrence v. Taylor and Newton v. Bronson were both actions in which the *adverse* party claimed rights through the agency of individuals whose acts had been subsequently ratified. And the authorities cited in support of the proposition laid down in the last case (Weed v. Carpenter, 4 Wend. 219; Episcopal Society v. Episcopal Church, 1 Pick. 372; Corning v. Southland, 3 Hill, 552; Moss v. Rossie Lead Mining Co., 5 Id. 137; Clark v. Van Riemsdyk, 9 Cranch, 153, and Willinks v. Hollingsworth, 6 Wheat. 241, 5 L. Ed. 251), will, when examined, be found to have been cases where the subsequent assent was employed against the persons who had given it and taken the benefit of the contract."

[89] Bolton Partners v. Lambert, 41 Ch. Div. 295.

ratified Scratchley's letter of acceptance, and, the defendant refusing to go on, this action for specific performance was instituted. The defense was the lack of mutuality and the withdrawal of the offer before acceptance. Kekewich, J., granted the relief prayed for, saying: "The doctrine of ratification is this, that when a principal on whose behalf a contract has been made, though it may be made in the first instance without his authority, adopts it and ratifies it, then, whether the contract is one which is for his benefit and which he is enforcing, or which is sought to be enforced against him, the ratification is referred to the date of the original contract, and the contract becomes as from its inception as binding on him as if he had been originally a party."

§ 517. ——— The case went to the court of appeal, where the judgment was affirmed. Several opinions were written, but quotation from one will indicate the view of all.

Lopes, L. J., said: "If there had been no withdrawal of the offer this case would have been simple. The ratification by the plaintiffs would have related back to the time of the acceptance of the defendant's offer by Scratchley, and the plaintiffs would have adopted a contract made on their behalf. It is said that there was no contract which could be ratified, because Scratchley at the time he accepted the defendant's offer had no authority to act for the plaintiffs. Directly Scratchley on behalf, and in the name of the plaintiffs, accepted the defendant's offer, I think there was a contract made by Scratchley assuming to act for the plaintiffs, subject to proof by the plaintiffs that Scratchley had that authority. The plaintiffs subsequently did adopt the contract and thereby recognized the authority of their agent Scratchley. Directly they did so the doctrine of ratification applied and gave the same effect to the contract made by Scratchley as it would have had if Scratchley had been clothed with a precedent authority to make it. If Scratchley had acted under a precedent authority, the withdrawal of the offer by the defendant would have been inoperative, and it is equally inoperative where the plaintiffs have ratified and adopted the contract of the agent. To hold otherwise would be to deprive the doctrine of ratification of its retrospective effect. To use the words of Baron Martin in Brook v. Hook,[40] the ratification would not be 'dragged back as it were, and made equipollent to a prior command.'"

§ 518. ——— Bolton Partners v. Lambert has been affirmed in later cases [41] in the same court, though one of the judges who concurred in

[40] Brook v. Hook, L. R. 6 Exch. 96.

[41] See *In re* Portuguese Consolidated Copper Mines, Steele's Case, 42 Ch. D. 160. Same: Bosanquet's Case, 45 Ch. D. 16; *In re* Tiedemann, [1899] 2 Q. B. 66.

it gave an explanation of it not to be reconciled with the opinions in the original case. Its doctrine that there may be ratification notwithstanding a previous attempt at withdrawal by the other party, has, however, been criticised by judges of lower courts,[42] nevertheless bound by it, by magazine and text writers [43] and by Lord Justice Fry in a note added for that purpose to his treatise on Specific Performance.[44] As stated by the latter, "It seems to follow from it that the intervention of a mere stranger may prevent a person who has made an offer from withdrawing that offer until it be seen whether the person to whom it is made will ratify it or not, and consequently places that person in the difficult position of neither having a contract nor a right to withdraw an offer. An offer made to a principal may be withdrawn: an offer made to a person who professes to be an agent but is not, cannot be withdrawn; so that the person making the offer is worse off in the latter than the former case." "To hold him [the other party] bound with perhaps the market rising," says another writer,[45] "while the principal is free to ratify or reject, is to place him at an undeserved disadvantage."

The later cases have attached an obviously just limitation that the ratification must take place within a reasonable time, a matter here, as elsewhere depending upon the circumstances of each case.[46]

§ 519. ——— **Several American cases declare a contrary rule.**— The rule that the principal can ratify even after the other party has attempted to withdraw is denied in several American cases. In one of the most recent,[47] one S., acting as agent for complainant, but without written authority, entered into a contract to sell land to defendant. "It needs no citation of authorities to show that this contract was void under the statute of frauds, and did not bind either complainant or defendant, until complainant had ratified the act in some manner which would take it out of the statute." Defendant tendered compliance but complainant insisted upon other terms to which defendant would not assent. After further negotiation, complainant declared that if the matter was not closed by a certain hour he "should call the deal off," to which the defendant replied, "If that is so, all right," and the parties separated. After this, complainant tendered a deed and signed a paper ratifying the act of S. and handed it to him. This document, however,

[42] See per North, J., in Bosanquet's Case, *supra*. See also per Chitty, J., in Dibbins v. Dibbins, [1896] 2 Ch. 348.

[43] See 5 Law Quarterly Review, 441; 9 Harvard Law Review, 40.

[44] Appendix, Note A.

[45] 5 Law Quarterly Review, 441.

[46] See per Bowen, L. J., in Bosanquet's Case, *supra*.

[47] Baldwin v. Schiappacasse, 109 Mich. 170.

was never shown to the defendant, and, said the court, "of course, was not binding upon him." [48] The complainant then insisted that a sale had taken place and filed this bill to enforce a vendor's lien. The bill was dismissed. Said the court: "Until complainant had placed himself in such a position that defendant could enforce the contract against him, he was not in position to enforce it against the defendant. Until that was done, there was in fact no contract binding upon either party, and the defendant was at liberty to withdraw.[49] After such withdrawal, the complainant could not bind the defendant by any act of ratification. The paper executed by S. and the defendant was not a continuing offer to purchase, which might at any time be accepted by the complainant. It purported to express the terms of an agreement of sale, void because there was no written authority to make it, and incapable of being ratified after the refusal of the defendant to be bound by it."

§ 520. ——— In a case before the appellate court in Illinois [50] it appeared that the plaintiff had authorized one E., a broker, to buy oats,

[48] Citing Dickinson v. Wright, 56 Mich. 42.

[49] Citing Pom. Cont. § 166; Duvall v. Myers, 2 Md. Ch. 405; Bodine v. Glading, 21 Pa. 50, 59 Am. Dec. 749.

There is discussion of the question, but no decision, in Aetna Ins. Co. v. Stambaugh-Thompson Co., 76 Ohio St. 138, 118 Am. St. R. 834; and in Atlanta Buggy Co. v. Hess Spring & Axle Co., 124 Ga. 338, 4 L. R. A. (N. S.) 431, with full note in latter report.

There is quite elaborate discussion in Kline Bros. v. Royal Ins. Co., 192 Fed. 378, with a disapproval of Bolton Partners v. Lambert.

It is held, in Owen v. National Hatchet Co., 147 Iowa, 393, that after ratification by the principal the other party can not withdraw, though it is said that had he done so before "there would be fair room for the contention that no agreement had ever been perfected." No cases are cited. Breithaupt v. Thurmond, 3 Rich. (S. Car.) L. 216, is to same effect.

In Cowan v. Curran, 217 Ill. 598, at pp. 610, 611; Dodge v. Hopkins, 14 Wis. 630, *supra*, and Atlee v. Bartholomew, 69 Wis. 43, 5 Am. St. R. 103, *supra*, are cited and followed with apparent approval. There is no reference in the case to the cases taking the contrary view. See also Brooks v. Cook, 141 Ala. 499.

Where the other party has once repudiated the contract on the ground of the lack of authority, he cannot afterwards take advantage of an alleged ratification by the principal without consenting to be also bound by it himself. Haldeman v. Chambers, 19 Tex. 1, 52.

[50] Gregg v. Wooliscroft, 52 Ill. App. 214.

Where an agent without authority sells lands to a purchaser who enters and makes improvements, and the principal on learning of the sale disapproves of it, whereupon the buyer abandons the land, the principal cannot afterward ratify and enforce the contract. Wilkinson v. Harwell, 13 Ala. 660.

not stating the grade and thereby, as the court held, authorizing only the purchase of the usual grade, No. 2. The broker contracted with defendant for the sale of "cool and sweet" oats, an inferior grade. The broker advised the plaintiff that he had bought of defendant "mixed oats" to arrive "cool and sweet," at a certain price. There was no such grade of oats as "mixed oats" and therefore, the court held, grade No. 2 must be inferred. Plaintiff then wrote directly to defendant confirming the purchase of "grade 2, mixed oats." Defendant immediately replied that he had not offered to sell oats of grade No. 2, and withdrew his offer of the "cool and sweet" oats. Plaintiff then wrote confirming the purchase of the oats as "cool and sweet," but defendant refused to recognize a contract or to deliver the oats. The action was for damages, and in the circuit court the plaintiff recovered, but this judgment was reversed on the defendant's appeal. "Before the appellee wrote the letter [of confirmation] he had received notice from E. and also from the appellant that the appellant had revoked his offer and cancelled any alleged sale. If the appellant offered to sell cool and sweet oats and E. accepted the offer for the appellee the acceptance was unauthorized, and not binding on the appellee until he adopted it, and in such case the appellant might lawfully withdraw the offer at any time before the appellee had accepted."

§ 521. ——— Other American cases also declare a rule contrary to that of the English cases although the facts are distinguishable. The most carefully considered of these is, perhaps, the Pennsylvania case of McClintock v. South Penn Oil Co.[81] Here the plaintiff's husband, as her agent but without written authority, had entered into a contract to sell to defendant certain interests in land belonging to the plaintiff. Later written ratification was supplied, after which the defendant sought to repudiate. Said the court per Mitchell, J.: "If the agent had been properly authorized, the contract would have bound both parties in the first instance, and the settled rule is that ratification is equivalent in every way to plenary prior authority. The objection of want of mutuality is not good in many cases of dealing with an agent, for if he exceeds his authority, actual and apparent, his principal will not be bound, yet may ratify, and then the other party will be bound from the inception of the agreement. The *aggregatio mentium* of the parties need not commence simultaneously. It must co-exist; but there must be a period when the question of contract or no contract rests on the will of one party to accept or reject a proposition made, and this interval may be long or short. The offer, of course, may be revoked or

[81] 146 Pa. 144, 28 Am. St. R. 785.

withdrawn at any time prior to acceptance, but after acceptance it is too late. The contract is complete."

§ 522. ——— Rules compared—The weight of authority.—If a comparative statement of these various rules were attempted, it might be said that the Wisconsin cases deny the right of the principal to ratify in the absence of something showing the other party's present adherence to the contract; that the English courts admit a ratification within a reasonable time even though the other party has before the ratification attempted to withdraw; while the majority of American courts permit a ratification, within a reasonable time, if the other party has not previously signified his intention to withdraw, though not afterward.

Neither of these rules is entirely satisfactory. The Wisconsin rule seems to the writer fundamentally sound, though it perhaps gives too little effect to the growing doctrine of ratification. The English rule is certainly questionable for the reason already stated, among others, that it puts a person who makes an offer to an agent in a worse position than though he had made it directly to the principal. The other American rule ignores the consideration that the other party may be refraining from a withdrawal when he would be glad to withdraw, only because he supposes he is bound by a valid contract. Perhaps a sufficient answer to the last objection is that if the other party had used due care in the first instance to ascertain the agent's authority, he would not have made the contract; and that in most cases if he has been deceived by the agent as to the existence of his authority he has a remedy against the agent for any loss thereby sustained.

The latter American rule, however, seems open to fewest objections and is likely to prevail. It may, perhaps, be stated thus: Where one assuming to be agent but without authority has negotiated a contract for his alleged principal, the latter may ratify the act and enforce the contract against the other party where he so ratifies within a reasonable time and before the other party has signified his withdrawal from the negotiation, but not afterward.

The English courts would of course sustain the rule on its positive side, though they would carry it much further, and would deny the limitations.

The German Civil Code provides that "Before ratification of the contract the other party is entitled to revoke it, unless he knew of the absence of authority at the time when the contract was entered into." [82]

[82] Section 178. The translation is that of Dr. Wang.

§ 523. ——— **Applications of the rule.**—Under the application of this rule, the principal may ratify and enforce contracts for the sale or purchase or leasing of real or personal property,[53] the furnishing of material,[54] the performance of labor, and the like.

§ 524. ——— **Ratification by insured of insurance effected for his benefit.**—Within the operation of the general rule also would come the case of the ratification by the insured after a loss of insurance effected for his benefit. That this might be done had been held by the English courts long before the difficult questions involved in Bolton Partners v. Lambert had presented themselves,[55] and this holding had been followed in the United States.[56] It is difficult to imagine a case wherein the fast and loose character of the principal's obligation, or his range of speculation whether to ratify or not, would seem to be more clearly illustrated. If no loss occurs he may ignore the contract and escape liability for the premium; if a loss happens, he may ratify and enforce the contract. As against the agent he may ratify even after payment.[57]

The case is exceptional also in the fact that ratification after loss enables the principal to do by ratification what he could not then himself do directly, namely, insure lost property; and a strong effort was made some years ago in the English courts to induce a reconsideration of the cases holding that it may be done, but it was declared that these cases were much too strong and of too long standing to be overruled.[58]

[53] McClintock v. South Penn Oil Co., 146 Pa. 144, 28 Am. St. R. 785; Clews v. Jamieson, 182 U. S. 461, 45 L. Ed. 1183; Soames v. Spencer, 1 Dowl. & R. 32; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Citizens' Gas Co. v. Wakefield, 161 Mass. 432, 3 L. R. A. 457.

[54] New England Monument Co. v. Johnson, 144 Pa. 61.

[55] Hagedorn v. Oliverson, 2 M. & S. 485; Routh v. Thompson, 13 East 274; Lucena v. Craufurd, 1 Taunt. 325; Williams v. North China Ins. Co., 1 C. P. Div. 757. See also Pickles v. Western Assur. Co., 40 Nov. Scotia 327.

In an article in 19 Green Bag 93, Mr. Frederick T. Case contends that the rule should be confined to the cases in which the person who effected the insurance was a part owner or other person with an interest in the property, so that a valid contract was closed before the loss, leaving open only the question to whom the loss is to be paid. But see 20 Harvard Law Review, 504.

[56] Finney v. Fairhaven Insurance Co., 5 Metc. (Mass.) 192, 38 Am. Dec. 397; Oliver v. Mutual Commercial Ins. Co., 2 Curtis, 277; Insurance Co. v. Chase, 5 Wall. (U. S.) 509; Snow v. Carr, 61 Ala. 363, 32 Am. Rep. 3; Miltenberger v. Beacom, 9 Pa. St. 198; Watkins v. Durand, 1 Port. (Ala.) 251; Boutwell v. Globe, etc., Ins. Co., 193 N. Y. 323, s. c. 87 N. E. 1115.

[57] Snow v. Carr, *supra;* Miltenberger v. Beacom, *supra.*

[58] Williams v. North China Ins. Co., *supra.*

It is to be observed, however, that the case is not ordinarily so hard upon the insurance company as might, at first blush, appear to be the fact. In many of the cases, the premium had been already paid by the agent or he had made himself liable for it. In any case moreover in which the agent's liability had not been excluded, he would be liable for a breach of his implied warranty of authority if the principal did not ratify. What the company would lose in such a case would be the expected liability of the principal for the premiums.

In a late case in the United States circuit court, it was held that where the premium had not been paid and the agent was not liable for it, there could be no ratification after loss, although the principal then tendered the premium before the company repudiated the policy.[59]

§ 525. ——— **Limitations.**—It has been said, however, that the principal's right of ratification in these cases is, where the assumed agent was a mere volunteer, subject to the latter's power to surrender and cancel the policy before ratification occurs.[60]

And where it was expressly stipulated that a life insurance policy should not take effect until the advance premium thereon should be paid in the life time of the person whose life was insured, it was held that a payment of the premium in his life time by an unauthorized person could not be ratified by the administrator and beneficiary after his death.[61]

§ 526. ——— **Defence based on ratification.**—The principal may, of course, base a defence upon his own ratification as well as a cause of action. Thus where an insurance company, whose agent had inserted an unauthorized clause in a policy, had formally ratified the act and undertaken to perform accordingly, it was held that the other party could not afterwards repudiate the transaction on the ground that no contract had really been entered into and recover back the money he had paid upon the policy.[62]

§ 527. **II. In tort.**—The application of the rule in tort cases must necessarily be limited because the cases wherein the principal will seek to enforce rights based upon his ratification of his agent's torts will be very rare. Injuries to rights acquired by ratification may often occur and give rise to action. Thus it has been held that where property acquired for the principal through the unauthorized act of his agent

[59] Kline Bros. v. Royal Ins. Co., 192 Fed. 378, reversed, on other points, 198 Fed. 468.

[60] Stillwell v. Staples, 19 N. Y. 401.

[61] Whiting v. Massachusetts Mut. L. Ins. Co., 129 Mass. 240, 37 Am. Rep. 317.

[62] Andrews v. Aetna L. Ins. Co., 92 N. Y. 596. See also Cook v. Tullis, 85 U. S. (18 Wall.) 332, 21 L. Ed. 933.

has been converted, the principal may ratify the act and sue for the conversion.[63] The bringing of the action is in itself, it was held, a sufficient ratification.

§ 528. III. Other acts creating rights or duties.—In addition to the acts resulting strictly in contract or constituting torts, there is a large class of acts upon which rights may be founded or duties imposed and to which the doctrine of ratification may be applicable. Examples may be suggested in such acts as assignments of causes of action, demands, entries, notices, and the like; and in a number of instances difficult questions will be found presented. The case of a notice to quit given by a person acting as agent but without authority, may be used as illustration. What is the tenant to do? If he vacates and the notice is not ratified, he will still be liable for the rent. If he remains and the notice may be ratified, he is remaining at his peril. Judge Story in his work on Agency[64] undertook to state a rule to govern these cases, saying that "where an act is beneficial to the principal and does not create an immediate right to have some other act or duty performed by the third person, but amounts simply to the assertion of a right on the part of the principal," the rule giving ratification its retroactive effect is applicable; but where the act done by the unauthorized person "would, if authorized create a right to have some act or duty performed by a third person, so as to subject him to damages or losses for the non-performance of that act or duty, or would defeat a right or an estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it so as to bind such third person to the consequences." This rule has been criticised[65] and can not be regarded as entirely accurate, but it serves to illustrate some of the ideas which must determine the matter. A number of cases will throw further light upon it.

§ 529. ——— Actions—Ratification of unauthorized bringing.—The unauthorized bringing of an action may, it is held, be ratified by the person in whose name and on whose account it was brought so as to sustain the action from the beginning.[66]

[63] Warder, etc., Co. v. Cuthbert, 99 Iowa, 681. See also Smith v. Savin, 69 Hun (N. Y.), 311, (aff'd 141 N. Y. 315).

[64] Story on Agency, §§ 246-247.

[65] Farmers' Loan & Tr. Co. v. Memphis, etc., R. Co., 83 Fed. 870; Wright on Principal and Agent, p. 75.

[66] Ancona v. Marks, 7 H. & N. 686; Day Land & Cattle Co. v. State, 68 Tex. 526. But see Frye v. Calhoun, 14 Ill. 132.

Same rule applied to filing claims. Stearns v. Klug, 21 Victoria L. R. 164.

§ 530. ——— **Assignment of cause of action.**—So it has been held that the unauthorized assignment of a cause of action may be ratified after the commencement of the action so as to sustain it;[67] but other courts have denied that the defendant can, by ratification, be thus deprived of his defense that the plaintiff had not, when he sued, a complete cause of action,[68] and the weight of authority seems to be with them.

§ 531. ——— **Adding parties to existing actions.**—So it has been held that the doctrine of ratification can not be so applied as to authorize one to be made a party to a suit by amendment, when the ratification took place after the suit was instituted.[69]

§ 532. ——— **Attachment affidavit and bond.**—In reliance upon the rule suggested by Judge Story, it has been held that authority for the making of the affidavit and bond in attachment must be perfect at the time the action is begun, and consequently an unauthorized making could not be made good by subsequent ratification;[70] but the contrary has also been held or assumed in several cases.[71]

§ 533. ——— **Declaration of maturity to accelerate action.**—So, where a bond and mortgage provided that, in case of certain defaults, the whole amount unpaid might be declared to be immediately due, it was held that such a declaration made without authority might, after suit brought in reliance upon it, be ratified with retroactive effect;[72] but it may be difficult to reconcile this conclusion with certain of those referred to in the preceding section.

[67] Ancona v. Marks, *supra;* Persons v. McKibben, 5 Ind. 261, 61 Am. Dec. 85; Marr v. Plummer, 3 Greenl. (Me.) 73.

[68] Wittenbrock v. Bellmer, 57 Cal. 12; Read v. Buffum, 79 Cal. 77, 12 Am. St. R. 131; Dingley v. McDonald, 124 Cal. 682; Graham v. Williams, 114 Ga. 716.

See also Fiske v. Holmes, 41 Me. 441; Powell v. Henry, 96 Ala. 412.

[69] Burns v. Campbell, 71 Ala. 271, 289. In this case Somerville, J., says: "It [the doctrine of ratification] cannot be applied so as to authorise one to be made a party defendant to a suit, by amendment, when the act creating his liability was done after the suit was instituted. All pleas setting up defenses to an action, have reference to the time when an action was commenced, excepting pleas to the further maintenance of the action, and pleas *puis darrein continuance.* If a defendant be not liable on the date when the suit is commenced, he can not be made liable at all *in that action* by any subsequent act of adoption or ratification. To create such retrospective liability, with its attendant costs and consequences, would be to pervert the doctrine of relation to an unjust and improper end."

[70] Grove v. Harvey, 12 Rob. (La.) 221.

[71] Bank v. Conrey, 28 Miss. 667; Mandel v. Peet, 18 Ark. 236; Hutchinson v. Smith, 86 Mich. 145; Palmer v. Seligman, 77 Mich. 305.

[72] Farmers' Loan & Trust Co. v. Memphis, etc., R. Co. (C. C.) 82 Fed. Rep. 870.

§ 534. ——— **Demand of payment, delivery, etc.**—On the other hand, a demand of payment, delivery of goods, and the like, must, it is held, in order to put the other party in default so as to sustain an action against him, be made by a person who has then authority to make the demand so that it may safely be complied with, and such a demand made by an unauthorized person will not sustain an action. A ratification of it by adopting it and basing an action upon it, is not enough.[73]

§ 535. ——— **Notice of abandonment.**—So it was held that notice of abandonment, under a marine policy, could be made only by some one then authorized so that it might safely be relied upon, and it was said that a subsequent ratification would not avail.[74]

§ 536. ——— **Notice of dishonor.**—Notice of dishonor of negotiable paper, also, must, it is held, be given by an authorized person; and the subsequent adoption of a notice given by an unauthorized person is not sufficient.[75]

§ 537. ——— **Notice to quit.**—The requirement of present authority is applied also in the case of a notice to quit, and a subsequent assent on the part of a landlord will not, it is held, establish by relation an unauthorized notice to quit given by another as his agent. The tenant must act upon the notice at the time it is given, and the notice must, therefore, at that time, be such as he can act upon with security; otherwise the tenant would be subjected to the injustice of being left in doubt as to his action until the ratification or disavowal of the principal.[76]

§ 538. ——— **Options.**—Again where an option is given to be exercised within a particular period, the other party is entitled to know absolutely within that period whether it is to be accepted, and a notice of acceptance given within the time fixed but by a person who has no

[73] Solomons v. Dawes, 1 Esp. 83; Coore v. Callaway, 1 Esp. 115; Coles v. Bell, 1 Camp. 478, note. See also Freeman v. Boynton, 7 Mass. 483.

In Sequin v. Peterson, 45 Vt. 255, 12 Am. Rep. 194, a demand by the wife for the return of money spent by her boy for pipes and tobacco was held to sustain a subsequent action by the father, though the court attached emphasis to the peculiar relation of the mother and to the fact that defendant had recognized her authority by returning a part.

[74] Per Crompton, J., in Jardine v. Leathley, 3 B. & S. 700.

[75] East v. Smith, 16 L. J. Q. B. 292; Brower v. Wooten, 4 N. Car. T. R. 70, 7 Am. Dec. 692.

[76] Pickard v. Perley, 45 N. H. 188, 86 Am. Dec. 153; Brahn v. Jersey City Forge Co., 38 N. J. L. 74; McCroskey v. Hamilton, 108 Ga. 640, 75 Am. St. R. 79; Right v. Cuttrel, 5 East, 491; Doe v. Walters, 10 B. & C. 626; Doe v. Goldwin, 2 Q. B. 143.

Contra, Roe v. Pierce, 2 Camp. 96; Goodtitle v. Woodward, 2 B. & Ald. 689.

authority cannot, it is held, be made good by ratification after the time has expired.[77]

§ 539. ——— **Stoppage in transit.**—And so it has been decided that a notice of stoppage in transit given by a person without authority during the transit, cannot, after the transit is ended, be made good by ratification.[78]

4. As Between Agent and the Other Party.

§ 540. **In general.**—It is ordinarily neither the purpose nor the function of the agent to create binding relations of any sort between himself and the third persons with whom he deals. On the contrary, it is usually his intention and his duty to create relations only between his principal and such third persons. There are, however, three classes of cases in which relations between the agent and the other party may arise. One is where, though fully authorized, the agent conceals the fact of his agency and deals as the ostensible principal. Here, of course, no question of ratification can arise because there is no lack of authority: there is merely a failure to disclose it. In these cases, as will be seen, the agent binds himself to the other party though the latter has his option of holding the undisclosed principal when discovered.[79]

A second class of cases, somewhat like the first, is that in which an agent, though fully authorized and disclosing his principal, has yet seen fit to pledge his personal responsibility. Here, often it is true, as will be seen,[80] that the other party may, at his option, hold either the principal or the agent; sometimes the agent only.

The other class of cases is that wherein one has acted as agent without authority. He may do this in two forms: He may intend to act as agent but conceal that intention; or he may intend to act as agent and openly avow that fact and act and contract as agent. In the first form, as has been seen, there is much doubt whether the doctrine of ratification has any application.[81] In the second case, the doctrine has full sway. Assuming that there may be ratification by the assumed principal, the question is, what is its effect as between the agent and the other party?

§ 541. ——— It is the general rule, as will be more fully seen hereafter, that when one assumes to act as agent of another but fails to

[77] Holland v. King, 6 C. B. 727; Dibbins v. Dibbins, [1896] 2 Ch. 348 (distinguishing Bolton Partners v. Lambert).

[78] Bird v. Brown, 4 Exch. 786.

[79] See *post*, Book IV, Chap. III.

[80] See *post*, Book IV, Chap. III.

[81] See *ante*, § 387.

bind that other as assumed on account of a lack of authority, he will himself become personally liable to the party who relied upon his pretended authority for all losses and damages which he may sustain by reason of such failure.[82] But now the act, *ex hypothesi*, is ratified, and the ordinary effect of such a ratification is, as has been seen, to go back to the beginning and cure all defects which flowed from the original absence of authority. It establishes authorized relations between the principal and the agent. It puts the relations between the principal and the other party, in the main, upon the same basis as though authority had originally been given. In the main, also, it does the same with the relations between the agent and the other party, though a distinction is to be observed between cases of contract and those of tort.

§ 542. Ratification releases agent on contract.—Where the contract has been made in the name and on behalf of the alleged principal, and the latter, with full knowledge of the facts, has ratified it, the contract then becomes in fact, so far as the rights of the other party are concerned, what at first it only assumed to be,—the contract of the principal. The other party has then what he contracted for,—the liability and responsibility of the principal; and he can obviously suffer no injury from the fact that the agent's act was originally unauthorized. The agent, therefore, drops out of sight. His identity is thereafter merged in that of the principal and he cannot personally call upon the other party for performance, nor can performance be demanded of him. He cannot sue in his own right, nor can he be rendered personally liable upon the ground of the failure of an assumed authority.[83]

The fact that the principal subsequently fails to perform the contract on his part does not revive the liability of the agent.[84]

[82] See *post*, Book IV, Chap. III.

[83] See also East India Co. v. Hensley, 1 Esp. 112; Polhill v. Walter, 3 B. & Ad. 114; Bowen v. Morris, 2 Taunt. 374; Hopkins v. Everly, 150 Pa. 117; Berger's Appeal, 96 Pa. 443; Lingenfelder v. Leschen, 134 Mo. 55; Sheffield v. Ladue, 16 Minn. 388, 10 Am. Rep. 145; Spittle v. Lavender, 2 Brod. & B. 452; Brong v. Spence, 56 Neb. 638.

In Billingsley v. Benfield, 87 Ark. 128, it was held that where an agent, without authority, had taken, from the maker of a note due his principal, new notes in satisfaction of the old, and had falsely represented that he himself was the owner of the note being surrendered, subsequent ratification of the transaction by the principal made the transaction valid, and without injury to the third person so that this third person cannot in a suit upon the extension notes brought later by the man formerly agent avail himself of the agent's lack of authority or of his misrepresentations as a defense.

[84] Lingenfelder v. Leschen, *supra*.

CHAPTER VIII

OF THE TERMINATION OF THE RELATION

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698. Usually terminates authority.

8. By Termination of Principal's Authority.

699. Principal's removal from office removes subordinates.

9. By Change in Law.

700. Change in law rendering prosecution of agency unlawful.

10. Notice of the Termination.

701-703. Notice not generally necessary when authority terminated by operation of law.

§ 547. **Purpose of chapter.**—Having heretofore considered in what manner and under what conditions the relation of principal and agent may be created, it now remains to be seen in what manner and under what conditions that relation may be terminated, and also to ascertain what results may follow from such termination.

§ 548. **Variety of methods.**—The termination of the authority may be effected by a variety of methods. Thus the agency may have been created to endure only for a limited period, and at the expiration of that period would come to a close by the mere efflux of time; or it may have been called into being for the express purpose of performing a single act or a series of acts, and these being performed the agency would be terminated by the accomplishment of that for which it was created. Again, under certain circumstances, the agency may be concluded by the act of the parties, as where the principal revokes or the agent renounces it. So subsequent events or changes in the condition or relation of the parties may render the continuance of the agency inconsistent or impossible, and it will be terminated by what is often termed the operation of law.

§ 549. **Classification adopted.**—For convenience of treatment the various methods of termination may be distributed under two main heads: I. By act of the parties. II. By operation of law. Termination by act of the parties may be by force either of, 1. Their original agreement, or 2. Their subsequent acts. Termination by original agreement arises when the parties at the time expressly or impliedly put a limitation upon its continuance, and it may be either by *a*. Expiration of time, *b*. Accomplishment of object, or *c*. Stipulation in the contract. Termination by the subsequent act of the parties may be either by *a*. Mutual consent, *b*. Revocation by the principal, or

c. Renunciation by the agent. Termination by "operation of law" occurs where some event happens, or some change occurs, which renders the further continuation of the relation impossible or impracticable, such as death, bankruptcy, marriage, war, and the like. Each of these methods will be separately considered.

I.

BY ACT OF THE PARTIES.

1. By Force of Their Original Agreement.

§ 550. a. By efflux of time.—Where the agency was originally created to endure during a given period or until the happening of a certain event, the expiration of that period and the happening of that event would respectively operate to terminate the agency.[1]

Where the language used by the parties is express as to the length of time the agency is to continue, there can of course be no doubt as to its duration; but this result may also be reached where the period is not expressly fixed but must be determined by the facts and circumstances of the case.

Thus where a resident of Australia who was possessed of estates in England, executed a written power of attorney to a firm of English solicitors, in which he recited, "Whereas I am about to return to South Australia and am desirous of appointing attorneys to act for me during my absence from England in the care and management of the said estate * * * and generally to act for me in the management and dealings with any property belonging to me during my absence from England," and then proceeded by the operative part of the instrument to convey such a power, but without any limitations as to time, it was held that the recital controlled the general language used in the operative part of the instrument and limited the exercise of the powers of the attorneys to the period of the principal's absence from England.[2]

[1] Thus, for example, where an agent has power to do a certain act as, *e. g.* to sell land, if he can do so before a certain date, his power ceases upon the expiration of the time fixed. Rundle v. Cutting, 18 Colo. 337; Castner v. Richardson, 18 Colo. 496; Learned v. McCoy, 4 Ind. App. 288.

Where a mortgagor was permitted to remain in possession and make additions as the agent of the mortgagee it was held that his power expired when the debt was due. Herd v. Bank of Buffalo, 66 Mo. App. 643.

[2] Danby v. Coutts, L. R., 29 Ch. Div. 500.

§ 551. ——— So where an agreement creating an agency for the sale of machines, made no provisions as to the time of its continuance, but did provide that the agency should extend over a certain section of the country, and that the principal agreed to furnish to the agent "such number of machines as he may be able to sell as their agent, prior to October 1st, 1867," it was held in an action against the agent's sureties, that a fair and reasonable construction of the agreement created an agency only until the first day of October, 1867.[3]

§ 552. b. **By accomplishment of object.**—Where the agency was created for the purpose of performing some specific act or acts, it will be terminated by the accomplishment of the purpose which called it into being. Having fulfilled its mission, it is henceforth *functus officio*.

Thus is an Iowa case,[4] the firm of A & B had been employed by one S to negotiate for him the purchase of some land. In the month of July they made the purchase and delivered to S the contract of sale, and S then gave them one-half of the purchase price for payment to the vendor, and paid them for their services. In August a deed for the land was sent to them and they delivered it to S, who then paid the balance of the purchase price. In October following, A bought the same land at a sale thereof for taxes, and subsequently brought an action to recover the land of the vendee of S, and it was attempted to defeat the action upon the ground that A & B were still the agents of S at the time A made the purchase at the tax sale. But the court said that upon these facts it was quite clear that the agency of the plaintiff, or of A & B, for the purchase of the land for S, terminated at the time they delivered to him the written contract for the conveyance of the land on receipt of one-half of the purchase money and the payment of their fee for the services performed. When this was accomplished, A & B had done all they had been employed to do. They had made the purchase as S had desired them to do, delivered to him the written contract sent to them for S, and had received the first payment as per agreement. This completed the services they had undertaken. S himself so regarded it, for when these things were done, he inquired how much they charged for their services, and, on being informed of the amount, he paid the same. They had performed the business for which the agency had been constituted, and by operation of law, the agency was terminated. This was in July. The purchase at the tax sale was not made until October of the same year. At that time they

[3] Gundlach v. Fischer, 509 Ill. 172.

[4] Moore v. Stone, 40 Iowa, 259. And a like ruling was made in the similar case of Walker v. Derby, 5 Bissell, 134. See also Blackburn v. Scholes, 2 Camp. 343.

were as free to purchase the same as any other persons. Their agency no longer existed.[5]

§ 553. ——— So where an agent was employed to find a purchaser for land at a fixed price, which he did, it was held that thereupon his agency to the seller terminated, and he was at liberty to undertake the service of the purchaser in attending to the due execution of the conveyance.[6] And an agent to sell after fully completing his undertaking, and after the title has passed and the price has been paid, is as competent to acquire title from the purchaser as any one else.[7]

So a power delegated to an agent to "fix and determine" a matter in which he has no power of his own outside of the agency, is expended when he has once acted upon it.[8]

Similarly, a power of attorney to confess judgment is ordinarily exhausted when the judgment is confessed, and will not sustain a second judgment.[9]

[5] An agency to obtain a loan ceases when the money is received by the borrower, and all the requisite papers have been executed and delivered. Statements thereafter made by the former agent do not bind the principal. Atlanta Sav. Bank v. Spencer, 107 Ga. 629.

So where an agent acts for both parties in negotiating a contract for the sale of goods, the agency terminates when the contract is signed by the parties and notice to him, or correspondence with him, from one of the parties no longer binds the other. Groneweg & Schoentgen Co. v. Estes, 144 Mo. App. 418.

So the authority of an attorney by virtue of his retainer terminates when judgment is obtained. Butler v. Knight, L. R. 2 Ex. 109; Macbeath v. Ellis, 4 Bing. 578; Newkirk v. Stevens, 152 N. C. 498 (in which it was held that after judgment was obtained the attorney might deal with the former client concerning the land in suit and might act at arm's length); Haines v. Wilson, 85 S. C. 338 (in which it was held that a contract for the conduct of a suit was completed when judgment was recovered, and that further services in attending to the client's interests in bankruptcy proceedings against the judgment creditor were not covered by the contract).

So in Tobler v. Nevitt, 45 Colo. 231, 132 Am. St. R. 142, 23 L. R. A. (N. S.) 702, 16 Ann. Cas. 925, it was held that an attorney, employed to defend a suit which had been brought against his client, has no implied power to do anything looking beyond the judgment entered upon the trial, or in preparation for a possible appeal.

[6] Short v. Millard, 68 Ill. 292. And after an agent to sell has completed his contract he cannot thereafter bind his principal to changes and modifications of the contract made with the vendee. Campbell v. Chase, 78 Kan. 593.

[7] Board of Trustees v. Blair, 45 W. Va. 812. See also Walker v. Carrington, 74 Ill. 446; Robertson v. Chapman, 152 U. S. 673, 38 L. Ed. 592.

[8] Douvielle v. Supervisors, 40 Mich. 585.

[9] Bellevue Borough v. Hallett, 234 Pa. 191; Com. v. Massi, 225 Pa. 548; Manufacturers' etc., Bank v. Cowden, 3 Hill (N. Y.), 461. There is good discussion of this subject in 60 University of Pennsylvania Law Review, 724.

§ 554. ——— Again, where the object for which the agency was created is accomplished by other means before the agent has acted, there is nothing left for him to act upon, and his authority is therefore terminated. Thus where the inhabitants of a town authorized their treasurer to borrow money for the adjustment of a state tax, but the tax was adjusted in another way before the treasurer had acted, it was held that his authority to borrow money was thereby terminated.[10] So where before one of two agents separately authorized to sell real estate had found a purchaser, the principal had effected a sale of the land to a purchaser produced by the other agent, it was held that the first agent's authority to sell was terminated by the sale.[11]

§ 555. **Where object contemplated involved a series of acts.**— Where the end to be attained, or the object to be accomplished, requires continuous negotiations, or is an enterprise not fully ended by a single act, but requires a series of acts to complete it according to the intention of the parties and the usages of business under similar circumstances, the authority of the agent does not expire with the performance of one act, even though that act may be of prime importance.[12]

§ 556. **Authority not necessarily continuing until object accomplished.**—It does not necessarily follow that, because an authority would be terminated by the accomplishment of the object, it must in all cases continue until the object is accomplished. That it is to so continue until the object is attained, may be evident from the express terms of the appointment or from the surrounding circumstances,[13] but, on the

[10] Benoit v. Conway, 10 Allen (Mass.), 528.

[11] Ahern v. Baker, 34 Minn. 98.

[12] Cleveland, etc., R. Co. v. Closser, 126 Ind. 348, 22 Am. St. R. 593, 9 L. R. A. 754 [citing Pennsylvania Co. v. Nations, 111 Ind. 203; United States, etc., Co. v. Rawson, 106 Ind. 215; Wells v. Morrison, 91 Ind. 51; Louisville, etc., R. Co. v. Henly, 88 Ind. 535; Kirkstall, etc., Co. v. Furness R. Co., L. R. 9 Q. B. 468; Morse v. Connecticut, etc., R. Co., 6 Gray, 450; Lane v. Boston, etc., R. Co., 112 Mass. 455; Gott v. Dinsmore, 111 Mass. 45].

In McClanahan v. Breeding, 172 Ind. 457, a power to "sign any remonstrance or remonstrances against persons who may give notice of intention to apply for license to sell intoxicating liquors, and also to file and present" the same to the board of county commissioners, was held to be a continuing one, not confined to a single remonstrance or a single instance.

[13] Formal powers of attorney to do a given act or to do acts of a class, may well be longer lived than informal ones, or than authority based merely upon circumstances which are subject to change. Thus in Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, a recorded power of attorney to sell and convey land, executed five years before a conveyance made under it, was presumed to be still operative, the only inquiry made by the court being whether it could be presumed

other hand, it may be equally clear that the authority is not to continue indefinitely merely because the accomplishment of the object is indefinitely delayed or postponed. Known changes in conditions or values may be significant and perhaps conclusive. The mere lapse of time may raise a presumption of termination, which may become conclusive where the period elapsed is so great that no reasonable man could fairly believe that the parties still intended the authority to continue. In some cases, it would be a question of reasonable time. The case of the real estate broker may be taken as an example. He has been "authorized" (though the term "authority" is here usually a misnomer: there is usually simply an *offer* of a commission if he finds a purchaser) to find a purchaser, and has been promised a commission if he does so. This would usually, like any other similar offer, expire after a reasonable time if the purchaser had not been found; and could not be held as necessarily enduring until he could find a purchaser.[14]

In many other cases also, it would be evident that, though not expressly so declared, the authority was only to be executed in case the object could be accomplished at once, or speedily, or concurrently with some other object.

§ 557. c. Termination in pursuance of term in the contract.—It is also entirely competent for the parties, at the time of creating the relation, to provide for its termination, automatically or otherwise, upon the happening of certain events; or to reserve to one or to either

to have been terminated by a possible death of the principal within that time. It was held that no such presumption would arise; on the contrary the presumption would be that he was still living.

[14] See *post*, Book V, Chap. III, Real Estate Brokers. It is true that language more or less opposed is used in Hartford v. McGillicuddy, 103 Me. 224, 16 L. R. A. (N. S.) 431, 12 Ann. Cas. 1083, but while the conclusion in that case may be sound upon the facts, the present writer is obliged to dissent from certain of the views advanced by it. There a real estate broker was held to have earned his commission by making a sale ten years after the authority was conferred, but there was evidence of acts in the meantime which gave color to the idea of a continuing authority.

Compare Proudfoot v. Wightman, 78 Ill. 553, where three years had elapsed and the property had greatly increased in value. Hall v. Gambrill, 88 Fed. 909 (aff'd 92 Fed. 32), where six years had elapsed and the land had increased in value from $5 to $100 per acre, and, Wasweyler v. Martin, 78 Wis. 59, where more than nine months had intervened and the property had increased in value.

Compare Chicago, etc., R. Co. v. Keegan, cited in preceding note.

In Dillon v. Macdonald, 21 New Zeal. L. R. 45, it is said by Stout, C. J., "If a considerable time elapsed, nothing being done in the meantime, after an agent is authorized to sell a property, I think it will be assumed that the agency had ceased," citing Breese v. Lindsay, 8 Victoria L. R. 232.

the right to terminate it, at particular times or at any time, for causes specified or for any cause, upon conditions or without them; and a termination in pursuance of such a provision will be effective, and will impose no liability upon the party exercising the right.[15]

2. *By Their Subsequent Acts.*

§ 558. What here included.—Termination of the authority may also be effected in many cases by the subsequent acts of the parties. This may be either the act of both, or *termination by mutual consent*, or it may be by virtue of the act of one of them only. When done by the principal, it is usually spoken of as *revocation*, and, when done by the agent, as *renunciation*.

A. Termination by Mutual Consent.

§ 559. Authority so terminable.—It will be seen hereafter that, in general, the authority may be revoked by the principal or renounced by the agent at any time; though it can not be so revoked where it is coupled with an interest, nor can it be revoked or renounced, without liability, in violation of an agreement that it should continue for a definite time not yet expired. But even though it may not be terminable by the act of one of the parties, it may, given the necessary conditions of form and consideration, be terminated through the subsequent release by the party in interest, or the agreement of both parties to rescind or cancel the contract between them.[16] Notwithstanding any limitation or condition originally imposed, the same power that made the arrangement in the first instance can subsequently waive the condition or remove the limitation. So far as any authority depends upon the act of the parties (as distinguished from authority created by law), the law has no purpose to subserve which will require the continuance of the relation, when *both* parties desire and agree that it shall be terminated, and the rights of third persons are not impaired.

[15] Barkley v. Olcutt, 52 Hun (N. Y.) 452; Karsner v. Union Cent. L. Ins. Co., 12 Ohio C. C. 394; Doyle v. Phoenix Ins. Co., 25 Nov. Sco. 436; Burelson v. Northwestern Mut. L. Ins. Co., 86 Cal. 342; Ballard v. Travellers' Ins. Co., 119 N. Car. 187; Oregon Mtg. Sav. Bank v. American Mortgage Co., 85 Fed. 22, 13 Sawyer, 260.

[16] Binsse v. Ohl, 51 N. J. L. 47; Conrey v. Brandegee, 2 La. Ann. 132.

B. Revocation by the Principal.

§ 560. Rules different in public and in private agency.—Somewhat different rules apply to revocation by the act of the principal in the case of a private agency, from those governing in the case of a public agency, and they will therefore be separately considered.

1. Private Agency.

a. Power of Revocation.

§ 561. In general.—The authority existing in any given case may have been conferred under a variety of circumstances which may influence to some extent the time and method of its withdrawal. Thus, 1. The execution of the authority may have been undertaken wholly gratuitously by the agent, for the accommodation or convenience of the principal, and the question whether it shall be executed or not may be a matter of complete indifference to the agent. 2. It may be that, while, as before, the agent had no interest whatever in the thing to be accomplished or in the results to flow from the execution of the authority, he yet was to be paid for doing it, and is therefore anxious to execute the authority in order to earn the promised compensation. 3. It may be that while, as in the last case, the agent had no interest whatever in the thing to be accomplished, his authority to do it was coupled with, or was an incident of, a contract of employment by the principal for a definite time, which employment the agent is desirous of continuing in order to obtain the compensation agreed upon. 4. It may be that the authority was given as an incident to some right or interest, then acquired by the agent, in the property or thing concerning which the power is to be exercised, and that the continuance of the power is essential to enable the agent to protect or realize upon the right or interest so acquired. 5. It may be that the agent has been induced to do some act, or incur some obligation, in reliance upon the continuance of the power, and that such continuance is essential to enable him to avoid or indemnify himself against the risk or liability so incurred.

§ 562. ——— It will be observed that the interest of the agent in all these cases varies somewhat. In the first, he has no interest whatever in the continuance of the authority. In the second and third, he has an interest, not in the thing itself which is to be done or in the result to be accomplished, but merely in earning the compensation

which was to be paid for doing it. In the fourth and fifth cases, the situation is different. Here the agent is interested not merely in earning compensation, but he has an interest or estate in the very thing itself concerning which the power is to be exercised, and its continuance is essential to protect his interest or shield him from liability.

In the first three cases, the principal alone has any real interest in having the authority executed. In the last two, the agent has such an interest. In the first three, the agent has an authority but no real interest in its execution. In the last two, he has an interest as well as an authority. The distinction will be found to be significant.

Cases falling within the first groups are much the more common. Such cases may indeed be called the ordinary ones, and the rule which governs them will be stated first. Thus—

§ 563. General rule—Authority is revocable at any time.—The authority of the agent to represent the principal depends ordinarily wholly upon the will and license of the latter. It is the act of the principal which creates the authority; it is for his benefit and to subserve his purposes, that it is called into being; and, unless there is some other element present, as, for example, that the agent has acquired with the authority an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. The agent, obviously, except in the instance mentioned, can have no right to insist upon a further execution of the authority if the principal himself desires it to terminate.[17]

It is the general rule of law, therefore, that the authority of the agent may be revoked by the principal at his will at any time, and with or without good reason therefor.[18] Authority of this nature is often

[17] See Clark v. Marsiglia, 1 Denio (N. Y.), 317, 43 Am. Dec. 670; State v. Walker, 38 Mo. 279; Owen v. Frink, 24 Cal. 171, 178; Lord v. Thomas, 64 N. Y. 107; Frith v. Frith, [1906] A. C. 254.

[18] Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Taylor v. Burns, 203 U. S. 120, 51 L. Ed. 116; Chambers v. Seay, 73 Ala. 372; Cronin v. American Securities Co., 163 Ala. 533, 136 Am. St. R. 88; Hynson v. Noland, 14 Ark. 710; Posten v. Rassette, 5 Cal. 467; Barr v. Schroeder, 32 Cal. 609; Brown v. Pforr, 38 Cal. 550; Mitchell v. Gray, 8 Cal. App. 423; Darrow v. St. George, 8 Colo. 592; Lowell v. Hessey, 46 Colo. 517; Briggs v. Chamberlain, 47 Colo. 382, 135 Am. St. R. 223; Linder v. Adams, 95 Ga. 668; Bonney v. Smith, 17 Ill. 531; Davis v. Fidelity Fire Ins. Co., 208 Ill. 375; Shiff v. Lesseps, 22 La. Ann. 185; Creager v. Link, 7 Md. 259; Attrill v. Patterson, 58 Md. 226; Cadigan v. Crabtree, 186 Mass. 7, 104 Am. St. R. 543, 66 L. R. A. 982; Smith v. Kimball, 193 Mass. 582; Loving Co. v. Cattle Co., 176 Mo. 330; Miller v. Wehrman, 81 Neb. 388; Hartshorne v. Thomas, 43 N. J. Eq. 419; Hutchins v. Hebbard, 34 N. Y. 24; Gardner v. Pierce, 181 App. Div. (N. Y.) 605; Oppenheimer v.

termed a bare or naked power; and it is but to restate the general rule in different form to say, as it is so often asserted, that a bare power is revocable at the will of the principal at any time.

This power to revoke exists when the state is the principal as well as when the principal is a private person.[19]

An alleged custom that an authority otherwise revocable shall be irrevocable is said to be unreasonable and void.[20]

§ 564. ——— If not already executed.—Of course if the authority has been executed, or if the agent, in pursuance of it, has entered into contracts or created obligations binding upon the principal, the authority, though otherwise revocable, cannot be revoked so as to affect these acts already done. And if the agent, in pursuance of the authority, has incurred obligations or been put to expense, on the principal's account, the revocation would not affect his right to indemnity or reimbursement for what had thus been already done.[21]

Barnett, 131 App. Div. 614; Brookshire v. Voncannon, 6 Ired. (N. C.) 231; Raleigh Trust Co. v. Adams, 145 N. C. 161; Wheeler v. Knaggs, 8 Ohio, 169; Simpson v. Carson, 11 Ore. 361; Coffin v. Landis, 46 Pa. 426; Frederick's Appeal, 52 Pa. 338, 91 Am. Dec. 159; Hartley's Appeal, 53 Pa. 212; Blackstone v. Buttermore, 53 Pa. 266; Kirk v. Hartman, 63 Pa. 97; Macfarren v. Gallinger, 210 Pa. 74; McMahon v. Burns, 216 Pa. 448; McCallum v. Grier, 86 S. C. 162, 138 Am. St. R. 1037; Newton v. Conness (Tex. Civ. App), 106 S. W. 892; Arthur v. Porter (Tex. Civ. App.), 116 S. W. 127; s. c. 118 S. W. 611; Tucker v. Lawrence, 56 Vt. 467; Weekes v. Dale, 14 Victorian L. R. 159; Hinchey v. Keam, 20 New Zeal. L. R. 478. See also Brookfield v. Drury College, 139 Mo. App. 339.

[19] State v. Walker, 88 Mo. 279; Missouri v. Walker, 125 U. S. 339, 31 L. Ed. 769; Lord v. Thomas, 64 N. Y. 107.

[20] Minis v. Nelson, 43 Fed. 777.

[21] Where the agent, at the principal's direction to pay money in the agent's hands to a third person, has incurred an obligation to pay it to such person, the principal cannot revoke his authority to pay it out of those funds unless the principal indemnifies him against liability. Bristow v. Taylor, 2 Starkie, 50 (dictum); Hodgson v. Anderson, 3 B. & Cr. 842; Goodwin v. Bowden, 54 Me. 424.

So of credits extended before authority terminated. Gelpcke v. Quentell, 74 N. Y. 599.

So of payment of bets made on principal's account. Read v. Anderson, 10 Q. B. Div. 100, 13 Id. 779.

So of authority to buy property out of funds in the agent's hands, after he has bound himself for the purchase. Wiger v. Carr, 131 Wis. 584, 11 L. R. A. (N. S.) 650, 11 Ann. Cas. 998.

So there are cases in which, if the principal revokes the authority out of the proceeds of which the agent was to be paid, he must compensate the agent for what he has already done, if it be not a case in which, as is usually true of the real estate broker, the agent is to take his chances of reimbursement out of commissions if earned. McCray v. Pfost, 118 Mo. App. 672 (although the court uses wider language than this, it can mean no more); Royal Remedy Co. v. Gregory Grocer Co., 90

If the authority has been executed in part only, and the residue be severable, the authority as to such residue may be revoked as in other cases.

§ 565. Rule applies though authority called "exclusive" or "irrevocable."—The mere fact that an authority, which from its nature would otherwise be revocable at the will of the principal, is called "exclusive," [22] or "irrevocable," [23] will not change the rule. It cannot be made irrevocable merely by calling it so, and unless given as security or coupled with an interest, in the sense to be hereinafter explained, such an authority may be terminated as in any other case. The fact, however, that the parties expressly declare a power "irrevocable," has some tendency to prove that they regarded it as one coupled with an interest or given as a security.[24]

§ 566. Rule applies though principal may have agreed that agency should continue for a definite period.—And even the fact that the principal may have expressly agreed that the agency shall continue for a certain period will not prevent his revoking the authority before the expiration of that time, if not coupled with an interest or otherwise irrevocable as hereinafter explained; but he will be liable to the agent for the damages which the agent sustains on account of the revocation contrary to the agreement.[25]

If, therefore, a declaration that the authority shall be "exclusive" or "irrevocable," as referred to in the preceding section, may be construed

Mo. App. 53; Lowell v. Hessey, 46 Colo. 517; Briggs v. Chamberlain, 47 Colo. 382, 135 Am. St. R. 223.

So where an agent to find a purchaser for land has fully performed, see *post*, Book V, Ch. III.

[22] Chambers v. Seay, 73 Ala. 372; Woods v. Hart, 50 Neb. 497; Norton v. Sjolseth, 43 Wash. 327; Kolb v. Bennett Land Co., 74 Miss. 567. Contract to give an agent the "exclusive" agency in certain territory, does not prevent the principal from selling there (Golden Gate Packing Co. v. Farmers' Union, 55 Cal. 606), though he may be liable in damages if he does. Garfield v. Peerless Motor Car Co., 189 Mass. 395.

[23] Chambers v. Seay, 73 Ala. 372; Blackstone v. Buttermore, 53 Pa. 266; Frink v. Roe, 70 Cal. 296; McGregor v. Gardner, 14 Iowa, 326; Walker v. Denison, 86 Ill. 142; Attrill v. Patterson, 58 Md. 226.

[24] Norton v. Whitehead, 84 Cal. 263, 18 Am. St. R. 172.

[25] This, of course, is what is meant in Milligan v. Owen, 123 Iowa, 285, though the court calls it an irrevocable authority. So, in Richardson v. McCleary, 16 Manitoba, 69; Park v. Frank, 75 Cal. 364; Alworth v. Seymour, 42 Minn. 526; Rowan v. Hull, 55 W. Va. 335; Novakovich v. Union Trust Co., 89 Ark. 412; Norton v. Sjolseth, 43 Wash. 327; Harrison v. Augerson, 115 Ill. App. 226; Johnson v. Buchanon, 54 Tex. Civ. App. 328. See also Standard Oil Co. v. Gilbert, 84 Ga. 714, 8 L. R. A. 410; Missouri v. Walker, 125 U. S. 339; Wilcox & G. Sew. Mach. Co. v. Ewing, 141 U. S. 627; Durkee v. Gunn, 41 Kan. 496, 13 Am. St. R. 300; Frith v. Frith, [1906] App. Cas. 254.

as an agreement not to revoke it during a definite period, it may still, subject to liability for damages, be revoked if not coupled with an interest or given as a security.[26]

In the analogous case of the dissolution of a partnership by one partner in violation of an agreement that it should continue longer [27] it is said: "When one partner becomes dissatisfied, there is commonly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve. Most contracts can be broken at pleasure, subject, however, to responsibility in damages. And that responsibility would exist in breaking a contract of partnership as in other cases." [28]

The revocation in these cases is operative not only as to the agent, but as to third persons also who have notice of it. The fact that the revocation may be a breach of the contract between the principal and the agent, does not enable a third person to charge the principal upon a contract made with the agent after knowledge of the revocation of the agent's authority.[29]

§ 567. Or though agent may have performed some service or incurred some expense.—The fact that the agent acting under a bare power, may have performed some service for which he is entitled to be

[26] Auerbach v. Internationale Gesellschaft, 177 Fed. 458.

[27] Per Cooley, C. J., in Solomon v. Kirkwood, 55 Mich. 256, citing Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; Mason v. Connell, 1 Whart. (Pa.) 381, and Slemmer's Appeal, 58 Pa. 155, 98 Am. Dec. 248. See also Karrick v. Hannaman, 168 U. S. 328, 42 L. Ed. 484.

[28] In the leading case of Clark v. Marsiglia, 1 Denio (N. Y.), 317, 43 Am. Dec. 670, it is said: "To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases, the just claims of the party employed are satisfied when he is fully compensated for his part performance, and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith towards the employer." See also Derby v. Johnson, 21 Vt. 17; Owen v. Frink, 24 Cal. 171; Lord v. Thomas, 64 N. Y. 107.

[29] Norton v. Sjolseth, 43 Wash. 327; Kilpatrick v. Wiley, 197 Mo. 123.

compensated, or incurred expense for which he may claim reimbursement, or subjected himself to a liability against which he may demand indemnity,—the authority not being given to him for the purpose of securing him in these cases—does not affect the revocability of the power. For all of these matters the agent would, where he was properly acting, and upon the principal's account, have a just claim against the principal;[30] but no one of them of itself gives the agent that sort of an "interest" or right to security, which in many cases operates to make a power irrevocable, within the rules hereafter to be considered.[31]

§ 568. Distinction between power and right to revoke—Between authority and contract of employment.—Distinction may be made in these cases between the *power* to revoke and the *right* to revoke; the principal always having the power to revoke but not having the right to do so in those cases wherein he has agreed not to exercise his power during a certain period. If, in the latter case, he does exercise his power he must respond in damages.[32]

The same conclusion may also be reached in other cases by distinguishing between the *authority* and the *contract of employment.* The authority may be withdrawn at any moment, but the contract of employment can not be terminated in violation of its terms, without making the principal liable in damages.[33]

§ 569. Exceptions—Authority not revocable.—In all of the cases thus far considered, the revocation of the authority has involved nothing more than that, and perhaps, also the breach of a contract of employment with its consequent loss of salary, fees or commissions. For the breach of such a contract, and its consequent loss of compensation, an ordinary action for damages affords an adequate legal remedy.

But while this is the ordinary situation, and revocability the ordinary rule, there may be cases in which the circumstances are such that the agent is something more than a mere agent, and the authority something more than a mere naked power to be exercised only for the principal's benefit,—cases in which it is clear that the agent has obtained something more than a mere contract, with its consequent right

[30] See Hallstead v. Perrigo, 87 Neb. 128; Lowell v. Hessey, 46 Colo. 517.

[31] See *post*, §§ 585, 659.

[32] See Alworth v. Seymour, 42 Minn. 526; Rowan v. Hull, 55 W. Va. 335; Novakovich v. Union Trust Co., 89 Ark. 412; Cloe v. Rogers, 31 Okla. 255, 38 L. R. A. (N. S.) 366.

[33] See Turner v. Sawdon, [1901] 2 K. B. 653. See also Toppin v. Healey, 11 Week. Rep'r, 466, where Willes, J., says, "You may revoke an authority, although you cannot revoke a contract."

to look simply to the personal responsibility of the principal for redress in case of breach, but has obtained *security* by virtue of a power to deal with specific property or interests for his protection—and in which, consequently, the revocation of the authority would cause a loss other than the mere loss of employment and its compensation—a loss not to be adequately remedied by a mere action for damages. In such cases, the rule of revocability should not apply.

These cases assume a variety of forms. Thus, 1. There are cases in which the agent has acquired some interest of his own in the execution of the authority, in addition to his mere interest in the contract of employment with its resulting gains—cases wherein it is often said he has a power "coupled with an interest." 2. There may be cases in which the agent has been induced to assume a responsibility, or incur a liability, in reliance upon the continuance of the authority, under such circumstances that, if the authority be withdrawn, the agent will be exposed to personal loss or injury. 3. There may be cases in which the authority was created for the protection, not of the agent, but of some third person, under such circumstances that its revocation would impair the latter's rights. 4. There may be cases of statutory powers which may be revoked only under the conditions prescribed by the statute. Each of these forms will be separately considered.

§ 570. 1. Authority "coupled with an interest."—The cases most commonly arising, in which the authority is deemed irrevocable, are those in which the authority is said to be "coupled with an interest." This expression is sometimes used to designate the whole class of irrevocable authorities, and sometimes to indicate but one species of such authorities. It is used somewhat differently in the English and in the American cases. By some of the latter, it has a different significance when applied to revocability by death than when revocation by the mere act of the principal is concerned. The question depends upon the meaning to be attached to the word "interest."

The "interest" which the agent may have in the execution of the authority may be one of three kinds:—

1. That already referred to, namely, an interest, not in the thing concerning which the power is to be exercised, or in the results to flow from its exercise, but merely an interest in being permitted to exercise it in order to earn his commissions.

2. An interest, not amounting to a property or estate in the thing itself, but still an interest in the existence of the power or authority to act with reference to it, not for the purpose of earning a commission by the exercise of the power, but because the agent has parted with

value, or incurred liability, or assumed obligations, at the principal's request or with his consent, looking to the exercise of the power as the means of reimbursement, indemnity or protection.

3. An interest or estate in the thing itself, concerning which the power is to be exercised, arising from an assignment, pledge or lien created by the principal, coupled with which is the power to deal with the thing itself in order to make the assignment, pledge or lien effectual.

§ 571. ——— **Variety of forms.**—Each of these three forms differs from the others. The first is the mere naked power, and is revocable at the will of the principal, as already seen, even though such revocation involves the breach of his agreement not to revoke it.

The second and third differ from each other only in the fact that, in the latter, the agent has an estate or interest in the subject matter of the power, while in the former his interest is rather in his right to exercise the power over the thing, in order to make it available for the security or protection contemplated.

The second and third forms might each be called a power coupled with an interest, and each has been so called, though the interest in the respective cases is of a different nature.

§ 572. ——— **American use of term.**—According to Chief Justice Marshall in the leading case of Hunt v. Rousmanier,[84] an interest of the second sort, though sufficient to make the power irrevocable by the mere act of the principal, is not such a "power coupled with an interest" as will survive his death. Nothing short of an interest of the third sort will, according to that view, suffice to prevent revocation by death. He says, in language often quoted and hereinafter more fully referred to, "Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law. * * * But does it retain its efficacy after his death? We think it does not. We think it well settled that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death. * * * This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest,' it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, 'a power coupled with an interest?' Is it an interest in the subject on which the

[84] 8 Wheat. (U. S.) 174.

power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing."

§ 573. ——— **English use of term.**—On the other hand, using the same term to express a different sort of interest, Lord Ellenborough said: "A power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death;"[35] and in another case[36] it is said: "What is meant by an authority coupled with an interest being irrevocable is this—that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable." In still another case[37] Lord Kenyon said: "There is a difference in cases of powers of attorney; in general, they are revocable, from their nature, but there are these exceptions—where a power of attorney is part of a security for money, there it is not revocable; where a power of attorney was made to levy a fine, as part of a security, it was held not to be revocable: the principle is applicable to every case where a power of attorney is necessary to effectuate any security, such is not revocable."

§ 574. ——— **Difference in results.**—Chief Justice Marshall's definition leads to this classification: 1. Ordinary bare powers which are revocable by the principal at any time. 2. Powers forming "part of a any act which is deemed valuable." These are irrevocable by the act contract," given as "a security for money or for the performance of of the principal, but are revoked by his death. 3. "Powers coupled with an interest," which are not only not revocable by the act of the principal, but are also not revoked by his death.

The English courts, by applying the term "power coupled with an interest" to the second class, have not reserved any familiar phrase to designate the third, nor do they seem to have had much occasion to consider it. Notwithstanding this difference in nomenclature, there is very little difference in the actual results reached in the two countries.

§ 575. ——— **Power irrevocable by death irrevocable by act of principal.**—Not all of the American courts have followed the distinc-

[35] In Watson v. King, 4 Camp. 272.

[36] *In re* Hannan's Empress Gold Min. & Dev. Co., Carmichael's Case, [1896] 2 Ch. Div. 643, quoting from Clerk v. Laurie, 2 H. & N. 199.

[37] Walsh v. Whitcomb, 2 Esp. 565, quoted in Smart v. Sandars, 5 C. B. 895. See also Gaussen v. Morton, 10 B. & C. 731.

tions made by Chief Justice Marshall, though that is clearly the tendency.[38] Without attempting at this stage, however, to reconcile differences in nomenclature, it is sufficient for the present purpose to observe that all courts, English and American, would agree in holding that an interest of the kind required by Chief Justice Marshall to preserve the power from revocation by death, would *a fortiori* render it irrevocable by the act of the principal.[39] What these powers are, will be considered in a later section to which the reader must be referred.[40]

§ 576. a. Power given as security and therefore "coupled with an interest."—It is clear, however, that there is a large class of cases in which the agent may have an "interest," less than an estate in the thing itself, which will render the power irrevocable by the act of the principal, even though it might not suffice to preserve it against his death. The "interest" here referred to is that of the second sort; it is more than a mere power, it is less than an estate in the subject matter of the authority. It exists where the agent has some other interest than merely to accomplish the principal's purpose and to earn the promised commission. A typical case is presented where the agent has advanced money, or incurred an obligation, for the principal, and the latter has given him some power,—for example, the power to sell certain property and pay himself out of the proceeds,—for his protection. The principal *might* have secured the agent by mortgage, or he might have delivered the property to him by way of pledge, in which case the agent would have acquired an estate or property as well as a power; but the principal has not done so: he has simply given a power by way of security. It is, however, more than a mere contract, for whose breach an action for damages may be maintained. The parties contemplated more than that: they intended a security. It is analogous to agreements to give security, which may be specifically enforced

[38] See Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86.

[39] See Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Watson v. King, 4 Camp. 272; Knapp v. Alvord, 10 Paige (N. Y.), 205, 40 Am. Dec. 241; Terwilliger v. Ontario, etc., R. Co., *supra;* Gulf, etc., Co. v. Miller, 21 Tex. Civ. App. 609 (authority to collect a claim coupled with an assignment of an interest in it, not revocable by assignor).

In Royal Society v. Campbell, 17 R. I. 402, 13 L. R. A. 601, as part of a family settlement, power was given to collect certain insurance moneys, put them into a common fund and pay out the fund in certain proportions. *Held*, that there was an equitable assignment of the insurance which made the power, to receive and pay out, one coupled with an interest, and it was therefore irrevocable by the act of grantor.

[40] See *post*, §§ 655–663.

because a mere judgment for damages, against a party perhaps pecuniarily irresponsible, would afford no adequate relief. As against the principal, such a power is irrevocable, so long as the agent has need to rely upon it for his protection.[41]

§ 577. ——— **Powers forming part of a contract.**—In other cases the granting of the power is one of the conditions of a contract between the parties, and is designed as a security for one of them. In the language of Chief Justice Marshall, it "forms part of a contract and is a security for money or for the performance of any act which is deemed valuable," and is irrevocable by the act of the principal for like reasons.[42]

[41] See the discussion in Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, *supra*.

[42] A contract with an "underwriter" to subscribe for shares in a proposed corporation, gave to the other party, the promoter, an "irrevocable" power to apply for the requisite number of shares in the name of the underwriter. *Held*, not to be revocable by the underwriter. Carmichael's Case, *In re* Hannan's Empress Gold Min. & Dev. Co., [1896] 2 Ch. Div. 643. See also Ottey v. Perth Licensing Justices, 9 West Austra. L. R. 39. The English court termed this "an authority coupled with an interest." Chief Justice Marshall would have called it "a letter of attorney forming part of a contract," or "a security for the performance of an act which is deemed valuable" but not "a power coupled with an interest." He would, however, have agreed with the English court that it was irrevocable by the act of the principal. There is good discussion of the question in Natal Bank v. Natorp, [1908] Transvaal L. Rep. 1016, where it is held that the Roman-Dutch law and the English law agree. A, being indebted to B, in order to discharge the debt, executed to B, a power of attorney authorizing him to sell certain land belonging to A. *Held* that this, being an authority coupled with an interest, could not be revoked by A. Gaussen v. Morton, 10 B. & C. 731. Chief Justice Marshall would have called this a "letter of attorney given as a security for money," but he would also have held it irrevocable by the act of A. A, being insolvent, gave to B, a creditor, a power of attorney to collect debts due A and apply the proceeds upon the debts due from A to B and other creditors. *Held*, irrevocable as "part of the security for the payment of the creditors." Walsh v. Whitcomb, 2 Esp. 565.

In Smyth v. Craig, 3 Watts. & S. (Pa.) 14, a power given to a third person to fix the price of goods sold in discharge of a debt was, on the authority of Walsh v. Whitcomb, *supra*, compared by Chief Justice Gibson to "a power coupled with an interest in the execution of it," and therefore held irrevocable.

In Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, *supra*, a power to sell property to satisfy a claim for damages for trespass by the principal on the land of the agent, was held to be irrevocable if it should be found that "there was any valid consideration within the law applicable to executory contracts, to uphold the authority."

In Raymond v. Squire, 11 Johns. (N. Y.) 47, a debtor had agreed with his creditor that the latter should have the benefit, for his security, of a covenant running from a third per-

§ 578. —— Powers given for a valuable consideration.—It is not infrequently said that the power is irrevocable, if granted for a valuable consideration. It is, of course, so granted in the cases above mentioned. But something more than a valuable consideration is essential, for the granting of a bare power may be upon such a consideration.[43] The test is, whether the agent has some interest to be protected,—other than his mere employment, or the opportunity to exercise a power in order that, by doing so, he may earn the commission or other compensation which awaits its exercise,—and for the protection of which interest he has stipulated for the power, under such circumstances that an action to recover damages for its revocation would not afford him the contemplated remedy.

son to the debtor; the debtor also executed to his creditor a power of attorney to sue upon and enforce the covenant in the name of the debtor. There was, however, no formal assignment of the covenant. *Held* that the agreement, plus the power of attorney, "was equivalent to a formal assignment, for the letter of attorney, being coupled with an interest, and given as a security, was not revocable."

In DeForest v. Bates, 1 Edw. (N. Y.) Ch. 394, an order to an agent to devote the principal's property to the payment of one of his creditors was held to amount "to an equitable assignment of the property founded upon a valuable consideration, therefore carrying with it an interest coupled with the power, and on that account not revocable."

In American Loan & Trust Co. v. Billings, 58 Minn. 187, it was held that a power of attorney executed by A, empowering B to sell and convey real and personal estate and pay the proceeds to C, to be applied in payment of a debt from A to C, existing or contemplated at the time of its execution, and executed and accepted as security for such debt, cannot be revoked by A.

In Montague v. McCarroll, 15 Utah, 318, a power of attorney, given for a small consideration, authorized the sale and conveyance of lands, and also expressly renounced and released to the agent all claim to the proceeds. *Held*, irrevocable.

So also the power of sale contained in a mortgage is said to be irrevocable by the act of the party even though revoked by death. Johnson v. Johnson, 27 S. Car. 309, 13 Am. St. R. 636; Wilkins v. McGehee, 86 Ga. 764. Equally so, a power to put a lien upon land—"to pass a bond over it." Natal Bank v. Natorp, [1908] Transvaal L. Rep. 1016. And so of a power of attorney to transfer stock given by way of security. Skinner v. Ft. Wayne, etc., R. Co., 58 Fed. 55.

And so of a power given by an inventor to an attorney to hold and control a patent for the benefit of those who had advanced money to pay for the expense of procuring it, who were also to pay the expenses of defending it, and were entitled to operate under it. Day v. Candee, 3 Fish. Pat. Cas. 9, 7 Fed. Cas. p. 230, No. 3,676. And so, of a power given by an insolvent firm to one who advanced money to it, to sell its property for reimbursement. Union Garment Co. v. Newburger, 124 La. 820.

[43] Norton v. Sjolseth, 43 Wash. 327. The mere fact that one pays a valuable consideration for appointment as a newspaper distributor or for a newspaper "route," does not make the appointment irrevocable. Staroske v. Pulitzer Pub. Co., 235 Mo. 67.

§ 586. ——— What "interest" not sufficient—Instances.—But a mere interest in the results or proceeds of the execution of the authority, as by way of compensation, is not enough.

Thus where one is given authority to sell the lands or other property or loan the money of another, and is to have a certain commission or share out of the proceeds for his services, the authority may be revoked at the will of the principal, even though in terms it was declared to be exclusive or irrevocable;[62] and so where one is authorized to collect a debt and is to have a commission or a share of what he

Am. St. R. 459; Smith v. San Francisco, etc., R. Co., 115 Cal. 584, 56 Am. St. R. 119, 35 L. R. A. 309; Hey v. Dolphin, 92 Hun (N. Y.), 230; Boyer v. Nesbitt, 227 Pa. 398, 136 Am. St. R. 890.

Compare Harvey v. Linville Improvement Co., 118 N. C. 693, 54 Am. St. R. 749, 32 L. R. A. 265.

A power of attorney to sell land, upon which the agent, at the request of the principal, has made valuable improvements, and for which he is to reimburse himself out of the proceeds, is irrevocable by the act of the principal unless he otherwise reimburses the agent. Buffalo Land Co. v. Strong, 91 Minn. 84.

So of a power given to an agent, who has procured insurance for his principal and advanced the money for the premiums, to hold the policy and collect its proceeds or its surrender value, under given circumstances, in order to reimburse himself (Miller v. Home Ins. Co., 17 N. J. Eq. 175); and a power given by a landlord to his tenant to sell crops in which the landlord had an interest in order to satisfy a debt which the landlord owed to the tenant (Big Four Coal Co. v. Wren, 115 Ill. App. 331); and a power, given by an insolvent firm to one who has advanced money to pay their debts, to sell the firm property for his reimbursement (Union Garment Co. v. Newburgher, 124 La. 819); and a power of attorney to assign wages to pay a debt where there is a subsisting employment (Cox v. Hughes, 10 Cal. App. 553).

A vessel was hired from the agent of the owner upon an agreement that the hirer, in addition to rent, should pay all expenses of navigation and give a bond to secure performance. Later it was agreed that in lieu of the bond, the agent should have the power to collect all freight money and disburse it as agreed. *Held*, irrevocable by the act of the hirer. The court said that it might be regarded as a power coupled with an interest, there being in effect at least an equitable assignment of the freight money. Pacific Coast Co. v. Anderson, 47 C. C. A. 106, 107 Fed. 973.

Where a bank, which had given credit upon a check that was later dishonored, had then received for collection a second check in order to reimburse itself, it was said that its authority to collect the second check was irrevocable. Citizens Bank v. Tessman, — Minn. —, 140 N. W. 178. The question, however, did not arise in any attempt to collect the check. The case contains a good discussion of irrevocable powers.

[62] Taylor v. Burns, 203 U. S. 120, 51 L. Ed. 116; Chambers v. Seay, 73 Ala. 372; Barr v. Schroeder, 32 Cal. 609; Brown v. Pforr, 38 Cal. 550; Frink v. Roe, 70 Cal. 296; Schilling v. Moore, 33 Okla. —, 125 Pac. 487; Norton v. Sjolseth, 43 Wash. 327; Hartley's Appeal, 53 Penn. St. 212; Walker v. Denison, 86 Ill. 142; Gilbert v. Holmes, 64 Ill. 550; Bonney v. Smith, 17 Ill. 531; Hunt v. Rousmanier, 8 Wheat. (U. S.) 175, 5 L.

collects for his services, the power is not coupled with a sufficient interest and is therefore revocable by the principal at will.[63] The interest in the commissions to be earned and in the moneys expended in endeavoring to carry out the agency, is not sufficient to prevent revocation. And so a mere power of attorney to confess judgment in favor of a third person not shown to have been executed on any consideration or to have been given as a security for any demands or to render a security effectual, is revocable at the will of the principal.[64]

Of course, no interest can be acquired where to do so would violate the express provisions of the law.[65] And though there was an attempt to assign an interest with the power, yet if that interest was not assignable, the power would be a bare power and revocable at will.[66]

§ 587. ——— Bare powers.—*A fortiori,* a bare power, not connected with any interest in the agent, may be revoked, without liability, at any time before its execution. Thus where a debtor, or one on his behalf, without consideration, deposits money with another to be paid to a creditor of the debtor, or to compromise an action against him, the relation of principal and agent arises between the debtor and the person with whom the money is so deposited. In such a case the money remains the property of the principal and he may revoke the

Ed. 589; Elwell v. Coon (N. J. Eq.), 46 Atl. 580; Darrow v. St. George, 8 Colo. 609; Simpson v. Carson, 11 Oregon, 361; Blackstone v. Buttermore, 53 Penn. St. 266; Oregon Bank v. American Mtg. Co., 35 Fed. 22.

The mere fact that the commissions are large, *e. g.* one half of the amount, does not change the rule. McMahan v. Burns, 216 Pa. 448; Walker v. Denison, 86 Ill. 142.

The same rule applies to an insurance agent who is simply interested in earning the commissions. Andrews v. Travelers' Ins. Co., 24 Ky. L. R. 844, 70 S. W. 43. Even though the writing under which the agent claims contains terms which purport to "sell" him the property or an interest in it, yet if the whole transaction shows that he was merely an agent authorized to sell for a commission, his authority is revocable. Taylor v. Burns, 203 U. S. 120, 51 L. Ed. 116, *supra.*

[63] Hartley's Appeal, 53 Pa. St. 212, 91 Am. Dec. 207; Flanagan v. Brown, 70 Cal. 254; Burke v. Priest, 50 Mo. App. 310; Stier v. Imperial Life Ins. Co., 58 Fed. 843.

Same rule applied where one was appointed by a state to prosecute claims against the U. S. government upon a commission. Missouri v. Walker, 125 U. S. 339, 31 L. Ed. 769. And where an insurance agent was authorized to collect premiums for a commission. Andrews v. Travelers Ins. Co., 24 Ky. L. Rep. 844, 70 S. W. 43.

[64] Evans v. Fearne, 16 Ala. 689, 50 Am. Dec. 197; Woodruff v. Dubuque, etc., R. R. Co., 30 Fed. 91.

[65] Thus a statute expressly provides that no transfer of land scrip issued to Indians shall be valid, this can not be defeated by the device of an irrevocable power of attorney to sell. Midway Co. v. Eaton, 183 U. S. 602, 46 L. Ed. 347 See also Strong v. Buffalo Land Co., 203 U. S. 582, 51 L. Ed. 327, affirming s. c., 91 Minn. 84.

[66] Flynn v. Butler, 189 Mass. 377

authority at any time until the agent has actually paid the money to the creditor, or has come under an obligation to him for it.[67] And any disposition of the money by the debtor, before such payment or credit, inconsistent with the appropriation first intended, as by an assignment for the benefit of creditors, will operate as a revocation.[68] So a deposit of stock with the officers of a corporation or others to enable it to be voted upon, is but a bare power and may be revoked at any time.[69]

§ 588. New nomenclature needed.—It will be evident from the foregoing discussion, that a new nomenclature is needed, for the present one is sadly ambiguous. If the expression "power coupled with an interest" is to be retained and used here to designate powers not revocable by the act of the principal (even though they may be revoked by his death), as seems to be the English practice, the term "power coupled with an estate," or something equivalent to that, should be used for the sort which survive death, and which are yet to be considered. If, on the other hand, we are to adopt the prevailing American practice, and call these latter powers "powers coupled with an interest," we should apply some other name to the ones now being considered; and the expression "power given for security" will suffice, if emphasis be laid upon the fact that it is only a power, and not an estate or property which is so given, although such an estate or property might have been conveyed.

Thus we should have, as heretofore suggested, this classification:

1. Bare powers.
2. Powers given as security (either of the agent or of third persons).
3. Powers coupled with an interest.

Bare powers are always revocable, even though a breach of contract may thereby be involved.

Powers given as security may not be revoked by the act of the principal (unless he actually reimburses the party protected) though they would ordinarily be deemed revocable by his death—a point yet to be considered.

Powers coupled with an interest are irrevocable by the act of the principal or by his death or other disability.

§ 589. ——— What may be the subject matter of a power given as security.—The subject matters with which a power given as security may be concerned, as shown by the decided cases, are very numerous.

[67] See Seaman v. Whitney, 24 Wend. 260, 35 Am. Dec. 618; Howard College v. Pace, 15 Ga. 486; Phillips v. Howell, 60 Ga. 411; Simonton v. First National Bank, 24 Minn. 216.

[68] Simonton v. First National Bank, *supra*.

[69] Woodruff v. Dubuque, etc., R. R. Co., 30 Fed. 91.

Such a power may be one over choses in action and the various forms of personal property, or—given the requisites of form—over real estate, or it may be an authority to impose personal obligations upon the principal.[70]

§ 590. ——— Necessary characteristics of such a power.—In order to make a power given by way of security effectual, it must, obviously, be conferred in definite and specific terms, and be to do some definite and specific act or acts. It need not be in writing, except where a statute requires it.[71] It must be a *power* to do some act for the protection of the party interested, and not merely an *employment* of him to do the act for the employer's benefit, with merely a resulting benefit to the agent in the form of fees or commissions. It must also, in order to be directly enforceable, be to do such an act and under such circumstances as would enable a court of equity either to enforce it specifically or at least to enjoin interference with its performance.[72]

§ 591. ——— Against whom power given as security enforceable.—The question as to the persons against whom a power given as security, and therefore irrevocable by the mere act of the principal, may be enforced, has thus far apparently been little considered by the courts. The true rule would seem to be that, so far as it concerns property, it is operative, not only against the principal, but also against any one succeeding to the property by the act of the principal,[73] and who is either a mere volunteer or a purchaser with notice.[74] So far as its exercise properly results in the creation of personal obligations against the principal, they would doubtless have the same effect upon those claiming through him, as though he had incurred the same obligations by his own personal act.

§ 592. Contracts of employment—When right to terminate exists—Employments at will.—Passing now beyond the question of the mere revocation of powers—and perhaps into a field not properly a

[70] See the cases referred to *ante*, §§ 576–8.

[71] Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86. See also Wiger v. Carr, 131 Wis. 584, 11 L. R. A. (N. S.) 650, 11 A. & E. Ann. Cas. 998.

[72] See Frith v. Frith, [1906] App. Cas. 254, where it was held that even though the power might be deemed irrevocable, it was so inseparably bound up with a contract for personal services that a court of equity, not being able to enforce that, could not enforce the residue.

[73] See Day v. Candee, 3 Fish. Pat. Cas. 9, 7 Fed. Cas. p. 230, No. 3,676.

Compare Howes v. Ball, 7 B. & Cr. 481; commented upon in Sewell v. Burdick, 10 App. Cas. 74, 95. Not good as against bona fide purchaser of *res* without notice. Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86 (*dictum*).

[74] Clark v. Flint, 22 Pick. (Mass.) 231, 33 Am. Dec. 733.

part of agency, if strictly limited, at all—attention may be given to the matter of the termination of employments. As has been already seen, the conferring of authority may or may not be accompanied by a contract of employment. It also may or may not be accompanied by an agreement for continuance. With reference to "bare" powers, *i. e.*, those not coupled with an interest or given as a security, it has been seen that even though there was an agreement not to revoke, the principal may nevertheless revoke, subject to liability for damages for the breach of the agreement. With reference to contracts of employment also, much the same situation exists. The employer may usually discharge his employee at pleasure, subject to damages if, in doing so, he breaks a contract of employment without legal justification.[75] There may have been no contract for a definite term, or, even if there were one, there may be legal excuse for breaking it, and in either of these events there would be no liability.

Speaking first of the former case, where there was no express or implied contract that the employment should continue for a definite time, it may ordinarily be terminated by either party at any time without liability. Such employments are deemed to be at will merely, and their termination violates no contract and involves no liability.[76]

[75] This may, perhaps, be made more clear by an illustration.

1. I give to a real estate broker authority to sell my land and promise him a commission for so doing. This is merely an *authority*, and not a contract of hiring or employment. There is as yet no *contract* between us at all. I may revoke this authority at any time before performance without liability.

2. I give to a real estate broker authority to sell my land, promising him a commission if he does so, and I also, for a sufficient consideration, agree not to revoke his authority within six months. This is still merely an authority, with a contract that it shall not be revoked. I may nevertheless revoke the authority, but am liable for the breach of the contract.

3. I may hire a man for six months to act as my agent [or servant, according to some views] in such matters as I may direct him. I then say to him, I authorize you to sell my stocks or chattels. Here is a *hiring* or an *employment* for a definite time. I may revoke his authority to sell my stocks or chattels at pleasure, and incur no liability. But if I also discharge him from my employment, I violate my contract of hiring or employment, and must pay him damages.

[76] Willcox & Gibbs Co. v. Ewing, 141 U. S. 627; Kirk v. Hartman, 63 Pa. 97; Coffin v. Landis, 46 Pa. 426; Jacobs v. Warfield, 23 La. Ann. 395; Knox v. Parker, 2 Wash. 34; Sheahan v. National S. S. Co., 87 Fed. 167, 30 C. C. A. 593; Rees v. Pellow, 97 Fed. 167, 38 C. C. A. 94; Hoover v. Perkins Windmill Co., 41 Minn. 143; Brougham v. Paul, 138 Ill. App. 455; Brookfield v. Drury College, 139 Mo. App. 339; Blumenthal v. Bridges, 91 Ark. 212; Harrod v. Wineman, 146 Iowa, 718; Harrington v. Brockman Commission Co., 107 Mo. App. 418; Evans v. Gay (Tex. Civ. App.), 74

The law presumes that all general or indefinite employments are thus at will merely, and the burden of proving an employment for a definite time rests upon him who alleges it.[77] He must, of course, show a consideration as in other cases.

Where, on the other hand, there was an employment for a definite term, or an agreement that the agency should continue for a stated period, it can only be terminated without liability, either where there was some right reserved or condition attached to that effect, or where some event has occurred or default happened which will legally justify a termination of the contract.

§ 593. ——— Employment on condition—"Satisfaction"—"Good cause."—It is not uncommon to provide that the agency, or employment, although otherwise for a definite period, shall cease or may be terminated by either party upon the happening of a certain event or the arising of a certain contingency, and when the agency does so cease, or is so terminated, no liability attaches to either party. Thus it is competent to provide that the relation shall continue only so long as one or either of the parties is satisfied, and where such is the agreement, the dissatisfaction of the party to be satisfied, if it be *bona fide*, is a sufficient ground for terminating the relation without liability.[78]

S. W. 575; Warden v. Hinds, 90 C. C. A. 449, 163 Fed. 201, 25 L. R. A. (N. S.) 529; Clarke v. Stevedoring Co., 163 Fed. 423; Currier v. Ritter Lumber Co., 150 N. C. 694, 134 Am. St. R. 955; Briggs v. Chamberlain, 47 Colo. 382, 135 Am. St. R. 223.

[77] Moore v. Security Trust Ins. Co., 93 C. C. A. 652, 168 Fed. 496, and other cases cited above.

[78] Tyler v. Ames, 6 Lansing (N. Y.) 280; Crawford v. Publishing Co., 163 N. Y. 404; Brown v. Retsof Min. Co., 129 App. Div. 368; Ginsberg v. Friedman, 146 N. Y. App. Div. 779; Adriance v. Rutherford, 57 Mich. 170; Sax v. Detroit, etc., Ry. Co., 125 Mich. 252, 84 Am. St. R. 572; Isbell v. Carriage Co., 170 Mich. 304; Hotchkiss v. Gretna Gin & Compress Co., 36 La. Ann. 517; Kendall v. West, 196 Ill. 221, 89 Am. St. R. 317; Karsner v. Union Cent. L. Ins. Co., 12 Ohio C. C. 394; Beissel v. Vermillion Farmers' Elevator Co., 102 Minn. 229, 12 L. R. A. (N. S.) 403; Corgan v. Lee Coal Co., 218 Pa. 386, 11 Ann. Cas. 841, 120 Am. St. R. 891; Stewart & Co. v. Exum, 132 Ga. 422; MacKenzie v. Minis, 132 Ga. 323, 23 L. R. A. (N. S.) 1003; Lieberman v. Weil, 141 Wis. 635.

But a dismissal in such a case, simply because his services were not needed, is a breach. Sax v. Detroit, etc., Ry. Co., *supra;* Atlanta Stove Works v. Hamilton, 88 Miss. 704. See also Hotchkiss v. Gretna Gin. & Compress Co., *supra;* and compare Crawford v. Pub. Co., 163 N. Y. 404.

It has been held, in a case in which in consideration of the release of a claim for injuries, an employe accepted an agreement for work so long as his services should be satisfactory, that the grounds of the dissatisfaction must be reasonable. Lake Erie & W. Ry. Co. v. Tierney, 29 Ohio C. 83 (aff'd without opinion, 75 Ohio St. 565); but see *contra* Sax v. Detroit, etc., Ry. Co., 125 Mich. 252, 84 Am. St. R. 572.

It has been suggested that in cases involving not commercial services,

[illegible] that the contract may be terminated by either party for good cause" was held to justify a termination by either party for any cause, if it be in good faith thereof.[79]

So a contract to give one employment so long as he does "faithful and efficient work" has been held to be terminable at the will of either party.[80]

§ 564 —— Termination for causes specified.—So, of course, it is entirely competent for the parties to stipulate that the principal shall have the right to terminate the contract for certain causes, or upon happening of a certain event, and a termination in pursuance of such a stipulation entails no liability. But the cause stipulated for must exist, and the notice required must be duly given.[81] And where the parties have stipulated for the right to terminate for a certain cause, there is an implied exclusion of the right to terminate for any other cause which would not justify a termination in the absence of any stipulation.[82]

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§ 594. ——— Termination for causes specified.—So, of course, it is entirely competent for the parties to stipulate that the principal shall have the right to terminate the contract for certain causes, or upon giving notice of a certain sort; and a termination in pursuance of such a stipulation entails no liability. But the cause stipulated for must exist, and the notice required must be duly given.[81] And where the parties have stipulated for the right to terminate for a certain cause, there is an implied exclusion of the right to terminate for any other cause which would not justify a termination in the absence of any stipulation.[82]

But a contract fixing no term for its continuance, and therefore terminable at will, will not be rendered not so terminable by the mere

but the peculiar personal "taste, fancy, satisfaction or judgment," the employer may discharge without assigning any reason, or stating his dissatisfaction, and that the court and jury will not go behind his action. Saxe v. Shubert Theatrical Co., 57 Misc. 620; Brown v. Retsof Min. Co., 127 App. Div. 368; Crawford v. Pub. Co., 163 N. Y. 404.

In Lieberman v. Weil, 141 Wis. 635, it was held that in cases at least of commercial service, the dissatisfaction must be real, whether it was reasonable or not, and that the question of *bona fides* might go to the jury.

Where the contract was for three years "or as long as he performs his duties in a successful or satisfactory manner," the court distinguished the cases first cited in this note, and held that the principal could not discharge merely because he was dissatisfied. Bridgeford v. Meagher, 144 Ky. 479.

[79] Cummer v. Butts, 40 Mich. 322, 29 Am. Rep. 530. The contract may make the employer the sole judge of performance. Allman v. Yukon Consol. Gold Fields Co., 7 Western L. Rep. 318, affirmed 8 id. 373.

The right to terminate "for cause" will not justify a purely arbitrary dismissal. Margulies v. Oppenheimer, 159 Ill. App. 520.

[80] Louisville, etc., R. Co. v. Offutt, 99 Ky. 427, 59 Am. St. Rep. 467; Louisville, etc., R. Co. v. Harvey, 99 Ky. 157.

[81] Johnson v. Pacific Bank Fixture Co., 59 Wash. 58; White Sewing Mach. Co. v. Shaddock, 79 Ark. 220. Where the principal may terminate if he desires to make a certain other arrangement that condition must actually exist in order to justify a termination. Fuller v. Downing, 120 App. Div. 36.

As to a custom requiring notice where none is stipulated for, see Joynson v. Hunt, 21 Times L. Rep. 692 (not allowed against a written contract apparently at will).

[82] Newcomb v. Imperial Life Ins. Co., 51 Fed. 725. To same effect: Newhall v. Journal Printing Co., 105 Minn. 44, 20 L. R. A. (N. S.) 899.

insertion of provisions by which it may be terminated in certain events. Such provisions would not ordinarily be sufficiently indicative of an intention to agree that a contract, otherwise terminable at will, should be terminated only in the cases provided for; and they would ordinarily be deemed to be cumulative and inserted only out of abundant caution.[83]

§ 595. ——— Implied conditions.—So there are certain implied conditions which enter into every contract of agency, for a violation of which the principal may rightfully terminate the contract. The most important of these are those which relate to the questions of the agent's ability to perform the appointed service, and the fidelity with which he employs the powers entrusted to him.

A full discussion of these conditions will be given in a later section.

§ 596. Contract for definite time cannot be terminated without liability except for legal cause.—Where the agent has been employed for a fixed period the agency cannot be rightfully terminated before the expiration of that period at the mere will of the principal, but only in accordance with some express or implied condition of its continuance. Any other termination of such an agency by the act of the principal will subject him to liability to the agent for the loss he has sustained thereby.[84] The principal will also be liable to the agent for his compensation up to the time of the wrongful revocation and for any liabilities and expenses which the agent has fairly and in good faith incurred on the principal's account in the execution of the authority before its revocation.[85]

[83] Willcox & Gibbs Co. v. Ewing, 141 U. S. 627, 35 L. Ed. 882; Stier v. Imperial L. Ins. Co., 58 Fed. 843; Moore v. Security Trust Ins. Co., 93 C. C. A. 652, 168 Fed. 496.

[84] See *post*, Book IV, Ch. IV; Rand v. Cronkrite, 64 Ill. App. 208; Glover v. Henderson, 120 Mo. 367, 41 Am. St. Rep. 695; Rowan v. Hull, 55 W. Va. 335, 104 Am. St. R. 998.

A contract of employment for the "season," presumptively means the season known to the particular trade, (Bauer v. Goldman. 45 Colo. 163), and in the territory in which the agent is to operate. Wolfsheimer v. Frankel, 130 App. Div. 853.

Where one was employed "subject to the account of the Alliance Silk Mills remaining with" the employer, it was held that the employer was liable for a discharge before that account was withdrawn. Downes v. Poncet, 38 Misc. 799.

So where, in consideration of $10 paid by the agent to his principal, and of services rendered and to be rendered in the sale of a piece of land to a church, the principal agreed that the agency should continue until such time as the church could be brought to buy, the principal who gave notice of termination and himself closed the sale to the church, was held liable to pay to the agent the amount of commission agreed upon. Luhn v. Fordtran, 53 Tex. Civ. App. 148.

[85] See *post*, Book IV, Chap. IV.

§ 597. What amounts to contract for definite time.—To consider exhaustively the question of what is to be deemed a contract for a definite time, is not within the scope of the present discussion. In many cases the contract is express and clear. In others no serious difficulty is presented in determining the intention of the parties. Illustrations of interpretation are collected in the note.[86]

§ 598. ——— Unilateral stipulations.—It is, however, in many cases, difficult to determine whether the parties have made a definite agreement for a fixed time or not. It is not indispensable that they should, in the first instance, be both bound for the same period. It may lawfully be made to rest with either party to determine, at his option, that the agreement shall be one for a certain time.[87] So it has been held that the appointment of an agent to do certain acts during a given period does not, of itself, amount to an agreement that he should be permitted to continue to act during that period.[88] Many other cases involving the same general question are referred to in the notes.

[86] In Mason v. New York Produce Exchange, 127 N. Y. App. Div. 282, an agreement in the following language: "You were appointed at a salary of $2,500 for the first year and * * * your remuneration for the second year and thereafter will be $3,000 per annum," was held to be a contract for an annual period, and was renewed on that basis by continuance in service.

In Dally v. Wheaton Co., 79 N. J. L. 574, an offer made in these terms: "We are willing on the above basis to start you in, say for three months, and see what you can do," was accepted. *Held*, employment was for the period stated, and not at will.

In Seago v. White, 45 Tex. Civ. App. 539, a contract reading: "I will work for you the first year for $1,000, etc.," was held to create a hiring for one year and not one terminable at will.

[87] Where the contract is for employment so long as the employee desires it, the term does not become fixed until he has exercised his option, and if he is discharged before doing so he cannot recover damages based upon a fixed period. "Perhaps the defendants could not, by abruptly breaking the contract, by discharging the plaintiff, deprive him of the right to exercise his option to fix a definite and reasonable period of service. But, though he might have exercised and declared his election even when he was notified of his discharge, * * * he does not appear to have done so." Bolles v. Sachs, 37 Minn. 315.

A contract to give another employment for whatever time the employee may desire to serve, entitles the employee to fix the period when he presents himself for work. But if he does not so fix it and is dismissed, he cannot recover damages based upon any particular period. East Line R. Co. v. Scott, 72 Tex. 70, 13 Am. St. R. 758 (see s. c. 75 Tex. 84); followed in Hickey v. Kiam (Tex. Civ. App.), 83 S. W. 716.

[88] Where an agent agreed to transport all the goods that might be "presented to him" for that purpose during one year, but the principal did not expressly agree to furnish any goods for transportation, *held*, that the agreement was binding upon the agent only, and that the principal might, at any time, refuse to fur-

§ 599. ——— So where the plaintiff agreed to serve the defendants "during the term of not exceeding three years," and not to be con-

nish any goods, and thus, practically, terminate the agency during the year without liability. Burton v. Great Northern Ry. Co., 9 Exch. 507.

Where the owner of coal mines appointed agents for the sale of the coal at Liverpool for seven years, but did not agree to furnish them any coal to sell during that period, *held*, that the owner might sell his mines and terminate the agency even though the seven years had not expired, without liability to the agents. Rhodes v. Forwood, L. R., 1 App. Cas. 256.

See also Northey v. Trevillion, 7 Com'l Cas. 201. (But compare Turner v. Goldsmith, [1891] 1 Q. B. 544 cited in second section following wherein this case was distinguished.) See also Churchward v. The Queen, L. R. 1 Q. B. 173; *Ex parte* Maclure, L. R. 5 Ch. 737; Cowasjee Nanabhoy v. Lallbhoy Vullubhoy, L. R. 3 Ind. App. 200; Chicago, etc., R. Co. v. Dane, 43 N. Y. 240.

So where it was agreed between A and B that A should manufacture cement for the use of B of a specified quality; that B should pay A a certain weekly sum for two years from the agreement, and another weekly sum for one year after, and should receive A into partnership in the business of manufacturing cement at the end of three years; and that A should instruct B in the art of manufacturing cement. *Held*, on action brought by A assigning as a breach of this agreement that B wrongfully discharged him, the plaintiff, from his service, and from manufacturing cement for the use of the defendant, and from any longer instructing the plaintiff in the art of manufacturing cement, before the expiration of two years from the agreement, that this agreement did not raise an implied contract of hiring and service for three years between the parties, and therefore the action was not maintainable. Aspdin v. Austin, 1 Dav. & M. 515; s. c. 5 Q. B. 671, s. c. 5 A. & E. 671.

So where it appeared that by indenture between defendant of the first part, J. D. son of plaintiff, of the second part, and plaintiff of third part, plaintiff, covenanted that his son should be assistant to the defendant, a dentist for five years, and do all such service as defendant should order to be performed in the way of his art; and that defendant, for the services to be done by the son, covenanted during the term, and in case the son should perform his part of the agreement, that he, defendant would pay the son a certain sum weekly during the term as compensation for the services aforesaid. That the son entered upon the service, and that he and the plaintiff performed their part of the agreement, and were ready and willing to continue such performance during the term. And the breach alleged was that defendant refused to permit the son to continue in the service and dismissed him. It was held there was no implied covenant by the defendant to retain the son in the service during the five years. Dunn v. Sayles, 1 Dav. & M. 579; s. c. 5 Q. B. 685, s. c. 5 A. & E. 685. [But some of the doctrines of Aspdin v. Austin, Dunn v. Sayles, and Williamson v. Taylor (cited in the following case), have been much criticised in the English courts, and they doubtless go no further than the precise point decided. See *per* Erle C. J., in McIntyre v. Belcher, 32 L. J. C. P. (N. S.) 254; Crompton J., in Worthington v. Sudlow, 31 L. J. Q. B. (N. S.) 131; L. Alverstone in Devonald v. Rosser, [1906] 2 K. B. 728.]

Where a traveling salesman, "in consideration of the sum of $2,100 for the year 1873, and $2,400 for the year 1874, to be paid in semi-monthly

nected with any other persons in like business "during the continuance of this agreement;" while the defendants merely agreed to pay him a stated sum per week "during the said term," it was held that defendants could terminate the agreement within three years by giving reasonable notice.[90] Said the court: "There is no express agreement of the defendants to employ the plaintiff for three years, and no stipulation from which, in our judgment, such an agreement can be implied. The agreement appears to have been framed and adapted to secure to the defendants the right to the exclusive services of the plaintiff for such time, not extending beyond three years from its date, as he should perform such services and they should continue the business and require his services, paying him the stipulated compensation weekly, so long only as he should be employed by and faithfully serve them; but not to oblige them to continue the business, or to employ him therein, except at their own election, or to pay him any compensation after

or monthly installments, agreed to devote his whole time and attention solely to the interests of" a certain firm, and entered into their service and continued until June 11, 1873, at which date the firm became bankrupt and suspended business, and the salesman was discharged, *held*, in an action brought by the salesman to recover damages for his discharge, that the contract contained no undertaking on the part of the firm to retain or continue him in their employ for any definite term and that hence he could not recover. Orr v. Ward, 73 Ill. 318 [citing Williamson v. Taylor, 5 A. & E. 175, and Aspdin v. Austin, *supra*]; Brougham v. Paul, *supra*.

An employment to sell "any or all" of a certain quantity of goods, the agent "to devote his entire time to the sale," and to have a commission "upon all sales made by him," was held since the agent had not bound himself to sell any or all of the goods, or to give his entire time for any specified period, to be an employment at will, and terminable by the principal at any time. Winslow v. Mayo, 123 App. Div. 758, aff'd without opinion, 195 N. Y. 551.

A contract for employment "for the sale of all the lumber that will or may be sawed" upon a certain named tract of land, is not a contract of employment to last until all the lumber is taken, but is rather "a provision as to what the agency is so long as it continues in force." Bradlee v. Southern Coast Lumber Co., 193 Mass. 378.

So an employment to prepare a tract of land for sale in lots and to secure purchasers, the compensation to be a commission upon sales made was held terminable at the instance of either party. Brougham v. Paul, 138 Ill. App. 455. But compare Glover v. Henderson, 120 Mo. 367, 41 Am. St. R. 695.

In Pellet v. Mfgrs. Ins. Co., 43 C. C. A. 669, 104 Fed. 502, an insurance agent was denied recovery of prospective commissions as damages for the breach of a contract for a definite term, where the defendant company sold out its business in the agent's territory. To same effect: *In re* English Marine Ins. Co., 5 Ch. App. 737, where the employment ceased on account of the voluntary dissolution of the company.

[90] Harper v. Hassard, 113 Mass. 187.

reasonable notice that they should no longer require his services. The case does not present the question whether the plaintiff had a similar right of election."

§ 600. ——— Contrary views.—But where one had been appointed general agent of a life insurance company for five years, but without any express agreement on the part of the company to employ him for any definite period, and the company, after the time had partly expired, became insolvent, abandoned the business and discharged the agent, a different conclusion was reached.[91] In an action brought by the agent to recover damages for the discharge, it was argued on behalf of the defendant that by the terms of the contract sued on, the plaintiff was merely appointed agent for the company for five years, and as the company did not expressly bind itself to continue in business for that length of time, its inability to act and execute the whole stipulation on its part constituted no breach. But it was said in reply by the learned judge who rendered the opinion of the court: "It is true there was no positive and direct covenant, on the part of the company, to carry on the business for any definite time. But the plaintiff agreed to act exclusively for the company for the period of five years, and had he neglected or failed, he would have been liable in damages. If he was bound for that length of time, it necessarily follows that the company must also have been bound, for mutuality was essential to the validity of the agreement. It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied." [92]

[91] Lewis v. Atlas Mut. L. Ins. Co., 61 Mo. 534, 538. See also Glover v. Henderson, 120 Mo. 367, 41 Am. St. Rep. 695. And Macgregor v. Union Life Ins. Co., 57 C. C. A. 613, 121 Fed. 493, where the insurance company having sold out its business, was compelled to pay damages to an agent for loss of commissions for the balance of his term. That the principal's insolvency furnishes no excuse for a breach of the contract, see Vanuxem v. Bostwick (Penn.), 7 Atl. 598.

[92] Citing Pordage v. Cole, 1 Wm. Saund. 319; Churchward v. The Queen, 6 B. & S. 807; Black v. Woodrow, 39 Md. 194. In Turner v. Goldsmith, [1891] 1 Q. B. 544, there was an agreement in Where the contract declares that "it is *mutually* understood" that an employment is to be for five years, it is not lacking in mutuality because the agent did not expressly agree to serve for that time. Butterick Pub. Co. v. Whitcomb, 225 Ill. 605, 8 L. R. A. (N. S.) 1004.

§ 601. ——— Mutuality under Statute of Frauds.—Cases under this head frequently arise in which the Statute of Frauds becomes an important element. Thus in a case in Michigan[94] it appeared that the defendants had entered into a written contract with the plaintiff as follows:

"We promise and agree to pay Thomas Wilkinson wages or salary at the rate of $3,500 a year for three years from the second day of October, 1882, in consideration of his working for us that length of time as cutter in our merchant tailoring department in the city of East Saginaw, Michigan. Payments to be made as earned, in such sums and at such times as he may desire.

"Dated October 14, 1882.

"HEAVENRICH BROS. & CO."

writing to employ the plaintiff as traveling salesman or agent "upon the terms and subject to the stipulations and conditions hereinafter contained." Among these terms and conditions were the following: "(1) The agency shall be deemed to have commenced on the 31st day of January, 1887, and shall be determinable either by the company or the said A. S. Turner at the end of five years" by written notice. (2) Turner agreed to do his utmost to obtain orders for all goods "manufactured or sold" by the company of which they should furnish him samples for that purpose. (5) Turner agreed not to sell goods except those "manufactured or sold" by the company. (8) The company was to pay him a commission on all goods sold. Two years later the company's factory was destroyed by fire and the company did not resume business or continue plaintiff's employment. He sued to recover damages for the breach of the contract. The company contended that the agreement was (like that in Rhodes v. Forwood cited in the preceding section) only that he should solicit orders for such goods only as they gave him samples, but that they did not agree to supply him with any such samples. But it was held, distinguishing Rhodes v. Forwood, that there was a binding contract to employ plaintiff for five years.

Compare Northey v. Trevillion, 7 Com'l Cas. 201.

[94] **Wilkinson v. Heavenrich**, 58 Mich. 574, 55 Am. Rep. 708. The court said: "The conflict of authority upon questions of the kind raised upon this record is truly bewildering, and the cases are incapable of being reconciled with each other; a large and respectable class holding that a contract which the Statute of Frauds declares shall not be valid unless in writing and signed by the party to be charged therewith, need only to be signed by the party defendant in the suit, and that it is no objection to maintaining such suit and recovering upon such contract, that the other party did not also sign and was not bound by its terms. 2 Kent's Com. 510; 2 Stark. Ev. 614; Smith's Appeal, 69 Penn. St. 480; Tripp v. Bishop, 56 Penn. St. 424; Perkins v. Hadsell, 50 Ill. 217; Old Colony R. R. Corp. v. Evans, 6 Gray (Mass.), 31, 66 Am. Dec. 394; Williams v. Robinson, 73 Me. 186, 40 Am. Rep. 352. See also Mason v. Decker, 72 N. Y. 595, 28 Am. Rep. 190; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576; Shirley v. Shirley, 7 Blackf. (Ind.) 452; Douglass v. Spears, 2 N.

Plaintiff alleged that he entered upon and continued in the employment under the contract until on or about July 5, 1884, when he was discharged without cause and against his protest. On July 8, he wrote to defendants, saying: "I hereby protest against your attempt to cancel our contract. I hold your written agreement for a three years' term of service, from October 2d, 1882. That contract I am ready and willing to perform on my part, and I hereby offer to continue, and request you to furnish me employment under the terms of that agreement."

& McC. (S. C.) 207; 10 Am. Dec. 588; Morin v. Martz, 13 Minn. 191; Anderson v. Harold, 10 Ohio, 399; Barstow v. Gray, 3 Greenl. (Me.) 409; Allen v. Bennett, 3 Taunt. 175; Laythoarp v. Bryant, 2 Bing. N. C. 735; Saunderson v. Jackson, 2 Bos. & Pul. 238. Another and equally respectable class of jurists hold that unless the party bringing the action is bound by the contract, neither is bound because of the want of mutuality. Lees v. Whitcomb, 3 C. & P. 289; Sykes v. Dixon, 9 Ad. & El. 693, 36 Eng. Com. L. 366; Krohn v. Bants, 68 Ind. 277; Stiles v. McClelland, 6 Col. 89; and as bearing upon the question, Hall v. Soule, 11 Mich. 496; Scott v. Bush, 26 Mich. 418; Liddle v. Needham, 39 Mich. 147; McDonald v. Bewick, 51 Mich. 79. See also, Corbitt v. Salem Gaslight Co., 6 Oreg. 405, 25 Am. Rep. 541 and note. I shall not attempt a reconciliation where reconciliation is impossible; but as the question is new in this state, the court is left to adopt such view as appears to rest upon principle. It is a general principle in the law of contracts, but not without exception, that an agreement entered into between parties competent to contract, in order to be binding, must be mutual; and this is especially so when the consideration consists of mutual promises. In such cases, if it appears that one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality. Hopkins v. Logan, 5 M. & W. 241; Dorsey v. Packwood, 12 How. (U. S.) 126, 13 L. Ed. 921; Ewins v. Gordon, 49 N. H. 444; Hoddesdon Gas Co. v. Haselwood, 6 C. B. (N. S.) 239; Souch v. Strawbridge, 2 M. G. & S. 808; Callis v. Bothamly, 7 Wk. Rep. 87; Sykes v. Dixon, 9 Ad. & El. 693; Addison, Cont. § 18; Parsons, Cont. 449; Utica, etc., R. Co. v. Brinckerhoff, 21 Wend. (N. Y.) 139; Lester v. Jewett, 12 Barb. (N. Y.) 502. Such was the case here. The consideration consisted of mutual promises of the parties, not to be performed within a year from the making thereof. The defendants' promise was in writing, and signed by them; but the plaintiff's promise does not appear in the writing signed by the defendants, nor was any note or memorandum made and signed by him promising to labor for defendants three years or any length of time. Plaintiff was never bound by the agreement. There never was, then, any consideration to support defendants' promises. The agreement was void for want of mutuality. The plaintiff was under no legal obligation to work for defendants a moment longer than he chose, and the defendants were under none to keep him in their employment. The plaintiff could neither revive nor make a contract with defendants after he was discharged by them, without their consent and concurrence. The letter written after he was discharged was of no avail."

In an action brought to recover damages for the discharge, it was held that as the plaintiff had not also signed the contract, it was not binding as to him under the Statute of Frauds; and that as he was not bound to stay three years, there was no mutuality in the agreement and that hence the defendants were not bound.

The weight of authority, however, seems to be against the view taken by the court in this case as to the necessity of the signing by both parties.[95]

§ 602. Contract for a definite time implied from circumstances.— But a contract to retain the agent for a definite time may be implied, although not clearly expressed, where from the facts and circumstances surrounding the case, such appears to have been the intention of the parties.[96] Whether it was so or not is usually a question of fact for the jury.[97]

Thus in a leading case where it appeared that the plaintiff had entered into a contract with a joint stock company whereby he agreed that from a certain date he would act as the attorney and solicitor of the company for a salary of 100l. a year, and the company on its part agreed to retain and employ him as such attorney and solicitor on the terms aforesaid, it was held, although no time for the continuance of the relation was agreed upon, that it must be construed to be a retainer

[95] See Wood on the Statute of Frauds, § 405, and cases cited.

[96] In Luce v. San Diego Land Co. (Cal.), 37 Pac. 390, plaintiffs wrote: "An annual salary of $5,000 is the least sum for which we ought to take upon ourselves the labor and responsibilities incident to continuing our position as general attorneys for the company." Defendant replied: "On and after March 1st, until a change be made, their names shall appear on the pay roll at the rate of $416.66 per mo." Later the plaintiffs stated orally that their offer contemplated a yearly hiring and not a monthly one. The defendant's agent answered: "We would no more employ you by the month than you would be employed by it." *Held*, a contract for one year with salary payable monthly.

In Chamberlain v. Detroit Stove Works, 103 Mich. 124, the plaintiff, who had worked for the defendant company a number of years at an annual salary, was elected director and secretary in January, 1886. He continued to perform same services, but at an increased salary. He was re-elected each year until 1892, when another person was chosen in his place. In May, 1892, he was discharged. The jury found that the employment was for an annual period and continued distinct from his offices in the corporation. *Held*, that the character of the hiring was properly left to the jury, and that their determination was not improper.

[97] See cases cited in following notes: Tallon v. Grand Portage Copper Min. Co., 55 Mich. 147; McCullough Iron Co. v. Carpenter, 67 Md. 554; Tatterson v. Suffolk Mfg. Co., 106 Mass. 56; Davis v. Ames Mfg. Co., 177 Mass. 54.

for at least one year.[98] So where an offer of employment as superintendent of ships was made by a letter stating that the wages would be one hundred dollars per month, "and if you give me satisfaction at the end of the first year, I will increase your salary accordingly," it was held that this was a contract for a yearly hiring.[99] So a letter engaging a person as a hotel manager at a salary of one hundred and twenty-five dollars per month, and showing upon its face that the engagement contemplated his giving up another situation and removing, with his family, several hundred miles to a hotel, and there undertaking, besides the duties of a manager, those of secretary and treasurer of the hotel company, was held to import an engagement for at least a year.[1]

§ 603. ——— Yearly or other periodical salary—Yearly accountings.—The mere fixing of the salary by the year, month or other interval is not, according to many cases, enough to make the employment one for such interval, unless the nature of the undertaking or the surrounding circumstances indicate—as they may undoubtedly do—that such was the evident intent of the parties.[2] Other cases, how-

[98] Emmens v. Elderton, 13 Com. B. 495. An appointment of an attorney "at a salary of $1,000 per year payable quarterly," and an acceptance "upon the terms offered" constitute a hiring for at least one year. Horn v. Western Land Association, 22 Minn. 233. See Beeston v. Collyer, 4 Bing. 309.

[99] Norton v. Cowell, 65 Md. 359, 57 Am. Rep. 331. See also Tallon v. Grand Portage Copper Min. Co., *supra*.

[1] Smith v. Theobald, 86 Ky. 141. See also Franklin Mining Co. v. Harris, 24 Mich. 115, where there was held to be evidence of an employment for a year; but *cf.* Kansas Pac. Ry. Co. v. Roberson, 3 Colo. 142, where under quite similar facts there was held not to be. See also Bauer v. Goldman, 45 Colo. 163.

[2] Palmer v. Marquette Rolling Mill Co., 32 Mich. 274; Franklin Mining Co. v. Harris, 24 Mich. 115; De Briar v. Minturn, 1 Cal. 450; Tatterson v. Suffolk Mfg. Co., 106 Mass. 56; McCullough Iron Co. v. Carpenter, 67 Md. 554; Orr v. Ward, 73 Ill. 318; Haney v. Caldwell, 35 Ark. 156; Prentiss v. Ledyard, 28 Wis. 131; Weidman v. United Cigar Stores Co., 223 Pa. 160, 132 Am. St. R. 727; Watson v. Gugino, 204 N. Y. 535, 39 L. R. A. (N. S.) 1090; Currier v. Ritter Lumber Co., 150 N. C. 694, 134 Am. St. R. 955; Bauer v. Goldman, 45 Colo. 163; Martin v. Ins. Co., 148 N. Y. 117; Finger v. Brewing Co., 13 Mo. App. 310; Evans v. Ry. Co., 24 Mo. App. 365.

Same: Central South African Ry. v. Cooke, [1904] Transv. L. R. 531.

So in Edwards v. Seaboard, etc., R. Co., 121 N. C. 490, it was held that a letter stating "you have been appointed general storekeeper * * * to take effect July 15th. Your salary will be $1,800 a year," did not constitute an employment for a year.

So in The Pokanoket, 84 C. C. A. 49, 156 Fed. 241, where, upon the employment of a marine engineer, it was agreed that his wages were to be $50 a month, it was held that there was no hiring by the month.

Thus in Frank v. Manhattan Maternity & Dispensary, 107 N. Y. Supp. 404, it was said, "It is too well settled in this state to require extended citation that 'a hiring at so much a day, week, month or year,

ever, declare it to be enough, even in the absence of such circumstances.[3]

Neither is the fact that in a contract, not fixing a definite time, there are stipulations for yearly accountings. "These provisions," said the court, "upon which the plaintiff relies as showing an agreement to continue the business from year to year, we think amount to no more than agreements for yearly accountings so long as the relation established by the contract shall continue." [4]

§ 604. Stipulation for "permanent" employment.—A contract for "permanent" employment is not necessarily one for a fixed and definite period. That ordinarily is "permanently" established which is designed to continue generally without present expectation of change.[5] Not more than that can usually be claimed for a "permanent" employment. It cannot ordinarily be interpreted as meaning an employment for life or for any fixed or certain period, but only an employment that

no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.' Martin v. Insurance Co., 148 N. Y. 117, 121; Wood, Master and Servant, § 136; Baker v. Appleton & Co., 107 App. Div. 358, aff'd 187 N. Y. 548; Outerbridge v. Campbell, 87 App. Div. 597; Fisher v. Sanchez & Hays Co., 44 App. Div. 629. Where a contract of hiring is general or indefinite in its terms, it is *prima facie* a hiring at will, and the burden rests upon the servant to prove that the hiring is for a definite term. Hotchkiss v. Godkin, 63 App. Div. 468."

[3] In Maynard v. Royal Worcester Corset Co., 200 Mass. 1, the court says that "the weight of authority is that this circumstance alone, [namely, "a hiring at so much a year, where no time is specified"] in the absence of any other consideration impairing its weight, will sustain a finding that there was a hiring for that period." Not all the cases cited, however, sustain the proposition, though several of them do. This seems to be the settled rule in England. Emmens v. Elderton, 4 H. L. C. 624; Buckingham v. Surrey & Hants Canal Co., 46 L. T. R. (N. S.) 885; Foxall v. International Land Credit Co., 16 L. T. R. (N. S.) 637. And in Canada: Armstrong v. Tyndall Quarry Co., 20 Manitoba, 254. This seems to be the rule in some American states. Beach v. Mullin, 34 N. J. L. 343; Young v. Lewis, 9 Tex. 73; Horn v. Western Land Ass'n, 22 Minn. 233; Kelly v. Carthage Wheel Co., 62 Ohio St. 598; Jones v. Vestry of Trinity Parish, 19 Fed. 59; Magarahan v. Wright, 83 Ga. 773; Odom v. Bush, 125 Ga. 184. See also Kellogg v. Citizens' Ins. Co., 94 Wis. 554; Cronemillar v. Duluth, etc., Co., 134 Wis. 248, and Kirk v. Hartman, 63 Pa. St. 97.

[4] Hoover v. Perkins Windmill Co., 41 Minn. 143.

[5] See as to "permanent" location or establishment of buildings or institutions. Texas, etc., R. Co. v. City of Marshall, 136 U. S. 393, 34 L. Ed. 385; Newton v. Commissioners, 100 U. S. 548, 25 L. Ed. 710; Mead v. Ballard, 7 Wall. (U. S.) 290, 19 L. Ed. 190; Harris v. Shaw, 13 Ill. 456; Bentley v. Smith, 3 Ga. App. 242.

shall continue indefinitely and until one party or the other shall desire, for some good reason, to change it.[6]

Under exceptional circumstances, however, it may be clear that something more was intended; and a contract, made as part of a settlement of a claim for personal injuries, to give the employee injured "steady and permanent" employment, has been construed as meaning that the latter should be employed as long as he was able, ready and willing to perform such services as the other party, a railroad company, might have for him to perform.[7]

Even though a contract for permanent employment exists, it may be terminated, without liability, for any misconduct, and the like, which would justify the discharge of a servant employed for a fixed term.[8]

[6] Bentley v. Smith, 3 Ga. App. 242, 59 S. E. 720. An employment as "permanent attorney" means merely a general as distinguished from an occasional or special employment. Elderton v. Emmens, 4 Com. B. 479. An employment as the "permanent" attorney of a corporation cannot be deemed to be for the life of the corporation or of the attorney, and is satisfied by a year's employment. Sullivan v. Detroit, etc., Ry. Co., 135 Mich. 661, 106 Am. St. R. 403, 64 L. R. A. 673. An appointment as the "permanent" rector of a church is not an employment for life but only until either party "upon fair and equitable terms and after reasonable notice" desires to terminate it. Perry v. Wheeler, 12 Bush (Ky.), 541. An agreement by an employer that the employment shall be permanent so long as the employee desires to make it so, in consideration of the employee using his best efforts to extend the business, does not mean that the employment is for life or any fixed period but only that it is to continue indefinitely and until one or the other should wish for some good reason to sever the relation. Lord v. Goldberg, 81 Cal. 596, 22 Pac. 1126, 15 Am. St. R. 82. Under a contract to give "permanent employment" as long as the employee wishes it and his services are satisfactory, he must announce how long he wishes it to continue, when he enters upon the employment. Hickey v. Kiam (Tex. Civ. App.), 83 S. W. 716.

In Carnig v. Carr, 167 Mass. 544, 57 Am. St. R. 488, 35 L. R. A. 512, a contract for permanent employment was held to be not for life, but so long as the employer had work of that sort to be done and the employee could do it satisfactorily. The question was suggested but not decided in Orient Ins. Co. v. Kemp, 29 Ill. App. 232.

[7] Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 51 Am. St. R. 289 (a case of settlement for personal injuries in consideration of "steady and permanent" employment).

To same effect: Louisville, etc., R. Co. v. Cox, 145 Ky. 667. In this case the court said: "In many of the cases where contracts of this sort have been sustained, the contract was to give employment until some event happened, as, for instance, as long as the servant may be able to do the work (Smith v. St. Paul R. Co., 60 Minn. 330), or until he gets well, or so long as the servant lives, or the employer is in business. Pierce v. Tenn. Coal Co., 173 U. S. 1, 43 L. Ed. 591; Yellow Poplar Lumber Co. v. Rule 106 Ky. 455; Nortonville Coal Co. v. Sisk, 145 Ky. 55." See also Harrington v. Kansas City Cable Co., 60 Mo. App. 223.

[8] Louisville, etc., R. Co. v. Cox, *supra*.

§ 605. Continuing under prior contract—Holding over.—A person who has been previously employed by the month, year or other fixed interval, and who is permitted without any new arrangement to continue in the employment after the period limited by the original employment has expired, will, in the absence of anything to show a contrary intention, be presumed to be employed until the close of the current interval and upon the same terms.[9]

This, however, is merely a presumption, and gives way before evidence that such a continuation was not intended.[10]

§ 606. Agency terminable for agent's incompetence.—As will be seen hereafter, there is an implied covenant on the part of every agent that he possesses and will exercise in the execution of his undertaking, a reasonable degree of skill, knowledge and ability. If, therefore, the agent, though employed for a definite period, proves not to possess that reasonable degree of skill, or, if possessing it, he neglects or refuses to exercise it, the principal may properly terminate his authority therefor without liability for a breach of the contract.[11] *A fortiori* would this be true where the covenant for competency was express instead of implied. Any other rule would, as can readily be seen, place

[9] Standard Oil Co. v. Gilbert, 84 Ga. 714, 8 L. R. A. 410; Adams v. Fitzpatrick, 125 N. Y. 124 (citing many other New York cases). Douglass v. Merchants' Ins. Co., 118 N. Y. 484, 7 L. R. A. 822, 23 N. E. 806; Vail v. Jersey Falls Co., 32 Barb. (N. Y.) 564; Grover & B. Sew. M. Co. v. Bulkley, 48 Ill. 189; Moline Plow Co. v. Booth, 17 Ill. App. 574; Kelly v. Carthage Wheel Co., 62 Ohio St. 598; Sines v. Superintendents of the Poor, 58 Mich. 503; Tallon v. Mining Co., 55 Mich. 147; Tatterson v. Suffolk Mfg. Co., 106 Mass. 56; Alba v. Moriarty, 36 La. Ann. 680; Lalande v. Aldrich, 41 La. Ann. 307; McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 Atl. Rep. 176; Weise v. Milwaukee County Supervisors, 51 Wis. 564; New Hampshire Iron Co. v. Richardson, 5 N. H. 294; Wallace v. Floyd, 29 Pa. St. 184, 72 Am. Dec. 620; Ranck v. Albright, 36 Pa. St. 367; Nicholson v. Patchin, 5 Cal. 474; Capron v. Strout, 11 Nev. 304; Beeston v. Collyer, 4 Bing. 309; Mansfield v. Scott, 1 Cl. & Fin. 319; Bullock v. The Wimmera, etc., Co., 5 Vict. L. R. 362.

[10] A travelling salesman, employed by the year, became by accident incapable of completing his year. Two months afterward he came back, worked a little about the store, "dunned" several of his former customers, but did not resume his former duties as traveler. *Held*, not enough to justify the presumption that the parties had assented to an arrangement for another term of the same length at the same salary. O'Connor v. Briggs, 182 Mass. 387.

[11] Peterson v. Drew, 2 Alaska, 560; Franklin v. Lilly Lumber Co., 66 W. Va. 164; Rosbach v. Sackett Co., 134 App. Div. 130; United Oil Co. v. Grey, 47 Tex. Civ. App. 10; Allcroft v. Adams, 38 Can. S. C. 365. The principal does not *necessarily* lose his right because he does not immediately discharge the agent upon discovering his incompetency. Rosback v. Sackett Co., *supra*. See also United Oil Co. v. Grey, *supra*.

the principal at the mercy of an incompetent agent, and compel him to suffer, perhaps for a long period, a constant and increasing loss and injury from the inefficiency of an agent who had impliedly, if not expressly, warranted himself to be competent.

If, however, at the time of the employment, the principal knew of the agent's incompetence, he could not discharge him on that ground, unless, at least, the incompetence were greater than the principal knew or had reasonable grounds to suppose. If a man knowingly chooses incompetent agents, he has no reason to complain if he receives incompetent service.

Brief periods of incompetency caused by illness or accident would not be within the rule; but if continued for an unreasonable period, and certainly if permanent, would justify a termination.[12]

§ 607. Agency may be terminated for agent's disobedience, dishonesty or other misconduct.—It is also an implied condition in every contract of agency, that the agent will not wilfully disobey or disregard the reasonable and lawful instructions of his principal; that he will not willingly permit to suffer his principal's interests committed to his care; that he will be honest and faithful, and will exercise reasonable care and diligence in the performance of his duties; and that he will not intentionally violate the established principles of morality or the laws of the land.[13]

If, therefore, the agent, though employed for a definite time violates this condition, the principal may discharge him therefor without incurring liability on account of such discharge.[14]

This rule is indispensable for the protection of the principal. The agency is created by him for the furtherance of his interests. It is *his* will that is to be executed, *his* object that is to be accomplished. Within reasonable and lawful limits, he has, and of necessity must have, the right to determine the time, the methods and the means to be employed. He has a right to have the business performed in his own way, if it be a

[12] Spindel v. Cooper, 46 N. Y. Misc. 569; Gaynor v. Jones, 104 N. Y. App. Div. 35; Johnson v. Walker, 155 Mass. 253, 31 Am. St. R. 550; Poussard v. Spiers, 1 Q. B. Div. 410; Dartmouth Ferry Co. v. Marks, 34 Can. S. C. 366; Storey v. Fulham Steel Works, 24 Times L. R. 89; Myers v. Sieradski, [1910] Transv. L. R. 869.

[13] Callo v. Brouncker, 4 C. & P. 518; Atkin v. Acton, 4 C. & P. 208; Bixby v. Parsons, 49 Conn. 483, 44 Am. Rep. 246; Parker v. Farlinger, 122 Ga. 315. Where an agent has been guilty of misconduct which justifies his discharge, the fact that he was guilty of no actual wrong intention is immaterial. Kelmar v. Souden, 2 N. S. Wales St. R. 348.

[14] Chicago, etc., Ry. Co. v. Bayfield, 37 Mich. 205; Dieringer v. Meyer, 42 Wis. 311, 24 Am. Dec. 415; Henderson v. Hydraulic Works, 9 Phila. (Penn.) 100; Urquhart v. Scottish Am. Mtg. Co., 85 Minn. 69, 88 N. W. 264.

the tendency is to injure or endanger, not to protect and promote, the interests of the latter. And it makes no difference in such a case that the agent gives his whole time and services to the business of his principal; his interest in the other business, though actually conducted by agents of his own, is hostile to his principal's interests.[22]

§ 610. ——— **Further illustrations.**—So where a clerk and traveling agent, employed by the year, assaulted his principal's maid servant with intent to ravish her, it was held that this was a good cause for his dismissal without notice, and that he was not entitled to recover wages for the time he had served.[23] This decision was based upon the ground that the agent by his misconduct had broken the implied agreement which formed part of the contract of hiring and gave the principal the right to rescind it. So where an agent seduced the minor daughter of his principal, it was held that this was a good cause for his discharge and that the principal might recoup against the agent's claim for wages, the damages sustained by the seduction.[24]

So if the agent proves to be wilfully or habitually disobedient or disregardful of his principal's reasonable instructions or directions;[25]

[22] Dieringer v. Meyer, 42 Wis. 311, 24 Am. Rep. 415 [citing Singer v. McCormick, 4 W. & S. (Pa.) 265; Jaffray v. King, 34 Md. 217; Adams Express Co. v. Trego, 35 Md. 47; Lacy v. Osbaldiston, 8 C. & P. 80; Read v. Dunsmore, 9 C. & P. 588; Nichol v. Martyn, 2 Esp. 732; Gardner v. McCutcheon, 4 Beav. 534; Ridgway v. Market Co., 3 Ad. & E. 171; Amor v. Fearon, 9 Ad. & E. 548; Horton v. McMurtry, 5 Hurl. & N. 667].

Thus where it appeared that a traveling salesman who had contracted his entire time to his employer, had been secretly taking orders for another firm, it was held that this would justify his discharge though employed for a fixed term. Orr v. Ward, 73 Ill. 318 [citing Ridgway v. Market Co., *supra;* Spotswood v. Barrow, 5 W. H. & G. 110].

In Day v. American Machinist Press, 86 N. Y. App. Div. 613, the fact that the plaintiff had taken steps to procure a copyright and had talked of the possibility of starting a rival business, was held not such disloyalty as would justify a dismissal. So merely planning to enter a rival business after his term expires is not enough. Myers v. Sullivan, 166 Mich. 193. See other cases cited in preceding section.

[23] Atkin v. Acton, 4 C. & P. 208.

[24] Bixby v. Parsons, 49 Conn. 483, 44 Am. Rep. 246; Wood v. Barker, 12 Western L. Reporter, 225.

A female performer in a circus who is guilty of such immoral conduct as to scandalize and demoralize the whole company, may be rightfully dismissed. Drayton v. Reid, 5 Daly (N. Y.), 442. So may a man servant who openly boasts of his improper familiarity with women. Denham v. Patrick, 20 Ont. L. R. 347.

[25] Jerome v. Queen City Cycle Co., 163 N. Y. 351; Peniston v. Huber Co., 196 Pa. 580; Forsyth v. McKinney, 56 Hun (N. Y.), 1; Ford v. Danks, 16 La. Ann. 119; Edwards v. Levy, 2 Fost. & Fin. 94; Callo v. Brouncker, 4 C. & P. 518. Where an agent wilfully sells his principal's goods for less than the fixed price or so conducts himself as to drive away his principal's customers, the principal is justified in discharging him. New-

or if he proves to be an habitual drunkard, or if he becomes a drunkard to such an extent as to incapacitate him for the performance of his undertaking,[26] he may properly be discharged. And so if he becomes a gambler upon the stock exchange.[27]

Further illustrations will be given in the note.[28]

man v. Reagan, 65 Ga. 512. See also a striking illustration in Von Heyne v. Tompkins, 89 Minn. 77, 5 L. R. A. (N. S.) 524.

In Costet v. Jeantet, 108 N. Y. App. Div. 201, where it was expressly agreed that the employee should perform a particular service, it was held improper to submit to the jury the question whether a command to do the same was reasonable. In Lindner v. Brewing Co., 131 Mo. App. 680, it was held that a refusal by superintendent to go into the bottling department until the foreman apologized to him was such disobedience as would authorize a discharge. In the following cases a failure to make reports as requested was held to justify a discharge. Macfarren v. Gallinger, 210 Pa. 74; Kenner v. Southwestern Oil Co., 113 La. 80; Armstrong v. Ins. Co. (Tex. Civ. App.), 112 S. W. 327. In Russell v. Inman, 79 N. Y. App. Div. 227, an employee's persistence in signing his own name to firm correspondence was held to warrant his discharge.

Where a question of reasonableness in a command is in doubt, it is for the jury to determine under all the facts of the case. In Smith v. Herring-Hall-Marvin Safe Co., 115 N. Y. Supp. 204, a written contract of general employment was made in New York; the plaintiff was ordered to go to Philadelphia and refused. On question of reasonableness of the order, held that the jury could hear parol evidence in regard to a custom in the defendant's business of transferring its agents. In Development Co. v. King, 88 C. C. A. 255, 161 Fed. 91, 24 L. R. A. (N. S.) 812, R was employed "to devote all his time * * * to service of the company and to the performance of such labors as the officers may direct." Prior to his contract R had been president of defendant company. R refused to obey an order to go to a remote part of Mexico and examine land, alleging it to be an unreasonable command. *Held*, that reasonableness was a question for the jury, and that the motive behind the command was immaterial provided the command itself was reasonable.

[26] McCormick v. Demary, 10 Neb. 515; Physioc v. Shea, 75 Ga. 466; Nolan v. Thompson, 11 Daly (N. Y.), 314; Bass Furnace Co. v. Glasscock, 82 Ala. 452, 60 Am. Rep. 748; Atkinson v. Heine, 134 N. Y. App. Div. 406; Mowbray v. Gould, 83 N. Y. App. Div. 225.

[27] Pearce v. Foster, 17 Q. B. Div. 536.

[28] In the following cases the facts were held to support a finding that the agent's misconduct warranted his dismissal. Standidge v. Lynde, 120 Ill. App. 418 (an attorney's clerk left his briefs one Saturday afternoon to play base ball); Wieselthier v. Cohen, 116 N. Y. Supp. 559 (the employee took and kept patterns belonging to his master); Highland Buggy Co. v. Parker, 27 Oh. Cir. Ct. 115 (a salesman sold below the prices fixed); Wright v. Lake, 48 Wash. 469 (negligence in twice allowing a team to run away); Alexander v. Potts, 151 Ill. App. 587 (disrespectful language to fellow employees and to customers); Shields v. Carson, 102 Ill. App. 38 (refusal of a salesman to return samples on request); Hutchinson v. Washburn, 80 N. Y. App. Div. 367 (overcharging in an expense account); Parks v. Tolman, 113 Mo. App. 14 (employer bargained

§ 611. ——— Limitations—Waiver—Condonation.—But it is not for every slight offense, or for every default causing no serious injury, that the agent is to be discharged. The question of the sufficiency of the reason in such a case is ordinarily one of fact and law to be determined from all the facts and circumstances of each particular transaction. The disobedience of the agent ought to be such as to show such a spirit of insubordination or of reckless and careless disregard for proper instructions as reasonably to indicate that he could not be relied upon for faithful and efficient service.[29]

Where the principal undertakes to discharge because of specific acts of misconduct, he must, it is held, act with reasonable promptness after their discovery; otherwise he will be deemed to have waived or condoned them.[30] On the other hand, where the principal undertakes

for services of an unmarried woman as stenographer. Regardless of reasons for the condition, marriage and concealment thereof was grounds for dismissal); McGeorge v. Ross, 5 Territories L. R. 116 (employee circulated false reports concerning the principal); Bonsquet v. Nellis, 35 Que. S. C. 209 (the employee slandered the master); Gourmany v. Manitoba Club, 1 West. L. R. 175 (club steward appropriated club supplies to his own use); Thomson v. Raworth, [1910] Transv. L. R. 782; Youngash v. Saskatchewan Engine Co., 16 West. L. R. 268; Walker v. John Hancock Mut. L. Ins. Co., —— N. J. L. ——, 79 Atl. 354; Thomas v. Houston, etc., Co., 146 Ky. 156 (wilful disobedience to orders).

[29] Shaver v. Ingham, 58 Mich. 649, 55 Am. Rep. 712.

Compare Jerome v. Cycle Co., *supra*. A single act of disobedience was held sufficient in Connell v. Gisborne Times Co., 28 New Zeal. L. R. 299; a single act of serious negligence in Baster v. London Printing Works, [1899] 1 Q. B. 901. There is no fixed standard by which the question may be decided in every case. It must often be left to the jury with proper instructions. Clouston v. Corry, [1906] App. Cas. 122. *Cf.* with Vidalia v. Mathews, 1 Ga. App. 56, where it is said that absence from employment may or may not justify a discharge. It is to be determined by considering the contract, the nature of the business and the effect upon the employer's interests.

Same: Brown v. Sessell, [1908] Transv. L. R. 1137.

In the following cases, the grounds for discharge were held insufficient. Porter v. Murphy, 7 Ind. Ter. 395 (M was retained as attorney by the Creek Nation; although his services were satisfactory, he was released because he was mentioned disparagingly in a report made by federal agents); Wood v. Ravenscroft, 135 Iowa, 346 (misrepresentations as to amount of salary paid by him to an assistant); Burt v. Catlin, 175 N. Y. 486 (fighting with a fellow servant which the jury found justifiable in view of the provocation); Beaucage v. Winnipeg Stone Co., 14 West. L. R. 575 (a single act of negligence which could be compensated by damages); Williams v. Hammond, 16 Manitoba, 369 (a single instance of disrespectful language provoked by the employer's conduct).

[30] In Batchelder v. Standard Elevator Co., 227 Pa. 201, 19 Ann. Cas. 875, it was held that intoxication was condoned by retention for a year thereafter; and likewise an act of misconduct in using his employer's time in outside service was condoned

to discharge, not because of specific acts of misconduct, but because of an inherent want of capacity or integrity, of which various acts of misconduct were evidence, it is held that this doctrine of condonation by mere delay is not applicable.[31]

§ 612. Even though employed for definite time, agent may be discharged subject to liability for damages.—It must also be kept in mind that even though there is an employment for a definite time, and no right to terminate it exists, such employment may in fact be terminated and the employee discharged before the expiration of that time, subject to the employer's liability to pay damages for the wrongful discharge. Mere employments do not, as has been seen, come within the rules governing irrevocable authority,[32] and, as will be seen hereafter, courts of equity do not ordinarily undertake to specifically enforce contracts of personal service or to enjoin their violation by the parties.[33]

b. Manner of Revocation.

§ 613. How the authority may be revoked.—Passing now to the question of how the authority, when revocable by the principal, may be revoked, it may be observed that the means by which the authority may be revoked are as various as the methods by which it may be conferred. It may be done by a solemn instrument under seal, or by a writing not under seal, or by a public and formal announcement or proclamation, or by a simple and private declaration. It may also be inferred from circumstances.

The precise mode to be adopted in any given case, or the mode which, having been adopted, shall be deemed sufficient in such case, is to be determined largely by considering the object with which an authority is revoked. A revocation is not effected by the mere operation

by lapse of one month before objection. In Reynolds v. Hart, 42 Colo. 150, the employee quit work for nine days; he resumed it with his employer's knowledge, and was discharged two days thereafter. The dereliction was held to have been condoned. And see Fitzpatrick Ginning Co. v. McLaney, 153 Ala. 586, 127 Am. St. R. 71.

[31] Kelly Plow Co. v. London (Tex. Civ. App.), 125 S. W. 974. In Glasgow v. Hood (Tenn. Ch. App.), 57 S. W. 162, the business manager of a girls' seminary was discharged for incompetency. The court said: "The fact that the employer bears with the incompetency or irregularities of such employee for a time, or for years, even, does not estop him from discharging such employee for such incompetency if it continues."

To same effect is United Oil Co. v. Gray, 47 Tex. Civ. App. 10.

[32] See *ante*, § 566. Frith v. Frith, [1906] App. Cas. 254.

[33] See *post*, §§ 642–644.

of the principal's will. That will must be expressed, and its expression must be brought to the attention of those whom it is desired to affect. This leads to the necessity of giving notice of the revocation, a question hereafter to be considered. It will be evident, too, that the mode adopted for accomplishing the revocation must not only be coextensive with the degree to which by length of time or widespread operations or publicity of appointment, the knowledge of the authority has been disseminated, but that it must also be adapted to the particular means by which such dissemination was effected.

It is to be kept in mind, also, that the question now is as to the *method* and not as to the *effect* of revocation,—how, for example, the authority may be terminated and not whether such a termination is a breach of contract which will entitle the agent to damages.

§ 614. By sealed instrument.—It is very customary to revoke a power of attorney under seal by an instrument executed with the same degree of solemnity, and the statutes of many states provide for giving constructive notice of the revocation of a recorded power of attorney by recording the instrument of revocation in the same office with the power. But a revocation under seal is not necessary even where the authority was conferred by deed. A parol revocation will suffice,[34] and particularly so when the seal upon the power to be revoked was superfluous, not being required by the nature of the act to be performed.[35]

§ 615. Express revocation not required.—Neither is it necessary that the revocation, in absence of a statute requiring it, should be in writing, or should be couched in any formal phrase. It is not necessary that the word "revoke," or other similar words, should be used.[36] A request to resign may amount to a revocation or discharge. Thus

[34] Brookshire v. Brookshire, 8 Ired. (N. C.) Law, 74, 47 Am. Dec. 341; Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 198.

Recording revocation.—As to the necessity of recording the revocation, see *post*, § 636.

[35] Brookshire v. Brookshire, *supra*.

[36] Jones v. Graham, etc., Transp. Co., 51 Mich. 539. Notice to an agent that he would "better let it go," is sufficient to revoke his authority to make a proposed purchase. First Nat. Bank v. Hall, 8 Mont. 341, 20 Pac. 638; or that the principal's wife will not sign a deed and therefore that the agent might just as well take the property off the market. Lacey v. Thomas, 164 Fed. 623.

Any language by which an employee is notified that his services are no longer required is sufficient to constitute a discharge from an employment. Ryan v. Mayor, 154 N. Y. 328; Sigmon v. Goldstone, 116 App. Div. 490. Refusing to accept the services except upon conditions violative of the contract is enough, Curtis v. Lehmann, 115 La. 40; or permitting only different and inferior work to be done, Wolf Cigar Stores v. Kramer, 50 Tex. Civ. App. 411.

the words "I am very sorry to have to ask you to resign your position" in a letter from a principal to his agent were held by the court to be a civil form but none the less a peremptory discharge of the agent, and that he rightly treated it as such.[37] So the demand by the principal of the return of a written power under which the agent was acting, and its surrender or withdrawal without any explanatory words or further instructions, amount to a revocation of the power.[38] On the other hand, a request to resign under circumstances showing that the employer desired a resignation but did not mean to force it, was held not to be a discharge.[39]

§ 616. Revocation may be implied.—So a revocation may be implied from the circumstances of the case, as where something has been done or has happened which makes the further continuance of the authority inconsistent or incompatible with the present situation of affairs. Thus if the powers conferred upon one agent are subsequently given to another, it will, in general, operate as a revocation of the authority of the first, as where a power is given to an agent to sell the interest of a principal in a vessel and the principal afterwards confers the same power upon the first agent jointly with another.[40]

[37] Jones v. Graham, etc., Transp. Co., *supra*.

[38] Kelly v. Brennan, 55 N. J. Eq. 423.

An unequivocal notice of revocation will be effective even though it may inadvertently ascribe the wrong date to the power or even refer to one which was not the one executed. Switzer v. Switzer, 57 N. J. Eq. 421.

[39] Reiter v. Standard Scale Co., 141 Ill. App. 427. A voluntary resignation accepted terminates the employment by mutual consent without liability on either side. New York L. Ins. Co. v. Thomas, 47 Tex. Civ. App. 150.

But where the employer wrote telling the employee in substance that his services were no longer required, saying that he presumed that the employee would prefer to retire by resignation and suggested that he send one and saying "It is hereby understood that the same is accepted," it was held not a voluntary resignation but a discharge. Cumberland, etc., R. Co. v. Slack, 45 Md. 161. In Wharton v. Christie, 53 N. J. L. 607, the court stood seven to six upon the question whether a resignation was voluntary or forced.

In Merrill v. Wakefield Rattan Co., 1 App. Div. 118, the employer requested a resignation and it was given unconditionally. It was held not a discharge, "Possibly, probably even, a refusal to resign would have been followed by a dismissal; but still there was no compulsion."

A mere complaint that the employee's services are very unsatisfactory is not *per se* a discharge. Caldwell Milling Co. v. Snively, 78 Kan. 556.

[40] Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 198; Schafer's Estate, 39 Pa. Super. 384. So where property is put into the hands of an agent with instructions to make certain disposition of it, this authority will be revoked by subsequent directions to deliver the property to some one else. Keyl v. Westerhaus, 42 Mo. App. 49.

So a revocation will be implied if the agent is afterwards authorized to deal with the subject-matter in an entirely different capacity, as where an agent authorized to sell land is subsequently made trustee to hold it for the benefit of a third person.[41] And so, where the principal subsequently authorizes an act inconsistent with the execution of the first power, as where having given authority to dismiss a suit he subsequently gives another authorizing its continuance.[42]

§ 617. ——— **Reducing rank, changing duties, etc.**—So a revocation or discharge may be implied where the principal substantially reduces the rank, radically changes the nature of the duties, or insists upon the performance of materially greater or more onerous services, as compared with the rank, duties or services contemplated by the original contract of employment.[43] Not so, however, where the change is immaterial, casual, or such as may fairly be deemed to have been within the terms of the employment.[44]

§ 618. ——— **Acts not working a revocation.**—But an employment by written contract to do a specified thing is not necessarily revoked by a subsequent general employment to attend to all the principal's business;[45] nor is a power of attorney executed by a widow and heirs at law of a decedent empowering the agent to complete an engagement entered into by the decedent, necessarily revoked by a subsequent grant of administration to the widow;[46] nor will a second power given to one of two previously appointed agents necessarily revoke the authority of the other, where the second appointment confers no new or additional authority in reference to the subject-matter of the agency;[47] nor will an authority given by a principal to an agent to collect a sum of money, be necessarily revoked by the mere authorization of another agent to receive the same sum.[48]

So where the present holder of a note allowed the former owner to continue to receive payments thereon from the maker as they fell due,

[41] Chenault v. Quisenberry (Ky.), 56 S. W. 410, 22 Ky. L. Rep. 79, 57 S. W. 234. But authority to sell land is not necessarily terminated by the fact that the principal has given the agent an option to buy it himself. Lipscomb v. Cole, 81 Mo. App. 53.

[42] Aiken v. Taylor (Tenn. Ch.), 62 S. W. 200.

[43] See Marx v. Miller, 134 Ala. 347; Cooper v. Stronge, 111 Minn. 177, 27 L. R. A. (N. S.) 1011, 20 Ann. Cas. 663; Kramer v. Wolf Cigar Stores Co., 99 Tex. 597; Loos v. Walter Brewing Co., 145 Wis. 1, 140 Am. St. R. 1052.

[44] See Excelsior Needle Co. v. Smith, 61 Conn. 56; Lathrop v. Printing Co. (R. I.), 30 Atl. 964; Wright v. Graves Land Co., 100 Wis. 269.

[45] Smith v. Lane, 101 Ind. 449.

[46] Jones v. Commercial Bank, 78 Ky. 413.

[47] Cushman v. Glover, 11 Ill. 600, 52 Am. Dec. 461.

[48] Davol v. Quimby, 11 Allen (Mass.), 208.

the authority of the maker to make further payments in the same way is not revoked merely by putting the note in a bank for collection, as the authority so given and exercised was entirely independent of the possession of the note.[49]

§ 619. ——— By disposing of subject-matter.—Where the principal, before the execution of the authority by the agent disposes of the subject-matter upon which the authority was to operate, an intention to revoke the power will ordinarily be implied. Thus if a principal authorizes an agent to sell his real estate,[50] or his interest in a patent,[51] but before the agent has found a purchaser the principal sells the same himself, there is nothing left to support the agency and—questions of notice not being involved—revocation will be implied.[52] In one such case, the court said: "That act [the sale by the principal], of itself stripped her agent of all power to make another contract in derogation of that entered into by his principal. The agent could have no greater authority than the principal, and the latter having disposed of the subject-matter of the agency, the power of the agent to act any further in the premises was at once ended." [53]

§ 620. ——— By dissolution of partnership or corporation.—So where a firm [54] or corporation [55] which has appointed an agent, is subsequently dissolved, the dissolution will ordinarily operate as a revocation of the power (though it does not usually terminate the contract of employment); [56] but a mere change in the name of the firm, where the new firm is composed of the same members as the old does not operate

[49] Enright v. Beaumond, 68 Vt. 249.

[50] Gilbert v. Holmes, 64 Ill. 548; Ahern v. Baker, 34 Minn. 98; Mott v. Ferguson, 92 Minn. 201; White v. Benton, 121 Iowa, 354; Kelly v. Brennan, 55 N. J. Eq. 423; Hallstead v. Perrigo, 87 Neb. 128; Frazier v. Cox (Ky.), 125 S. W. 148; Lowell v. Hessey, 46 Colo. 517; Wallace v. Figone, 107 Mo. App. 362. As to the necessity of notice of the sale, see *post*, under head of Notice.

[51] Walker v. Denison, 86 Ill. 142. (This was called a termination "by operation of law," but it was not that in any proper sense. The agent knew of the sale, and the action was to get back from the agent's wife property which had been conveyed to her by the persons to whom the agent had undertaken to sell.)

[52] Bissell v. Terry, 69 Ill. 184. (Here all parties knew of the sale.) Same where for example he sells a judgment which his attorney would otherwise have authority to enforce and collect. Caldwell v. Bigger, 76 Kan. 49.

[53] Kelly v. Brennan, 55 N. J. Eq. 423, *supra*.

[54] Schlater v. Winpenny, 75 Penn. St. 321; Whitworth v. Ballard, 56 Ind. 279; Meyer v. Atkins, 29 La. Ann. 586; Vaccaro v. Toof, 9 Heisk. (Tenn.) 194.

[55] Salton v. New Beeston Cycle Co., [1900] 1 Ch. 43.

[56] Brace v. Calder, [1895] 2 Q. B. 253; Tiffin Glass Co. v. Stoehr, 54 Ohio St. 157; Globe Ins. Co. v. Jones, 129 Mich. 664; Kinsman v. Fisk, 37 N. Y. App. Div. 443; Spader v. Mfg. Co., 47 N. J. Eq. 18. But see Louch-

to revoke an agency conferred upon it, the identity remaining the same.[57]

§ 621. ——— By severance of a joint interest.—Upon similar grounds, it is held that where two or more principals jointly appoint an agent for the transaction of some business in which they are jointly interested, a severance of this joint interest will operate to revoke the agency.[58]

§ 622. ——— Subagent's authority terminated by termination of authority of principal agent.—The termination of the authority of an agent terminates also the authority of subagents who derive their authority from him, and this is true even though he may have been expressly authorized to appoint them if they were appointed as his agents.[59]

c. Notice of Revocation.

§ 623. Notice usually necessary.—In order to render the termination of the authority by the act of the principal effectual, notice of it must, as a general rule, be given to those parties who are to be affected by it; and these parties are, usually, the agent himself, and those persons who from knowledge of his authority or from previous dealings with him, would be likely to deal with him in good faith in ignorance of the termination and upon the strength of the previous authority. It is necessary therefore to consider when notice of termination of the agent's authority must be given (1) to the agent, (2) in some cases to subagents, and (3) to third persons.

§ 624. 1. To the agent—When notice must be given to him.—Notice of the termination of the agent's authority by the act of the principal must, in general, be given by the principal to the agent, and, in general, the revocation will not, as between the principal and the agent, become operative against the agent until such notice is given to him.[60] In some cases, indeed, as in those in which revocation can not

heim v. Printing Co., 12 Pa. Super. 55; People v. Ins. Co., 91 N. Y. 174; Lenoir v. Linville Impr. Co., 126 N. C. 922.

[57] Billingsley v. Dawson, 27 Iowa, 210.

[58] Rowe v. Rand, 111 Ind. 206.

[59] Union Casualty Co. v. Gray, 52 C. C. A. 224, 114 Fed. 422.

[60] Weile v. United States, 7 Ct. of Cl. 535 (notice to third person only held not enough); Jones v. Hodgkins, 61 Me. 480 (commission agent not liable in trover for selling goods after intended revocation but before notice); Best v. Gunther, 125 Wis. 518, 110 Am. St. R. 851, 1 L. R. A. (N. S.) 577; Spinks v. Georgia Granite Co., 114 La. 1044.

Where the parties had stipulated for "immediate notice" to the agent, it was held that this meant notice within a reasonable time, taking all the circumstances into account, and

well be manifested by conduct, a notice of revocation seems to be the only method open for the accomplishment of the object. Where the authority terminates by mere lapse of time, or upon the accomplishment of the object, or upon any other fixed or certain event, notice, of course, is unnecessary, as the agent knows these things as well as the principal; but the agent can not be presumed to know, until in some manner he has been notified, of the uncertain and unforeseen act of the principal in terminating the authority by his own act, and before it would otherwise have terminated. Hence, notice in some form must be given to the agent. If it be given by letter, it takes effect from the time the agent receives the letter, and not from the time of its mailing.[61] But after revocation of the agent's authority, the principal is not bound, as between himself and the agent, to notify the latter of his dissent from acts which the agent thereafter assumes to do by virtue of the original authority.[62]

§ 625. ——— **When notice to agent not required.**—There can, of course, however, be no necessity of formally notifying the agent of facts which he already knows.[63] He may, perhaps, know them before the principal does, or know them better than anyone else. There can be no necessity of notifying him of the happening of events, which like death and bankruptcy, operate *ipso facto* to terminate an agency.[64] Neither can there be any necessity of notifying him of events which by the express or implied terms of his employment he can be said to have assumed the risk of knowing. Thus it has been held in many cases—questionably, it is believed, unless it can be put upon the ground of an implied term in the employment[65]—that a real estate broker's authority to sell is terminated, *ipso facto* and without notice, by a sale made by the principal in person, or through another broker.[66]

that the jury were to determine whether this requirement had been satisfied. Tuffree v. Binford, 130 Iowa, 532.

[61] Robertson v. Cloud, 47 Miss. 208; Sayre v. Wilson, 86 Ala. 151. A notice sent to and received at the right place takes effect on such receipt, though the agent by reason of absence did not see it till later, if the sender was ignorant of his absence. Rees v. Pellow, 38 C. C. A. 94, 97 Fed. 167.

A notice given to the agent through another agent of the principal authorized to give it, is sufficient. Freeland v. Hughes, 109 Ill. App. 73.

[62] Kelly v. Phelps, 57 Wis. 425.

[63] Palms v. Howard, 129 Ky. 668.

[64] See *post*, §§ 701–3.

[65] See *post*, Book V, Chap. III, Real Estate Brokers.

[66] Ahern v. Baker, 34 Minn. 98; White v. Benton, 121 Iowa, 354; Hallstead v. Perrigo, 87 Neb. 128; Wallace v. Figone, 107 Mo. App. 362; Kelly v. Brennan, 55 N. J. Eq. 423; Teal v. McKnight, 110 La. 256; Smith v. Fowler, 57 Tex. Civ. App. 356; Frazier v. Cox (Ky.), 125 S. W. 148; Mott v. Ferguson, 92 Minn. 201.

Contra: Woodall v. Foster, 91 Tenn. 195, especially where there is a pro-

§ 626. ——— **Constructive notice.**—It has also been held that the registry of a deed, made by the principal upon such a sale, is constructive notice to the agent under a statute which provides that recording shall be "notice to all persons of the existence of such deed." [67] This would seem to be doubtful except for such a statute.

§ 627. **2. To subagents—When notice must be given to subagent.** Where the subagent derives his authority solely from the agent, no notice is required to be given by the principal to the subagent of the revocation of the agent's authority; but where the subagent was appointed by and with the authority of the principal, he is, as has been seen, the agent of the principal, and notice should be given to him of the revocation of his authority.[68]

§ 628. **3. To third persons—Where authority was general.**—With respect of third persons, a distinction is made between the case in which the authority was a "general" or apparently continuing one, and the case in which the authority was "special" or confined to the doing of some specific act, and therefore ordinarily exhausted when that act is done. Where a general authority is once shown to have existed, it may be presumed to continue until it is shown to have been revoked,[69] and persons who have dealt with the agent as such, or who have had knowledge of his authority and are therefore likely to deal with him, may very properly expect that if the authority be withdrawn, reasonable and timely notice of that fact will be given and they may therefore lawfully presume, in the absence of such notice, that the authority still continues.

General rule.—It is therefore the general rule that the acts of a former general agent within the scope of his original authority will, notwithstanding its revocation, continue to bind the former principal to those parties to whom the agent has been thus accredited and who deal with him in good faith in reliance upon his former authority, until due notice of its revocation [70] has been given in the manner required

vision requiring notice. Reams v. Wilson, 147 N. Car. 304.

[67] Donnan v. Adams, 30 Tex. Civ. App. 615.

[68] Story on Agency, § 469.

[69] Insurance Co. v. McCain, 96 U. S. 84, 24 L. Ed. 653; McNeilly v. Insurance Co., 66 N. Y. 23.

[70] Wheeler v. McGuire, 86 Ala. 398, 2 L. R. A. 808; Stockton Ice Co. v. Argonaut Land Co. (Cal.), 56 Pac. 885; Bourke v. Van Keuren, 20 Colo. 95; Fellows v. Hartford, etc., Co., 38 Conn. 197; Feldmann v. Shea, 6 Idaho, 717; Diversy v. Kellogg, 44 Ill. 114; Murphy v. Ottenheimer, 84 Ill. 39; Meyer v. Hehner, 96 Ill. 400; Meeker v. Mannia, 162 Ill. 203; Longworth v. Conwell, 2 Blackf. (Ind.) 469; Ulrich v. McCormick, 66 Ind. 243; North Chicago, etc., Mill Co. v.

It is true that some of these cases arose between the principal and third persons only, though the language used is general. For further discussion, see *Real Estate Brokers* in the chapter on Brokers.

by the law for the class of persons to which they belong. But this rule has no application where the act done is beyond the scope of the agent's former authority, and particularly so where the act is in excess of the power which the agent himself claimed to possess.[71]

Notice would not be necessary of the revocation of the authority of a subagent, unless he was so appointed with the principal's consent as to make him the principal's agent.[72]

§ 629. ——— Where authority was special.—Where, however, the authority was special or limited to the performance of a single act, a different rule applies. As has been seen, an authority created for the performance of a specific act exhausts itself in the accomplishment of the purpose for which it was created. No such presumption of continuity can arise from the existence of authority for the performance of a single act, as naturally arises from the existence of authority for a continuous course of dealing.

General rule.—It is therefore the general rule that no notice is required to be given to third persons of the termination of the authority of a special agent after the special authority has been executed.[73]

This rule must, however, be subject to the considerations already considered in an earlier chapter.[74] It is possible that even a special

Hyland, 94 Ind. 448; Springfield, etc., Co. v. Kennedy, 7 Ind. App. 502; Baudouine v. Grimes, 64 Iowa, 370; Hancock v. Byrne, 5 Dana (Ky.), 513; Gragg v. Home Ins. Co., 32 Ky. L. R. 988, 107 S. W. 322; Girard v. Hirsch, 6 La. Ann. 651; Harris v. Cuddy, 21 La. Ann. 388; Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. R. 436; Packer v. Hinckley Locomotive Works, 122 Mass. 484; Wright v. Herrick, 128 Mass. 240; Planters' Bank v. Cameron, 3 Sm. & M. (Miss.) 609; Lamothe v. St. Louis, etc., Co., 17 Mo. 204; Beard v. Kirk, 11 N. H. 397; Capen v. Pacific Mut. Ins. Co., 1 Dutch. (N. J.) 67, 64 Am. Dec. 412; McNeilly v. Ins. Co., 66 N. Y. 23; Claflin v. Lenheim, 66 N. Y. 301; Barkley v. Rensselaer, etc., Co., 71 N. Y. 205; Munn v. Commission Co., 15 Johns. (N. Y.) 44; Marsh v. Gilbert, 4 Thomp. & Cook (N. Y.), 259; Marshall v. Reading F. Ins. Co., 78 Hun (N. Y.), 83, aff'd 149 N. Y. 617; Rice v. Isham, 4 Abb. App. (N. Y.) 37; Clover Condensed Milk Co. v. Cushman, 31 N. Y. App. Div. 108; Stevens v. Schroeder, 40 N. Y. App. Div. 590; Vogel v. Weissmann, 23 N. Y. Misc. 256; Lynch v. Rabe, 28 N. Y. Misc. 215; Braswell v. American L. Ins. Co., 75 N. C. 8; Aetna Ins. Co. v. Stambaugh-Thompson Co., 76 Ohio, 188, 118 Am. St. R. 834; Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634; Hatch v. Coddington, 95 U. S. 48, 24 L. Ed. 339; Insurance Co. v. McCain, 96 U. S. 84, 24 L. Ed. 653; Johnson v. Christian, 128 U. S. 374, 32 L. Ed. 412.

Termination by lapse of time.—Where authority of a general agent terminates by lapse of time for its continuance, principal must give notice to those who did not know of the limit fixed. Willis v. Joyce, 27 Times L. R. 388, 16 Com'l Cas. 190.

[71] Baudouine v. Grimes, 64 Iowa, 370.

[72] See *ante*, §§ 622, 627; *post*, § 675.

[73] Watts v. Kavanagh, 35 Vt. 34; Strachan v. Muxlow, 24 Wis. 21.

[74] See *ante*, § 262.

agency may be accompanied by such generality in its creation or its recognition as to reasonably warrant an inference of its continuing character.

§ 630. ——— Where, however, the principal seeks to revoke the authority before its execution, different considerations apply. Such a case stands practically upon the same footing as any other. If the special agent has been accredited to a particular person, that person should ordinarily be notified: if the principal knows that negotiations have been begun with a particular person, the same requirement would ordinarily exist; in other cases, the principal must doubtless do whatever he reasonably should, if any thing, to prevent third persons who are charged with the duty of protecting themselves, in dealing with agents, from being misled by acting upon a power withdrawn.[75]

Third persons are not, in this case, entitled to the same consideration as in the case of the so called general agency. The situation presupposes the absence of a habit or course of dealing, and there is nothing ordinarily to qualify the general rule that those who deal with an alleged agent must look to his authority.

§ 631. ——— Moreover, as there may be express, there may also doubtless be implied conditions read into the authority even so far as third persons are concerned. Thus it is held that a third person contracting for the purchase of land through an agent acquires no rights against the principal if the latter has previously sold the land in person or through another agent even though the third person and the agent were both ignorant of the fact.[76] In a leading case,[77] the court said: "This is a case of special agency, and there is nothing in the case going to show that the defendant [the principal] would be estopped from setting up a revocation of the agency prior to the sale by Fairchild [the agent]. A revocation may be shown by the death of the principal, the destruction of the subject-matter, or the determination of his estate by a sale, as well as by express notice. The defendant had a right to employ several agents, and the act of one in making a sale would preclude the others without notice, unless the nature of

[75] "Where it appears that a person has been constituted a special agent to do a particular thing, and his authority to do this particular thing has been revoked before he acts in the matter, the principal will not be bound by a subsequent performance of the act, where the principal has not held the agent out as having the authority notwithstanding the revocation, and has not subsequently ratified the act." Florida Central R. Co. v. Ashmore, 43 Fla. 272.

[76] Ahern v. Baker, 34 Minn. 98; Kelly v. Brennan, 55 N. J. Eq. 423.

[77] Ahern v. Baker, *supra*.

his contract with them required it. In dealing with the agent the plaintiff took the risk of the revocation of his agency."

The collocation here, as though they were of equal rank, of the death of the principal, the destruction of the subject-matter, perhaps by a *vis major*, and a sale by the act of the principal, is certainly questionable. If the case is sound it would seem that the true ground must be either the one first suggested by the court that, the authority having been revoked by the sale, before the third person knew of the former authority, there was nothing to estop the principal from setting up the prior revocation against him, or, as suggested in the last clause of the quotation, that in all dealings with a mere real estate broker there is an implied condition that all negotiations through him are subject to the contingency of a prior sale, either by the principal in person or through another broker.

It will be observed also in this case that no notice had been given to the agent.

§ 632. ——— **Theory of necessity of notice.**—Revocation or other termination of authority is usually a matter of intention and fact, rather than a matter of form. Notice to third persons is not *per se* an indispensable part of it. The necessity of notice to them arises from the doctrine of estoppel. The principal for his own purposes has conferred authority and done something to cause it to appear. He wishes and intends that it shall be relied and acted upon. Otherwise, it would be of no avail. He now does or has done something by which or upon which he desires and intends the authority to terminate. If, however, notwithstanding this, what he did or caused respecting the creation of the authority is likely to lead reasonable men, ignorant of the change of fact or intention, reasonably to conclude that the authority still continues and to act upon that conclusion in such wise as to prejudice them if the conclusion be unfounded, he owes them a duty to take reasonable precautions to prevent that prejudice to them. If no such prejudice can arise, he owes no such duty.

§ 633. ——— Stated in a different form, after the authority of the agent has in fact terminated, the former principal can not be bound by his acts, unless the person seeking to bind him can work an estoppel against him which will prevent the principal from showing the fact of the termination. What are the elements of such an estoppel? 1. A representation. 2. A reasonable reliance upon it. In order to work an estoppel, then, the principal must have made some representation, by word or conduct, which reasonably led the other party to conclude that an authority once created by the principal still existed

at the time in question; and the other party must have acted upon that representation in such wise that he will now be prejudiced if it be not true. What was the representation in question? Was it the representation of authority in the agent to do a single act, or at a particular time only? If so, it warrants no inference of authority for other acts or at other times. Was it a representation of an exclusive authority to do the act, or did it leave it open for the principal to do the act in person or to authorize it to be done by some other agent also? Was the authority created so long ago that no reasonable man could properly infer that it still existed, or was it so recent that a reasonable man would properly conclude that it must be still in force? Was it apparently a general and continuing power which may fairly be deemed still operative? Was it, perhaps, a representation so made to the particular person that he might fairly conclude that it was to continue until he was notified to the contrary? In order to support an estoppel, the representation must have been of an authority which in the fair judgment of a reasonable man was still operative at the time in question.

§ 634. Notice—How given—What sufficient.—What shall be deemed sufficient notice in any case, and how it shall be given, are questions concerning which it is impossible to lay down any general rule, which shall be both comprehensive and precise. It is evident that these questions must be largely determined by the facts and circumstances of each particular case. The end to be aimed at must be a method reasonably adapted to reach the classes of persons entitled to receive notice.

The case is often said to be analogous to that of the dissolution of a partnership, and to be governed by the same rules.[78] To all persons who have had actual dealings with the agent, involving the giving of credit in reliance upon the existence of the authority,[79] actual notice must be given,[80] or such knowledge of the fact must be brought home to them as would be sufficient to put an ordinarily prudent man upon inquiry.[81] To persons who have had no such actual dealings, notice

[78] Claflin v. Lenheim, 66 N. Y. 301, 305; Lynch v. Rabe, 28 Misc. 215; Stevens v. Schroeder, 40 App. Div. 590.

[79] In partnership, those only are entitled to actual notice, under the head of former dealers or customers who have given credit to the firm. Vernon v. Manhattan Co., 22 Wend. (N. Y.) 183; Clapp v. Rogers, 12 N. Y. 283; Austin v. Holland, 69 N. Y. 571, 25 Am. Rep. 246; Askew v. Sillman, 95 Ga. 678; Merritt v. Williams, 17 Kan. 287.

[80] Claflin v. Lenheim, *supra;* Lynch v. Rabe, *supra;* Stevens v. Schroeder, *supra;* Braswell v. American L. Ins. Co., 75 N. C. 8; Fellows v. Hartford, etc., Co., 38 Conn. 197.

[81] See Williams v. Birbeck, Hoffman (N. Y.), Ch. 359. Notice that the principal has appointed some one

may be given by publication in some newspaper of general circulation in the place in which the business is carried on.[82] Notice by publication is sufficient even to those who have had dealings with the agent if it can be shown that they actually received it; otherwise not.[83]

§ 635. ——— The notice need not, of course, be in any particular form, but it must be clear and unequivocal; it need not come directly from the principal, but it must at least come through an apparently authentic channel, so as to fairly put the other party on inquiry.[84]

Where notice by publication or other similar means is all that the law requires it is, of course, immaterial that the party now claiming did not in fact know of the revocation. He is bound to know that the authority may be so revoked and must govern himself accordingly.[85]

§ 636. When evidence of agency recorded, revocation should be recorded.—It is a common provision of the statutes of the various

else to do the act, where authority to two would be inconsistent, would be enough (Clark v. Mullenix, 11 Ind. 532); but mere knowledge that the principal's store has burned is not necessarily enough (Claflin v. Lenheim, 66 N. Y. 301); nor is a notice stamped upon the face of a notice to pay a life insurance premium to "remit direct to the home office" conclusive. McNeilly v. Continental Life Ins. Co., 66 N. Y. 23.

[82] Notice by publication is by no means a *sine qua non*. It is a method *prima facie* sufficient, but there may be no newspaper available, or the only one available may be of such limited circulation or otherwise so peculiar as not to make its use a reasonable method.

[83] See Haynes v. Carter, 12 Heisk. (Tenn.) 7, 27 Am. Rep. 747; Rose v. Coffield, 53 Md. 18, 36 Am. Rep. 389; Robinson v. Floyd, 159 Pa. 165; Union Bank v. Lumber Co., 70 W. Va. 558, 41 L. R. A. (N. S.) 663.

[84] Plaintiff being dissatisfied with the conduct of his agent C, instructed D to act in the settlement of a certain matter with defendant. D went to defendant, showed him his authority to represent plaintiff and notified defendant to settle with him and not with C. Nevertheless defendant settled with C. *Held*, not binding on plaintiff. Johnson v. Youngs, 82 Wis. 107.

C, in Montana, had been buying wool for H of Chicago. Having an opportunity to buy a quantity at a certain price, C telegraphed H, saying that otherwise the wool would "go Boston" and "give your opinion quick." H telegraphed back "No money in it; better let it go to Boston." Nevertheless C bought it at a slight reduction from price named and drew on H for the price. Plaintiff a Montana bank bought the draft. In an action to recover of H *held*, that C's authority to buy was revoked by the telegram of H. First Nat. Bank v. Hall, 8 Mont. 341.

Notice given by another agent of the principal authorized to give it, is sufficient. Freeland v. Hughes, 109 Ill. App. 73.

Notice that the principal has done some act which works a revocation, is enough. Faraday Coal Co. v. Owens, 26 Ky. L. Rep. 242, 80 S. W. 1171.

Where the authority of the agent is revoked within the presence and hearing of the other party, no further or formal notice need be given to the latter. Byrne v. Realty Co., 120 N. Y. App. Div. 692.

[85] See Shuey v. United States, 92 U. S. 73, 23 L. Ed. 697.

states, that powers of attorney or other instruments conferring authority upon the agent to deal with the principal's real estate, shall or may be recorded in the proper recording office of the county or district in which the land is situated.[86] These statutes commonly provide also that any instrument revoking such a power shall or may be recorded in the same office, and make such recording in either case constructive notice of the facts which the record discloses. Where such statutes prevail, the recording of a revocation of the agent's authority is notice to all who may subsequently have occasion to deal with him;[87] and where the statute is imperative, the revocation cannot be given effect in any other way, unless by express notice.[88]

§ 637. Notice of revocation should be unequivocal.—But whatever may be the form adopted, the notice should be unequivocal and not leave the parties in doubt as to the principal's intentions. Any ambiguity or uncertainty in such a case should be construed most strongly against the principal, in whose power it lay to prevent such a result.

As was said by a distinguished judge in a case involving the revocation of an express power to draw bills, "Nothing could be more inconsistent with that candor and good faith which ought to mark the transactions of mercantile men, than to favor the revocation of an explicit contract on the construction of a correspondence nowhere avowing that object. It was in the defendant's power to have revoked his assumption, at any time prior to its execution; but it was incumbent on him to have done so avowedly, and in language that could not be charged with equivocation."[89]

[86] See Williams v. Birbeck, 1 Hoff. N. Y. Ch. 359.

The statute of Michigan, for example, provides that "No letter of attorney or other instrument so recorded, shall be deemed to be revoked by any act of the party by whom it was executed, unless the instrument containing such revocation be also recorded in the same office in which the instrument containing the power was recorded." How. Stats., § 5692.

[87] Arnold v. Stevenson, 2 Nev. 234. But in Best v. Gunther, 125 Wis. 518, 110 Am. St. R. 851, 1 L. R. A. (N. S.) 577, it is held that under a statute similar to that above quoted, a power of attorney is not required to be recorded, and that though it be recorded, a recorded revocation is not constructively notice of that fact. A provision that a revocation shall not be operative in a given case unless recorded is held not equivalent to a declaration that it shall be operative if recorded.

[88] Gratz v. Land, etc., Imp. Co., 82 Fed. 381, 53 U. S. App. 499, 27 C. C. A. 305, 40 L. R. A. 393.

[89] Johnson, J., in Lanusse v. Barker, 3 Wheat. (U. S.) 101, 143, 4 L. Ed. 343. See also Hatch v. Coddington, 95 U. S. 48, 56, 24 L. Ed. 339; Claflin v. Lenheim, 66 N. Y. 301; McNeilly v. Ins. Co., 66 N. Y. 23.

§ 638. How sufficiency of notice determined.—Where the circumstances are controverted, or where notice is sought to be inferred as a fact from circumstances, and more than one inference can reasonably be drawn from the facts, the question is for the jury;[90] they must determine as a question of fact whether the party claiming against the principal did or did not have notice of revocation; and if there be some evidence of this fact, it must be submitted to the jury. Where, however, the facts are undisputed, and the only question is whether they amount to constructive notice, or are sufficient to put the party upon inquiry, the question is not for the jury, but for the court.[91]

§ 639. Burden of proof as to notice.—Where authority has existed, but the principal claims that it was revoked and proper notice given, the burden of proof is upon the principal to establish it.[92]

2. Public Agency.

§ 640. Statutory agency not revocable at will of principal.—Where the state requires the creation and maintenance of an agency to subserve some purpose in which its citizens may have an interest, the authority of an agent appointed in pursuance of such a requirement cannot be revoked at the mere will of the principal, unless for the appointment of another in his place, while the exigency continues against which the statute was intended to provide.[93]

Thus where a statute required any foreign insurance company doing business within the state, to appoint an agent within the state upon whom process against the company might be served, it was held that the company having appointed such an agent, could only revoke his authority upon the appointment of another. Said the court: "Taking into consideration its evident purpose, and its utter futility if a company appointing an agent to receive service could by any act, known only to the agent and itself, withdraw his powers, it must be held that this appointment was irrevocable, unless the revocation might be made

[90] Perrine v. Jermyn, 163 Pa. 497; Grauley v. Jermyn, 163 Pa. 501.

[91] Claflin v. Lenheim, 66 N. Y. 301.

[92] Perrine v. Jermyn, 163 Pa. 497; Grauley v. Jermyn, 163 Pa. 501; Foddrill v. Dooley, 131 Ga. 790.

[93] See, in the case of insurance companies required to appoint an agent to receive service of process. Gibson v. Manufacturers' Ins. Co., 144 Mass. 81; Michael v. Mutual Ins. Co., 10 La. Ann. 737; Groel v. United Electric Co., 69 N. J. Eq. 397; Pervangher v. Union Casualty Co., 81 Miss. 32; Magoffin v. Mutual Reserve F. L. Ass'n, 87 Minn. 260, 94 Am. St. R. 699; Woodward v. Mutual Reserve F. L. Ass'n, 178 N. Y. 485, 102 Am. St. R. 519; Biggs v. Mutual Reserve F. L. Ass'n, 128 N. C. 5.

But there may be revocation so far as non-residents are concerned. Hunter v. Mutual Reserve L. Ins. Co., 184 N. Y. 136, 30 L. R. A. (N. S.) 677, 6 Ann. Cas. 291, aff'd 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686.

by the appointment, duly notified upon the records, of a new agent, who should be competent to receive service of process in regard to any controversies arising upon contracts previously entered into." [94]

C. Renunciation by the Agent.

§ 641. General rule—Agent may renounce at any time.—It has already been seen that agency depends usually upon the assent of both parties. It has been seen also that the principal may, in general, withdraw his assent at any time, subject to liability in damages in case he does so in violation of his agreement. Substantially correlative is the situation of the agent. He may, in general, renounce his agency at any time. His *power* to do this, in the sense that his further performance will not be specifically enforced, is co-extensive with the principal's power to revoke; but his *right* to do so, is, like the principal's right to revoke, limited by his contracts in the premises. Where the agency is indefinite in duration the agent may, upon giving reasonable notice, sever the relation at any stage without liability to the principal,[95] and will be entitled to compensation and reimbursement for his services and expenses up to that time.[96] Where, however, the agency was created for a definite period, or the accomplishment of a particular result was undertaken for a valuable consideration, the agent who renounces before the expiration of that period, or before

[94] Gibson v. Manufacturers' Ins. Co., *supra*.

[95] Barrows v. Cushway, 37 Mich. 481; United States v. Jarvis, Davies, 274, 2 Ware, 278, 26 Fed. Cas. 587; Owensboro Wagon Co. v. Hall, 143 Ala. 177; Security Trust Co. v. Ellsworth, 129 Wis. 349. See also Coffin v. Landis, 46 Pa. St. 426.

In Owensboro Wagon Co. v. Hall, *supra*, contract created an agency to sell for no definite period, but gave the principal a right after twelve months to treat the agent as a purchaser of the merchandise unsold, *held*, that a sale by the agent of his business and notification thereof, before the expiration of twelve months, was a renunciation of the agency and did not obligate the agent to answer as a purchaser of the unsold wares.

Notice of renunciation.—It is not essential in the ordinary case that there shall be any formal or particular notice of an intention to renounce. A stipulation in the contract may make it necessary, or custom may require it. But even though the agency is at will and the agent may renounce it without liability, there are many cases wherein reasonable notice of the intention to renounce is necessary. Thus, an agent having the custody of property would not be justified under many circumstances in summarily abandoning it without reasonable notice; a locomotive engineer would not be justified in leaving his engine in a dangerous position having given no notice which would enable the company to provide other means of caring for the property and protecting the lives entrusted to it; a teamster would not be justified in abandoning his team upon the highway without reasonable notice; and the like. See Toledo, etc., R. R. Co. v. Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395.

[96] See *post*, Book IV, Chap. IV.

the performance of his undertaking, will be liable to his principal for the damages he may sustain thereby.[97]

§ 642. Enforcement of contract—Specific performance—Injunction to prevent breach.—The action for damages, as suggested in the last section, is, moreover, ordinarily the only remedy for the breach of the contract, for it is well settled, as a general rule, that courts will not undertake to enforce the specific performance of contracts for personal service, or interfere by injunction to prevent their breach.[98] In a leading case before the United States court of appeals it was said by Mr. Justice Harlan, "The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employe of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employe, engaged to perform personal service, to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case, or the discharging in the other, is in violation of the contract between the parties, the one injured by the breach has his action for

[97] United States v. Jarvis, *supra;* Coffin v. Landis, *supra;* Cannon Coal Co. v. Taggart, 1 Colo. App. 60; White v. Smith, 6 Lans. (N. Y.) 5, aff'd 54 N. Y. 522.

Implied covenants for continuance.—An undertaking upon the part of the agent to serve for a particular time may, of course, like the correlative undertaking of the principal to employ him for a definite time (see *ante*, § 600), be implied from the facts and circumstances of the case. But it is not likely to be implied. "The doctrine of implied covenants is in a sense an equitable doctrine, and is enforced upon the broad principle that the law implies a covenant in the agreement where it is clear that if the attention of the party had been called to it he would have expressly agreed." In Security Trust Co. v. Ellsworth, 129 Wis. 349, 109 N. W. 125, the court refused to infer an agreement upon the part of the agent to serve at least until the business could be successfully established.

[98] See Fry on Specific Performance (4th Eng. Ed.), §§ 110–115.

By agent against principal.—Brett v. East India, etc., Co., 2 H. & M. 404; Chinnock v. Sainsbury, 30 L. J. Ch. 409; Bertram v. Ball, 27 Sol. Jour. 39; Alworth v. Seymour, 42 Minn. 526; Coburn v. Cedar Valley Co., 25 Fed. 791; Thomas v. Supervisors, 56 Ill. 351; Bronk v. Riley, 50 Hun (N. Y.), 489; Healy v. Allen, 38 La. Ann. 867; Healey v. Dillon, 39 La. Ann. 503, 2 So. 49; Elwell v. Coon (N. J. Eq.), 46 Atl. 580.

By principal against agent.—Toledo, etc., R. Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387; Same v. Same, 54 Fed. 746, 19 L. R. A. 395; Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; Rogers Mfg. Co. v. Rogers, 58 Com. 356, 18 Am. St. Rep. 278, 7 L. R. A. 779; Cort v. Lassard, 18 Or. 221, 17 Am. St. Rep. 726, 6 L. R. A. 653.

See Columbia College of Music v. Tunberg, 64 Wash. 19.

damages; and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of merely personal services. Relief of that sort has always been regarded as impracticable." [99]

§ 643. ——— Injunction where services unique and damages not adequate.—There may, however, be cases wherein, by reason of the peculiar circumstances, the remedy by the award of damages will not be adequate and the party will suffer irreparable loss if no other remedy be afforded. Ordinary services are presumptively always in the market and the person who has been deprived of the particular ones to which he was entitled may presumptively, with the damages awarded, make himself whole by engaging others. Where, however, the services stipulated for were unique, individual, peculiar, not capable of being adequately replaced, and the difficulty of estimating the actual loss which the employer will suffer is great, a different rule ought to be applied. In such cases it is now well settled that, while a court will not undertake to compel specific performance, it may, certainly where the contract contains negative covenants not to be employed by others,[1] and, by the weight of American authority, at least, even without them if the fair construction of the contract implies such covenants,[2] interfere by injunction to prevent the party employed from serving another in violation of his agreement with the complainant.

§ 644. ——— Mutuality.—Whether the court will even negatively interfere—that is, by injunction though not by an affirmative

[99] Arthur v. Oakes, *supra*.

[1] Lumley v. Wagner, 1 DeGex, M. & G. 604; Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416; Daly v. Smith, 49 How. Pr. 150, 6 J. & Sp. 158; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 90 Am. St. 627, 58 L. R. A. 227; Canary v. Russell, 9 N. Y. Misc. 558; McCaull v. Braham (Russell), 21 Blatchf. 278, 16 Fed. 37; Duff v. Russell, 14 N. Y. Supp. 134 (aff'd 133 N. Y. 678); Fredricks v. Mayer, 13 How. Pr. 566.

In England, not without the negative covenant. Whitwood Chemical Co. v. Hardman, *supra*.

But the prohibition must not be unreasonable, as a prohibition upon being employed in *any* other business for a term of ten years. Ehrman v. Bartholomew, [1898] 1 Ch. 671.

The principle of Lumley v. Wagner, ought not to be applied to any covenant which though negative in form is affirmative in substance. Davis v. Foreman, [1894] 3 Ch. 654.

Where the parties have fixed liquidated damages for the breach of the contract, injunction will not issue. Hahn v. Concordia Society, 42 Md. 460.

[2] Daly v. Smith, 49 How. Pr. 150, 6 J. & Sp. 158; Duff v. Russell, 14 N. Y. Supp. 134 (affirmed without opinion 133 N. Y. 678); Pratt v. Montegriffo, 10 N. Y. Supp. 903; Keith v. Kellermann, 169 Fed. 196; Cort v. Lassard, 18 Or. 221, 17 Am. St. Rep. 726, 6 L. R. A. 653. See also McCaull v. Braham, 16 Fed. 37, and note.

decree of specific performance,—where the obligations of the contract are not "mutual," as, for example, where the employer who is seeking to enforce the contract has himself the right to terminate it either at pleasure or upon the happening of certain events, has been much disputed.[3] It is urged on the one hand that the remedy of specific performance or injunction to restrain breach, is not a matter of strict right but of sound discretion, and that it is unreasonable and unfair to restrain the defendant from accepting other employment where the employer may later, and possibly when the employee cannot find other employment, discharge him by virtue of the right reserved.[4] It is replied on the other hand that the court is but simply enforcing the contract as the parties made it; that if there are any such inequalities they are such as the parties themselves created; and that, if the contract is not on the whole inequitable, the mere fact that the employee has not reserved as efficient a remedy against the employer as he has given the employer against himself is no reason why the contract should not be enforced according to its terms so long as it remains in force.[5] The weight of authority seems to be with the latter view.

§ 645. Renunciation by mutual consent.—Even though there was a contract by which the agent undertook to act for a definite time not

[3] See an article by Professor Ames in 3 Columbia Law Review, 1, 10; a note by Professor Lawson, in 54 Central Law Journal, 446, 451; and a note presumptively by Mr. A. C. Freeman in 90 Am. St. Rep. 634, 651.

[4] Brooklyn Baseball Club v. McGuire (U. S. C. C., Pa.), 116 Fed. 782 [relying upon Rutland Marble Co. v. Ripley, 10 Wall. (U. S.) 339, 19 L. Ed. 955; citing Sturgis v. Galindo, 59 Cal. 28, 43 Am. Rep. 239, and Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720; distinguishing Franklin Telegraph Co. v. Harrison, 145 U. S. 459, 36 L. Ed. 776; and disapproving Singer Sew. Mach. Co. v. Union Button Hole Co., Holmes, 253, Fed. Cas. No. 12,904]; American Baseball Co. v. Harper (C. C. St. Louis), 54 Cent. L. Jour. 449; Philadelphia Ball Club v. Hallman, 8 Pa. Co. Ct. 57; Harrisburg Baseball Club v. Athletic Ass'n, 8 Pa. Co. Ct. 337; but these Pennsylvania cases must be regarded as overruled by Philadelphia Ball Club v. Lajoie, cited in the following note.

Professor Lawson and Mr. Freeman in their notes above referred to approve this view; Professor Ames apparently approves the other.

[5] Singer Sew. Mach. Co. v. Union Button Hole Co., Holmes, 253, Fed. Cas. No. 12,904; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 90 Am. St. Rep. 627, 58 L. R. A. 227, 54 Cent. L. Jour. 446 [disapproving Rust v. Conrad, cited in preceding note, approving Singer Sew. Mach. Co., *supra*, and regarding Rutland Marble Co. v. Ripley, 10 Wall. (U. S.) 339, 19 L. Ed. 955, as modified by Franklin Tel. Co. v. Harrison, 145 U. S. 459, 36 L. Ed. 776]. See also Keith v. Kellermann, 169 Fed. 196.

Professor Ames (3 Columbia L. Rev. 10, 11), also disapproves of Rust v. Conrad, and approves Singer Sew. Mach. Co. v. Union Button Hole Co., *supra*, and Philadelphia Ball Club v. Lajoie, *supra*.

yet expired, the agent may renounce or the contract may be terminated without liability by the mutual consent of both parties.[6]

§ 646. Abandonment may be treated as renunciation.—If the agent abandon the agency he may not complain if the principal treats this as a renunciation, and appoints another in his stead. Thus where an agent in Philadelphia wrote to his principal in New York that he had decided to give up the business and requested him to come or to send some one to take charge of it, it was held that the principal might treat this as an abandonment and appoint a new agent.[7] So where an agent was arrested upon a criminal charge and kept in jail for two weeks during the busiest part of the season, it was held that the principal might lawfully treat the employment as abandoned, although it subsequently proved that the imprisonment was unauthorized.[8]

§ 647. Agent may lawfully renounce if required to do unlawful act.—If the principal requires of the agent the performance of an illegal or immoral act, the agent may lawfully renounce his agency. As is said by a learned judge: "*Honeste vivere* is a part of the law of principal and agent." [9]

§ 648. Agent's abandonment may be justified by principal's misconduct or default.—The agent's abandonment of his employment, even though for a definite time, may also be justified by the principal's misconduct or default. Thus, the repudiation by the principal of essential obligations on his own part, as, for example, his refusal to pay the agent his compensation, will justify abandonment by the agent.[10]

[6] Conrey v. Brandegee, 2 La. Ann. 132. In New York Life Ins. Co. v. Thomas, 47 Tex. Civ. App. 150, *held*, a voluntary resignation, if accepted, terminates the relation. In Messerrio v. Atchinson, etc., Ry. Co., 50 N. Y. Misc. 317, the plaintiff was hired indefinitely as an expert workman; he was found incompetent and was given another job; *held*, his acceptance of this terminated the first contract. In Blum v. Nebraska Creamery Co., 82 Neb. 110, *held*, a resignation must be accepted according to the conditions therein.

[7] Stoddart v. Key, 62 How. Pr. (N. Y.) 137.

[8] Leopold v. Salkey, 89 Ill. 412, 31 Am. Rep. 93.

A real estate broker who, with the consent of the owner, turns the property over to another agent for sale, and thereafter does nothing toward a sale, will be deemed to have abandoned the agency. Munson v. Mabon, 135 Iowa, 335. See also Jackson v. Parrish, 157 Ala. 584, where a letter written by a broker to his principal abandoning the undertaking was held operative from the time of mailing it.

[9] Conrey v. Brandegee, 2 La. Ann. 132.

[10] Duffield v. Michaels, 97 Fed. 825. An absolute refusal or failure to pay the agent what he is entitled to under the contract will justify an abandonment. Dunn v. Crichfield, 214 Ill. 292; Tait Mfg. Co. v. Tinsman, 138 Ill. App. 76; Tilton v. Gates Land Co., 140 Wis. 197; Dore v. Glenn Rock Spring Co., 147 Wis. 158.

And so of course will brutal and inexcusable language,[11] or physical violence,[12] by the principal toward the agent.

§ 649. Notice of renunciation.—Notice of the renunciation must in general be given by the agent to the principal in all cases in which such notice is material for the protection of the principal's interests and he is not otherwise advised of it;[13] and as against the principal the renunciation will be operative from the time the principal receives such notice of it.[14] The principal must also for his own protection give notice to third persons of the termination of the authority by renunciation in the same manner as where the authority is revoked.[15]

Notice may also in some cases be required from the agent to third persons where his change of attitude may affect his relations to them.

II.

BY OPERATION OF LAW.

§ 650. In general.—But the intentional act of the parties does not furnish the only means by which the relation of principal and agent may be dissolved. Such changes in the condition, capacity and surroundings of the parties, or in the subject-matter may occur as to render the further continuance of the relation inconsistent or impossible, and the agency will thereupon be terminated or dissolved. Such a termination, to distinguish it from termination by the mere act of the parties, is often called termination by operation of law.

Thus one or both parties to the relation may die, or become insane, or bankrupt. War may interrupt the commercial transactions between citizens of different states or countries, or the subject-matter of the agency may cease to exist or the authority become impossible or unlawful to be performed. Each of these contingencies it is important to consider.

1. By Death of One of the Parties.

a. By the Death of the Principal.

§ 651. In general.—The relation of principal and agent necessarily presupposes at least two existing and competent parties,—one

[11] Cody v. Raynaud, 1 Colo. 272.

[12] Bishop v. Ranney, 59 Vt. 316; Erickson v. Sorby, 90 Minn. 327; Horn v. Luntz, 125 N. Y. Supp. 786.

[13] *Ante*, § 641, note.

[14] A letter abandoning the agency is, as to the agent, operative from the time of mailing it. Jackson v. Parrish, 157 Ala. 584.

[15] Capen v. Pacific Mut. Ins. Co., 25 N. J. L. 67, 64 Am. Dec. 412.

competent to act for himself and in his own behalf, but preferring for reasons of convenience or otherwise to delegate this power to another; the other likewise competent, ordinarily, though not necessarily, to act for himself, but undertaking for the time being to assume a representative character and to act in the name and for the benefit of the person represented;—one supplying authority, the other exercising it. The situation presupposes a principal capable of doing the act at the time it is done, and who, upon the doctrine of *qui facit per alium facit per se,* does in law then perform it.

By the death of either of these parties, therefore, it is obvious that the relation must ordinarily be terminated. If the principal dies, there is thenceforward no one to be represented; no one in whose name the agent can act; no one from whom the supply of power can continue to flow, and unless there is something in the nature of the authority by which it can survive a severance from its source, it must perish with it.

§ 652. General rule—Death of principal terminates agency.—It is therefore the general rule that the authority of an agent, not coupled with an interest, is instantly terminated by the death of the principal, even though it may have been irrevocable in his life-time; and that any attempted execution of the authority after that event is not binding upon the heirs or representatives of the deceased principal.[16]

[16] Boone v. Clarke, 3 Cranch (U. S. C. C.), 389, Fed. Cas. No. 1,641; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Scruggs v. Driver, 31 Ala. 274; Saltmarsh v. Smith, 32 Ala. 404; Travers v. Crane, 15 Cal. 12; Ferris v. Irving, 28 Cal. 645; *In re* Kilborn, 5 Cal. App. 161; *In re* McPhee's Estate, 156 Cal. 335; Dieter v. Kiser, 158 Cal. 259; McGriff v. Porter, 5 Fla. 373; Dallam v. Sanchez, 56 Fla. 779; Wellborn v. Weaver, 17 Ga. 267, 63 Am. Dec. 235; Anderson v. Goodwin, 125 Ga. 663; Turnan v. Temke, 84 Ill. 286; Mecartney v. Carbine's Estate, 108 Ill. App. 282; Wallace v. Bozarth, 223 Ill. 339; Lancaster v. Springer, 239 Ill. 472; Trubey v. Pease, 240 Ill. 513; Johnson v. Wilcox, 25 Ind. 182; Lewis v. Kerr, 17 Iowa, 73; Darr v. Darr, 59 Iowa, 31; Condon v. Barnum (Iowa), 106 N. W. 514; Campbell v. Faxon, 73 Kan. 675, 5 L. R. A. (N. S.) 1002; Holmes v. Murdock, 125 La. 916; Harper v. Little, 2 Greenl. (Me.) 14, 11 Am. Dec. 25; Staples v. Bradbury, 8 Greenl. (Me.) 181, 23 Am. Dec. 494; Merry v. Lynch, 68 Me. 94; Tyson v. George's Creek Coal Co., 115 Md. 564; Marlett v. Jackman, 3 Allen (Mass.), 287; Lincoln v. Emerson, 108 Mass. 87; Mills v. Smith, 193 Mass. 11, 6 L. R. A. (N. S.) 865; Courser v. Jackson, 159 Mich. 119; Weaver v. Richards, 144 Mich. 395; Clayton v. Merrett, 52 Miss. 353; State v. Riley, 219 Mo. 667; Chicago, etc., Ry. Co. v. Woodson, 110 Mo. App. 208; Gale v. Tappan, 12 N. H. 145, 37 Am. Dec. 194; Wilson v. Edmonds, 24 N. H. 517; *In re* Bensel, 68 Misc. 70; Oatman v. Watrous, 120 App. Div. 66; Lalor v. Tooker, 130 App. Div. 11; People v. Bellando, 137 App. Div. 777, 199 N. Y. 533; *In re* Robbins, 61 Misc. 114; Doe v. Smith, 1 Jones (46 N. C.), 135, 59 Am. Dec. 581; Brown

The authority being thus terminated by the act of God, the agent can ordinarily maintain no claim for damages thereby, although he had been employed for a fixed term which had not yet expired.[17]

Of course where the authority has been fully executed before the principal's death, that event cannot affect the rights of the other party. So if before the principal's death, the authority has been executed in part, his death cannot operate as a revocation of the executed portion,[18] nor, it is held, if the authority be entire, of that which yet remains unexecuted.[19]

This general rule, that the death of the principal terminates authority, so far as it is applied to a mere power to do something for the benefit of the principal, even though the agent was to be compensated for his services,—to what is sometimes called a "bare" or "naked" power, is generally recognized and followed in the United States, though a few states make an exception, as will be seen, where the fact of the death was unknown.[20]

Aside from that, the only exception is said to be "the case of a naked power or authority given by one by his last will to his executors to sell his estate for the payment of debts, etc., in which case the authority is expressly given to be executed after his death, and the act may be done in the name of the executors, and not in the name of the testator." [21]

§ 653. ——— Even though not terminable by principal's act in his life time.—Moreover, even though the authority may have been more than a mere "bare" or "naked" power, and arose to the rank of a power which might be irrevocable by the act of the principal in his

v. Skotland, 12 N. D. 445; Moore v. Weston, 13 N. D. 574; Easton v. Ellis, 1 Handy (Ohio), 70; McDonald v. Black, 20 Ohio, 185, 55 Am. Dec. 448; Casto v. Murray, 47 Or. 57; Cassiday v. McKenzie, 4 W. & S. (Pa.) 282, 39 Am. Dec. 76; Frederick's Appeal, 52 Pa. 338, 91 Am. Dec. 159; Jenkins v. Atkins, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648; Primm v. Stewart, 7 Tex. 178; Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274; Williams v. Armistead, 41 Tex. Civ. App. 35; Skirvin v. O'Brien, 43 Tex. Civ. App. 1; Wall v. Lubbock, 52 Tex. Civ. App. 405; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11; Davis v. Windsor Savings Bank, 46 Vt. 728; Wells v. Foss, 81 Vt. 15; Huston v. Cantril, 11 Leigh (Va.), 136; Legan v. Dishman, Barr. 2 Va. Col. Dec. 254; Gilmore v. Casualty Co., 58 Wash. 203.

[17] As to this, see *post*, § 668.

As to the effect of the death of a partner or other joint principal, see *post*, § 669.

[18] Frederick's Appeal, 52 Pa. 338, 91 Am. Dec. 159.

[19] Garrett v. Trabue, 82 Ala. 227, where goods ordered the day before the principal's death, were shipped in pursuance of the order on the day after his death but in ignorance of it.

[20] See *post*, § 664.

[21] Thompson, J., in McGriff v. Porter, 5 Fla. 373.

life time, *e. g.*, a power given by way of security considered in an earlier section, it is still said that, unless "coupled with an interest" in the sense to be hereafter considered, it is nevertheless terminated by the principal's death.[22] Although given as a security or conferred "for a valuable consideration," it is still only an authority *over* the subject-matter and not an estate or interest *in* it. While death will not revoke an estate, it does revoke an authority, is the contention.

§ 654. Consideration of rule.—While this doctrine seems firmly fixed by the authorities, it is certainly questionable if it be sound as an invariable rule. Its application often not only disappoints expectations but produces hardship,[23] as it did in the famous case in which Chief Justice Marshall first formulated it in the United States.[24] The person who loses by it has given a valuable consideration for the power, while the persons who benefit by it are either general creditors who are not purchasers for value, or heirs or distributees who are mere donees. A contract made by the decedent in his life time may be enforced in many cases after his decease. Why not a power for which a valuable consideration has been given? Where the exercise of the power would result in creating new obligations, there may be serious difficulties; but where the only act contemplated is to deal with property, or to receive payment, and the like, the objections seem largely

[22] Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; McGriff v. Porter, 5 Fla. 373; Huston v. Cantril, 11 Leigh (Va.), 142; Hunt v. Ennis, 2 Mason, 244, 12 Fed. Cas. p. 913; and other cases cited *post*, § 662.

[23] Thus in Huston v. Cantril, *supra*, Stanard, J., while recognizing it as sound law, said: "I apply it with the more reluctance, seeing that by it the creditor will be deprived of a security which he and the court below, and one at least of the defendants, supposed to exist."

[24] Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589. (In the circuit court, 2 Mason, 244, 12 Fed. Cas. 913). A clearer case of the disappointment of reasonable expectations would be difficult to imagine. Rousmanier applied to Hunt for a loan, and offered a bill of sale or mortgage on certain vessels to secure the same. The loan was made and notes given. On advice of the attorney, it was agreed by the parties that Rousmanier should execute to Hunt a power of attorney to sell the vessels if default were made on the notes. This step was taken in preference to the execution of a mortgage security, in order that certain shipping inconveniences be avoided. Rousmanier died insolvent, having made only a small payment on the notes. Hunt took possession of the vessels in pursuance of his power of attorney to sell, and now brings a bill in equity to compel the administrators of Rousmanier to join in the sale. To the bill disclosing these facts a demurrer was filed, and Marshall, C. J., held that the power of attorney, given as it was by way of security, was irrevocable by Rousmanier during his life-time, but that it could not operate after his death. An amended bill for the correction of the instrument also failed. Hunt v. Rousmanier, 1 Pet. (26 U. S.) 1, 7 L. Ed. 27.

if not wholly technical. The *contract* as such, that the power may be exercised (where no purely personal considerations were involved) would be binding upon the estate if those who represented it refused to permit the power to be exercised, and damages might be recovered for its breach, but, in any case in which the question would be important, the estate would be insolvent, and damages for its breach would be a wholly inadequate remedy. What is needed is specific performance of the legal and binding agreement, given for a valuable consideration, respecting a specific chattel or chose in action or a specific act, in a case in which damages for the breach of the agreement would be inadequate. Although there seems to be no case directly in point, there are certainly analogies which are suggestive.[25]

If it should be held that, by the contract and the power, an equitable estate or interest in the subject-matter was created, then there are authorities [26] (whether really consistent with Hunt v. Rousmanier or not),[27] which would hold the power to be one coupled with an interest, and therefore irrevocable by the grantor's death.

§ 655. Authority not revocable by death when coupled with an interest.—Notwithstanding the general rule that the death of the principal operates *per se* to terminate authority, there is, as has already been suggested, a well settled, though not always clearly defined, exception to it, based upon the fact that in the given case the agent is not simply an agent—perhaps properly speaking not an agent at all—but a person having some interest of his own in the subject-matter of the agency for the protection of which an authority like the one conferred which shall survive the death of the principal is an essential incident. This situation is commonly described, in the United States at least, as the case of an agent having "an authority coupled with an interest," and the general rule of law is that where the authority of the agent is so "coupled with an interest in the subject-matter of the agency," it is not terminated by the death of the principal, and a subsequent execution of it by the agent will be good.[28]

[25] See Cowles v. Whitman, 10 Conn. 121, 25 Am. Dec. 60; Parker v. Garrison, 61 Ill. 250; Triebert v. Burgess, 11 Md. 452; Gottschalk v. Stein, 69 Md. 51; Clark v. Flint, 22 Pick. (Mass.) 231, 33 Am. Dec. 733; Peer v. Kean, 14 Mich. 354; Furman v. Clark, 11 N. J. Eq. 306; Cutting v. Dana, 25 N. J. Eq. 265.

See also the discussion on equitable liens in Walker v. Brown, 165 U. S. 654, at p. 664.

[26] See Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, 20, 7 Am. Dec. 513 (affirmed 14 Johns. 527); Shepard v. McNail, 122 Mo. App. 418; Pacific Coast Co. v. Anderson, 47 C. C. A. 106, 107 Fed. 973; Keys' Estate, 137 Pa. 565, 21 Am. St. R. 896; Farmers' Bank v. Kansas City Pub. Co., 3 Dillon, 287, Fed. Cas. No. 4,652.

[27] See *post*, § 657.

[28] Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Merry v.

§ 656. ——— What constitutes such an interest.—The difficulty in defining what is meant by the expression "a power coupled with an interest," and the difference in usage of the English and the American courts, have already been somewhat discussed.[29] In the present connection, however, there is substantial harmony among the American courts in their statements of the rule. The interest, it is said, which will preserve the power from termination by the principal's death must, in general terms, be an interest in the thing itself which is the subject-matter of the agency and the power must be capable of execution in the name of the agent. A mere power to be executed in the name of the principal, though it may perhaps be irrevocable by the principal in his life-time, is, nevertheless, terminated by his death. But as is said by Chief Justice Marshall in the leading case [30] already referred to, "This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest' it survives the person giving it and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression 'a power coupled with an interest?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.

"The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it.

"But the substantial basis of the opinion of the court on this point is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in

Lynch, 68 Me. 94; Bergen v. Bennett, 1 Caines' Cases (N. Y.) 1, 2 Am. Dec. 281; Knapp v. Alvord, 10 Paige (N. Y.), 205, 40 Am. Dec. 241; Leavitt v. Fisher, 4 Duer (N. Y.), 1; Houghtaling v. Marvin, 7 Barb. (N. Y.) 412; Dixon v. Dixon, 85 Kan. 379.

[29] *Ante*, §§ 572, 573.

[30] Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589.

him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name, and must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate being in him, passes from him by a conveyance in his own name. He is no longer a substitute acting in the place and name of another, but he is a principal acting in his own name in pursuance of powers which limit his estate. The legal reason which limits the power to the life of the person giving it, exists no longer; and the rule ceases with the reason on which it is founded."

Again it is said by a learned judge, "A power is simply collateral and without interest, or a naked power, when to a mere stranger, authority is given to dispose of an interest in which he had not before, nor has by the instrument creating the power, any estate whatsoever; but when the power is given to a person who derives under the instrument creating the power or otherwise, a present or future interest in the property, the subject on which the power is to act, it is then a power coupled with an interest." [81]

§ 657. ——— What meant by interest—Difficulty of applying rule.—The test suggested by Chief Justice Marshall, of the necessity of an estate or interest, is not easy to apply. If the grantee of the power has such an estate or interest as is required, what is the necessity of the annexed power? Why may not the grantee of the estate or interest deal with it because he is the owner or holder of it without reference to the power? Take the case of a pledge of property with a power of sale, for example. The law would give a power of sale even though none had been expressly conferred. The power given by the pledgor might, however, be more advantageous (as by waiving demand and notice), than that which the law alone would given. A power of sale attached to a mere common law lien—a mere right of detention—would also be a distinct advantage.

Where the interest transferred does not embrace the entire property in the thing, some questions may arise. What estate or interest may the grantee of the power transfer? Apparently such as may be

[81] Thompson, J., in McGriff v. Porter, 5 Fla. 373, 379.

necessary to make the power effectual—that is to say, if it is necessary to deal with the entire property in order to protect the interest, the grantee of the power may do that, being accountable for any surplus.

It is sometimes said that the "interest" or "estate" must be a *legal* one, but that does not seem every where to be regarded as essential. An equitable estate has been held sufficient in many cases,[32] though it is not easy to see how a purely equitable interest can suffice to preserve the power to convey the legal estate. Certainly the holder of the equitable interest can not convey the legal title in his own name.

It is also sometimes said that the "interest" and the "power" must be created by the same instrument;[33] but no good reason appears for that position, and there are cases in which the power was held irrevocable though this supposed requirement was not satisfied.[34]

§ 658. ——— The real reason—That the agent may act in his own name.—But the substantial ground and the real reason of the rule, as it is stated by Chief Justice Marshall, are found not merely in the fact that the agent has an interest or estate, but in the fact that he has such an estate or interest that he may execute the power in his own name and right and as his own act.[35] As stated by Chief Justice Marshall, "If the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate being in him, passes from him by a conveyance in his own name. He is no longer a substitute acting in the place and name of another, but he is a principal acting in his own name in pursuance of powers which limit his estate."

While the present conception continues, this requirement must probably be deemed an indispensable part of it.

§ 659. What interest sufficient—Instances.—Cases in which the power has been held to be one coupled with an interest are numerous,

[32] In Osgood v. Franklin, 2 Johns. (N. Y.) Ch. 1, 20, 7 Am. Dec. 513 (affirmed 14 Johns. 527); it is said: "It is not necessary that the interest coupled with the power should be a legal interest. An equitable estate is sufficient, and is regarded in this court as the real interest." See also Shepard v. McNail, 122 Mo. App. 418; Pacific Coast Co. v. Anderson, 47 C. C. A. 106, 107 Fed. 973; Keys' Estate, 137 Pa. 565, 21 Am. St. R. 896; Farmers & Drovers Bank v. Kansas City Pub. Co., 3 Dillon, 287, Fed. Cas. No. 4,652.

[33] As for example, *per* Hooker, J., in Weaver v. Richards, 144 Mich. 395, 6 L. R. A. (N. S.) 855.

[34] As for example, Babrowsky v. Grand Lodge, 129 N. Y. App. Div. 695; Keys' Estate, 137 Pa. 565, 21 Am. St. R. 896.

[35] See the opinion of Story, J., at the Circuit in the same case of Hunt v. Rousmanier's Adm'rs (Hunt v. Ennis, *et al.* Adm'r), 2 Mason, 244, 12 Fed. Cas. p. 913; Sulphur Mines v. Thompson, 93 Va. 293.

though it may not be easy in all of them to square the holding with the rules laid down by Chief Justice Marshall. Thus, where a debtor delivered property to his surety with power to sell the property to pay the debt or reimburse himself in case he paid it, it was held that the pledge and the authority constituted a power coupled with an interest within Chief Justice Marshall's definition and was therefore not revoked by the grantor's death.[36] So where there was an assignment of a cause of action upon which suit was pending, by way of security, with power to settle the suit and apply the proceeds upon the debt secured, the same ruling was made.[37] So, also, where leases were assigned as security with power to collect the rents and apply in payment of the debt secured.[38]

For similar reasons, the transferee of shares of stock with power to transfer them upon the books of the corporation has a power coupled with an interest not revoked by the death of the transferrer before transfer on the books.[39]

So the power of sale conferred by a mortgagor upon the mortgagee is almost universally held to be one coupled with an interest and, therefore, not revoked by the mortgagor's death.[40]

[36] Knapp v. Alvord, 10 Paige (N. Y.), 205, 40 Am. Dec. 241. See also Merry v. Lynch, 68 Me. 94, where there was authority to sell goods, pay certain debts to third persons, then debts due the donee, and turn over balance to donor.

[37] Hilliard v. Beattie, 67 N. H. 571. See also Morgan v. Gibson, 42 Mo. App. 234.

[38] Stevens v. Sessa, 50 N. Y. App. Div. 547.

[39] Leavitt v. Fisher, 4 Duer (N. Y.), 1; Fraser v. Charleston, 11 S. Car. 486; United States v. Cutts, 1 Sumn. 133, 25 Fed. Cas. 745; Fisher v. New York, etc., Co. (Pa.), 31 Wk. N. Cas. 502.

Much the same doctrine was applied to a transfer of land scrip with a power to locate land under it. Rogers v. Iron Co., 104 Minn. 198.

[40] Conners v. Holland, 113 Mass. 50; Varnum v. Meserve, 8 Allen (Mass.), 158; Berry v. Skinner, 30 Md. 567; Beatie v. Butler, 21 Mo. 313; White v. Stephens, 77 Mo. 452; Bradley v. Chester Valley R. R. Co., 36 Penn. St. 141; Bergen v. Bennett, 1 Caines' Cas. (N. Y.) 1, 2 Am. Dec. 281; Wilson v. Troup, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; Hodges v. Gill, 9 Baxt. (Tenn.) 378; Wilburn v. Spofford, 4 Sneed (Tenn.), 698; Hudgins v. Morrow, 47 Ark. 515; More v. Calkins, 95 Cal. 435, 29 Am. St. R. 128; Carter v. Slocomb, 122 N. C. 475, 65 Am. St. R. 714; Grandin v. Emmons, 10 N. D. 228, 88 Am. St. R. 684, 54 L. R. A. 610; Sulphur Mines Co. v. Thompson, 98 Va. 293; Muth v. Goddard, 28 Mont. 237, 98 Am. St. R. 553.

Contra, the mortgage being only a security. Johnson v. Johnson, 27 S. C. 309, 13 Am. St. R. 636; Wilkins v. McGehee, 86 Ga. 764.

In Texas, see Robertson v. Paul, 16 Tex. 472; McLane v. Paschal, 47 Tex. 365; Rogers v. Watson, 81 Tex. 400; Whitmire v. May, 29 Tex. Civ. App. 244; Texas Loan Agency v. Dingee, 33 Tex. Civ. App. 118.

Where P mortgages land to X to secure the debt of A and in the mortgage provides that X and A may extend the time of payment by certain

§ 660. ——— So, again, where one who was entitled to "enter" or locate government land, in consideration that another would perform the labor, make the proof and pay the expense, gave him a deed of an interest and an "irrevocable" power of attorney to act in the grantor's name and to sell the land and divide the proceeds, it was held that by virtue of the deed the agent acquired a present interest to which the authority was coupled, and that this authority was not revoked by the grantor's death.[41]

And, so, where a debtor, in order to secure his creditor, expressly assigned a claim to him and gave him an "irrevocable" power of attorney to collect it, it was held that the power was not terminated by the grantor's death.[42]

So where an attorney was authorized to prosecute a claim for a share of the proceeds and was given express power to compromise, it was held that he had a power coupled with an interest which was not revoked by the principal's death.[43] But it is difficult to sustain this conclusion unless it be thought that the contract gave the attorney an interest in the claim as well as a power over it. Where such an interest is assigned, the power to collect is held irrevocable.[44]

So a power given in a conveyance to one of an estate for life to dis-

prescribed methods, this is held to be a power coupled with an interest and not revoked by the death of P. Benneson v. Savage, 130 Ill. 352. Where a landowner and his tenant unite in a mortgage, an agreement that the lessee may arrange for an extension of time and that the mortgage shall still stand as a security is an agreement coupled with an interest and not revoked by the owner's death. Prussing v. Lancaster, 234 Ill. 462.

[41] Hennessee v. Johnson, 13 Tex. Civ. App. 530.

[42] Norton v. Whitehead, 84 Cal. 263, 18 Am. St. R. 172. See also Shepard v. McNail, 122 Mo. App. 418; Crowley v. McCambridge, 154 Ill. App. 135.

[43] Jeffries v. Mut. Life Ins. Co., 110 U. S. 305, 28 L. Ed. 156.

[44] Gulf, etc., Ry. Co. v. Miller, 21 Tex. Civ. App. 609; American Loan & Trust Co. v. Billings, 58 Minn. 187.

Where one advances money to another upon an agreement that the lender shall be entitled to collect insurance money and reimburse himself out of the same, a formal power to receive the money given in pursuance of the agreement is *held* to be coupled with an interest and irrevocable. The transaction was said to be "a virtual assignment of the fund." Babrowsky v. Grand Lodge, 129 App. Div. 695.

In Keys' Estate, 137 Pa. 565, 21 Am. St. R. 896, a letter accompanying a power of attorney in which letter the writer indicated a purpose that the person to whom it was sent should collect a certain sum of money and out of it pay himself a debt which the writer owed him, was held to be at least an equitable assignment of the claim and thus to create an interest which would preserve the power. See also Stover v. Eyeleshimer, 46 Barb. (N. Y.) 84, s. c. 3 Keyes, 620.

pose of the fee by will, has been held to be irrevocable by the death of the grantor, as a power coupled with an estate.[45]

If, under an authority valid, though revocable by death, the donee, in pursuance of the authority, and in the life-time of the donor, takes possession of the chattel or thing to which the authority applies, the authority would thereafter doubtless be deemed to be one coupled with an interest, and therefore irrevocable by death.

§ 661. ——— Usually the power and the interest are vested in the same person, but that is not indispensable. A power given to one to be exercised for the benefit of another who has an interest, is irrevocable.[46] Usually this takes the form of an express trust, though the form is not material. The power of sale under a deed of trust is therefore not revocable by the death of the grantor.[47]

So the indorsement and delivery for the purpose of collection of a promissory note passes the legal title in trust, and the agent may sue upon it in his own name after the death of the principal.[48]

§ 662. What interest not sufficient—Instances.—Illustrations of what is not a sufficient interest to preserve the power from revocation by death are also numerous. Thus a power of attorney not containing any words of conveyance or assignment but a simple authority to sell and convey, although given as collateral security for the payment of certain notes executed by the principal to the attorney and authorizing him to sell the property named in case of default and reimburse himself, is not a mortgage but a bare power and is terminated by the death of the principal before execution;[49] so where to secure the loan of money the borrower executed an instrument in writing, authorizing the lender, upon default in payment, to enter upon the premises of the borrower and take away certain slaves therein specified, and to sell and dispose of them and out of the proceeds of the sale to reimburse himself for the loan and all expenses, and to return the surplus, if

[45] Dixon v. Dixon, 85 Kan. 379. The court said: "A power of attorney authorizing another to act for the one granting the power, must not be confused with a power vesting an absolute authority in another to act for himself."

[46] Durbrow v. Eppens, 65 N. J. L. 10 (where the power given by each associate in a "Lloyd's" Insurance association to the managers to pay out of a common fund contributed to by each the losses upon which all were liable, was held not revocable by the death of one); American Loan & Trust Co. v. Billings, 58 Minn. 187.

[47] See the cases under power of sale in mortgages in the preceding section.

[48] Moore v. Hall, 48 Mich. 143; Boyd v. Corbitt, 37 Mich. 52.

[49] Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589. The court later refused to reform the instrument. Hunt v. Rousmanier, 1 Pet. (U. S.) 1, 7 L. Ed. 27.

any, to the borrower, the same ruling was made;[50] and again where a principal debtor gave his surety a written power of attorney authorizing him to sell certain lands to pay the debt, but the surety did not exercise the power during the grantor's life-time, it was held that the authority was utterly dissolved by the latter's death.[51] So a power given by a debtor to his creditor authorizing him to collect a debt, due to the debtor, and to apply it on his claim, but containing no conveyance or assignment of the debt;[52] and a power given by a debtor to a bank to apply his deposits to the payment of his notes held by the bank and to do so before maturity if the bank so desired, but making no assignment of the fund,[53] is terminated by the debtor's death.

§ 663. ——— *A fortiori,* is the power revoked by death where the authority conveyed is a mere power, or where the only interest is that in compensation to be gained from the proceeds of the sale of property or the collection of a debt.[54]

Of the former class, an authority to occupy land as an agent;[55] a power to sell a chattel,[56] or to sell and convey land,[57] an authority by a landlord to his tenant to make repairs;[58] a power of attorney to demand payment of a note,[59] or to receive notice of its dishonor;[60] a power of attorney to procure a patent,[61] an authority to carry on one's

[50] McGriff v. Porter, 5 Fla. 373.

[51] Huston v. Cantril, 11 Leigh (Va.), 142.

[52] Houghtaling v. Marvin, 7 Barb. (N. Y.) 412. See also Garber v. Myers, 32 Ill. App. 175.

[53] Gardner v. First Nat. Bank, 10 Mont. 149, 10 L. R. A. 45.

[54] Harper v. Little, 2 Greenl. (Me.) 14, 11 Am. Dec. 25; Saltmarsh v. Smith, 32 Ala. 404; Travers v. Crane, 15 Cal. 12; Ferris v. Irving, 28 Cal. 645; Coney v. Sanders, 28 Ga. 511; Lewis v. Kerr, 17 Iowa, 73; Primm v. Stewart, 7 Tex. 178; Wainwright v. Massenburg, 129 N. Car. 46; Fisher v. Trust Co., 138 N. Car. 90; Weaver v. Richards, 144 Mich. 395, 6 L. R. A. (N. S.) 855; Schilling v. Moore, —— Okla. ——, 125 Pac. 487.

[55] Lincoln v. Emerson, 108 Mass. 87.

[56] McDonald v. Black, 20 Ohio, 185; Brown v. Cushman, 173 Mass. 368; *In re* Kern's Estate, 176 Pa. 373.

[57] Pacific Bank v. Hannah, 90 Fed. 72, 59 U. S. App. 457, 32 C. C. A. 522; Tuttle v. Green, 5 Ariz. 179; Connor v. Parsons (Tex.), 30 S. W. 83; Fisher v. Trust Co., 138 N. Car. 90; Gilmer v. Veatch (Tex. Civ. App.), 121 S. W. 545; Kent v. Cecil (Tex. Civ. App.), 25 S. W. 715.

The case of Shepard v. McNail, 122 Mo. App. 418, is apparently *contra*, unless it is to be sustained upon the ground, stated by the court, that the effect of the arrangement was to convey an equitable estate in the accounts. The citations of the first edition of this work are to sections dealing with irrevocability by the act of the principal, and not to irrevocability by death.

[58] Wilson v. Edmonds, 24 N. H. 517.

[59] Gale v. Tappan, 12 N. H. 145, 37 Am. Dec. 194.

[60] Bank of Washington v. Peirson, 2 Cranch (U. S. C. C.), 685.

[61] Eagleston Mfg. Co. v. West Mfg. Co., 18 Blatch. (U. S. C. C.) 228.

business during his disability,[62] to deliver property to complete a gift,[63] to renew a note,[64] to draw money from the principal's funds in bank for the principal's use,[65] or to collect rents,[66] or to borrow money and mortgage land as security for its repayment,[67] are examples, and expire with the life of him who granted them.

§ 664. How when death unknown.—When the authority has thus been dissolved by the death of the principal, all subsequent attempts to execute it, or to act by virtue of it, even though made in good faith and in ignorance of the fact of the death, are ineffectual to bind the estate of the principal. Where the authority is one which must be executed in the name of the principal, as by executing deeds, this rule is unquestioned[68] but where the act is one which, while it is done for the principal, is not expressly required to be done in his name, it has been criticised and even denied by some text-writers and judges.[69] Even in the latter case, however, the rule is supported by an undoubted preponderance of authority.[70]

By the civil law, the act of an agent done in good faith in ignorance of the death of the principal, is binding upon his representatives. There the death does not necessarily and *ipso facto* operate as a dissolution of the agency, but the agency, as in the case of an express revocation, determines only from the time of notice.[71] But by the common law, the rule is different, as has been seen, and the death, except in cases coupled with an interest, works an instantaneous dis-

[62] Krumdick v. White, 92 Cal. 143. See also Triplett v. Woodward, 98 Va. 187.

[63] Duckworth v. Orr, 126 N. Car. 674.

[64] Home Nat. Bank v. Waterman, 134 Ill. 461.

[65] Hoffman v. Savings Institution, 109 (N. Y.) App. Div. 24.

[66] Farmers Loan & Tr. Co. v. Wilson, 139 N. Y. 284, 36 Am. St. R. 696.

[67] Brown v. Skotland, 12 N. D. 445.

[68] Harper v. Little, 2 Greenl. (Me.) 14, 11 Am. Dec. 25; Travers v. Crane, 15 Cal. 12; Ferris v. Irving, 28 Cal. 645; Coney v. Sanders, 28 Ga. 511; Lewis v. Kerr, 17 Iowa, 73.

[69] Story on Agency, § 495; Wharton on Agency, § 102; Cassiday v. McKenzie, 4 W. & S. (Penn.) 282, 39 Am. Dec. 76; Dick v. Page, 17 Mo. 234; Ish v. Crane, 8 Ohio St. 520, s. c. 13 Id. 574; Deweese v. Muff, 57 Neb. 17, 73 Am. St. R. 488, 42 L. R. A. 789; Meinhardt v. Newman, 71 Neb. 532.

[70] Long v. Thayer, 150 U. S. 520, 37 L. Ed. 1167; Weber v. Bridgman, 113 N. Y. 600; Farmers Loan & Trust Co. v. Wilson, 139 N. Y. 284, 36 Am. St. 696; Hoffman v. Savings Institution, 109 (N. Y.) App. Div. 24; Clayton v. Merrett, 52 Miss. 353; Galt v. Galloway, 4 Pet. (U. S.) 331; Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11; Davis v. Windsor Savings Bank, 46 Vt. 728; Jenkins v. Atkins, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648; Rigs v. Cage, 2 Humph. (Tenn.) 350, 37 Am. Dec. 559.

[71] Inst. 3, 27, 10; Digest, 17, 1, 6; 1 Domat b. 1, Tit. 15, § 4.

solution of the relation. Some tendency has been manifested to apply the rule of the civil law in certain cases as being more consonant with reason and justice. Thus in Cassiday v. McKenzie,[72] it was held that the payment made by an agent after the death of the principal, but in ignorance of it, was good. So in Dick v. Page,[73] the deposit of collaterals made by an agent as security for advances made after the principal's death, but all the parties being in ignorance of it, was held to be valid as against the executor of the principal, and the same principle was enforced in Ish v. Crane.[74]

§ 665. ——— But these cases have not been followed by other courts, and it is said of them by a learned judge, that "in as far at least as they announce the doctrine under discussion they are exceptional. The Pennsylvania case is believed to stand almost if not quite alone, in announcing the principle in its broadest scope. The overwhelming weight of authority is to the effect that the death of the principal operates as an instantaneous revocation of the agency where it is a naked power unaccompanied with an interest, and every act of the agent thereafter performed is null so far as the estate of the principal is concerned. This rule frequently operates very unjustly and produces very great hardships. A party dealing with an insolvent agent, upon the faith of his well known authority from a wealthy and distant principal, is suddenly confronted with the fact that the authority had ceased by the death of the principal, one day or perhaps one hour before his transactions occurred. Impressed with the hardship of such a case, the civil law adopts the rule contended for in the case at bar and renders valid a contract executed or a payment made under such circumstances," but he goes on to say that "however great the injustice produced in particular cases, undoubtedly the common law rule is that death revokes the agency and nullifies all acts thereafter performed. This doctrine rests upon the obvious principle that as a dead man can do no act for himself, so no man can do an act for him. When, therefore, the agent undertakes to act in his name, he is acting for a being not in existence. To hold his act valid is not to bind the dead man but his heirs and representatives, who are thus held liable for the acts of one whom they never appointed and whom perhaps they would be unwilling to trust. Whether a system of jurisprudence which would accomplish this result would be found in the long run

[72] *Supra.* The Nebraska cases cited *supra* were of this sort.

[73] *Supra.*

[74] *Supra.* See McClaskey v. Barr, 50 Fed. 712.

less productive of injustice than our present rule may well be doubted. At all events we are satisfied that such is not the law." [75]

§ 666. ——— Instances.—In accordance with the rule of the common law, therefore, it has been held that a payment made to an agent after the death of his principal, though the party paying did so in good faith and without notice of the death of the principal, was not sufficient, and that the administrator of the principal was entitled to recover it; [76] that the discount in good faith and without notice of the principal's death, of a note put into circulation by an agent after that event, conferred no right against the estate of the principal; [77] that the sale of real estate by an agent after the death of his principal, but in ignorance of it, was not binding upon the estate, [78] and hence not upon the purchaser; [79] that the act of an agent in separating, measuring and delivering, after the death of his principal, a quantity of corn that had been bargained by the principal in his life time, but the title to which, by want of such separating, measuring and delivering, had not passed to the other party, was not good against the principal's estate; [80] that an agent's power to buy goods for his principal ceases with his death, and that the seller could not recover against the administrators of the principal's estate, though the fact of the death was unknown both to the seller and the agent. [81]

§ 667. ——— But where an agent, authorized to buy goods, sent an order for them by mail on the day before the principal died, to a non-resident merchant with whom he had a general arrangement to supply goods on such orders, and the merchant filled the order within a reasonable time in ignorance of the principal's death, it was held that the contract was binding as of the day on which the order was deposited in the mail, and that the principal's estate was bound, notwithstanding the order was not received by the merchant until after the death of the principal. [82]

[75] Chalmers, J., in Clayton v. Merrett, 52 Miss. 353, *supra*.

[76] Davis v. Windsor Savings Bank, 46 Vt. 728; Clayton v. Merrett, 52 Miss. 353; Long v. Thayer, 150 U. S. 520, 37 L. Ed. 1167; Weber v. Bridgmen, 113 N. Y. 600; Farmers Loan & Trust Co. v. Wilson, 139 N. Y. 284, 36 Am. St. 696. (See the arguments *contra*, in Deweese v. Muff, 57 Neb. 17, 73 Am. St. R. 488, 42 L. R. A. 789.)

So, of a power to draw money from a savings bank. Hoffman v. Union Dime Savings Institution, 109 App. Div. 24.

[77] Michigan Ins. Co. v. Leavenworth, 30 Vt. 11.

[78] Jenkins v. Atkins, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

[79] Lewis v. Kerr, 17 Iowa, 73.

[80] Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274.

[81] Rigs v. Cage, 2 Humph. (Tenn.) 350, 37 Am. Dec. 559.

[82] Garrett v. Trabue, 82 Ala. 227; Hatchett v. Molton, 76 Ala. 410; Davis v. Davis, 93 Ala. 173.

§ 668. Effect of principal's death upon contract of employment.— Where, however, the transaction is more than the mere creation of a power, and amounts to a mutual and binding contract of employment for a definite time or the performance of a specific act, the effect of the principal's death upon the continuance of the contract depends upon a variety of considerations. Most contracts for personal services so evidently involve personal considerations and are so clearly dependent upon the continuance of the lives of the parties, as to be fairly subject, where no express provision is made, to the implied condition that the death of the principal or master as well as that of the agent or servant shall terminate the contract without liability.[83]

But, on the other hand, there may be contracts of employment which involve no such considerations, and contemplate merely the accomplishment of certain objects which are not dependent upon the life of the principal. Here the contract liability may survive even though the power to act may not; the contract may impose upon the representatives of the principal the obligation to renew or recognize the authority or to permit it to be exercised; and damages for the breach of the contract may be recovered against the representatives of the deceased principal if, being in a situation to permit the performance of the contract, they refuse so to recognize it.[84]

[83] Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578. Plaintiff contracted to work on M's farm as a farm laborer for a year and entered upon performance in March. In July M died, leaving a will by which the use of the farm for life and all the personal property on the farm was given to M's wife. Plaintiff knew of the will and continued without any new arrangement, to work on the farm under the direction of the widow, until the close of the year. He sued the executrix to recover for the whole year's service. *Held*, that upon the death of M the contract was terminated and that his estate was not liable for the services after his death. Lacy v. Getman, 119 N. Y. 109, 16 Am. St. R. 806, 6 L. R. A. 728. To same effect: Farrow v. Wilson, L. R. 4 C. P. 744.

See also Marvel v. Phillips, 162 Mass. 399, 44 Am. St. R. 370, 26 L. R. A. 416.

[84] Dumont v. Heighton, — Ariz. —, 123 Pac. 306. In Grapel v. Hodges, 112 N. Y. 419, it appeared that C & Son were the holders of a certain "Alabama claim." They made a contract with K, by which K was to undertake the collection of the claim, paying all costs, for a share of the proceeds which he "and his legal representatives or assigns" might retain. As part of the contract, C & Son made K their agent to "ask, demand and receive," to "take all lawful ways and means to collect," etc., and gave him, and "his legal representatives and assigns, full power and authority to do and perform all and every act whatsoever necessary and requisite to be done," etc. K proceeded with the enterprise, and presented the claim, with the evidence. The claim was rejected by the Geneva tribunal, but Congress passed an act providing for the allowance of such claims and K prepared to present the claim before the tribunal established by this act.

§ 669. Death of partner or joint owner dissolves agency.—The death of one partner ordinarily operates to dissolve the partnership, and the partnership being dissolved, the authority of an agent appointed by the firm thereupon ceases, where the authority is not coupled with an interest.[85] The same effect would also ordinarily follow from the death of one of two joint owners, their joint interest being thereby severed.[86]

C died early in the proceeding and the son, the surviving partner, also died before the act of Congress was passed. K tendered to the administrator his services under the contract to prosecute the claim before the new tribunal, but the administrator refused to permit him to proceed, and employed another attorney who presented the claim, which was allowed and paid. The referee found that K duly performed so far as he was permitted, and was ready to perform the residue, but that the administrator refused to permit him to perform. *Held*, that K was entitled to damages for not being permitted to perform. It was urged that K's power was revoked by the dissolution of the firm of C & Son, by the death of C, and by the death of the surviving partner. "But," said the court, "the paper signed by the parties was something more than a power of attorney. That was granted as incidental to a complete contract for services to be rendered on one side and compensation to be paid on the other. * * * They [C & Son] employed K to effect that object [the collection of their claim]. Their contract was with him, his assigns and representatives, and it provided that for service in that direction, rendered and to be rendered, K should receive twenty-five per cent. of the sum ultimately recovered. He entered upon the service. * * * The surviving partner of C & Co. had died but his death did not dissolve the contract. On one side, by its terms, it ran to those who might in the end represent K, and, on the other, beyond the death of C, if that occurred before the recovery was reached, for its terminus was a recovery or a final abandonment of the claim. By his services, K had acquired an interest in the enterprise contemplated by the contract, and a right to continue its prosecution to reach and procure the compensation agreed. * * * The ownership of the claim remained to the end in C & Co. and their representatives. The latter could, as they did, refuse to make K their attorney and so prevent him from fully performing his contract. But he tendered that full performance, and a recovery having been had, he is entitled to the stipulated reward, less the further expense incurred in making the final collection."

See also Wylie v. Coxe, 56 U. S. (15 How.) 415, 14 L. Ed. 753; Morgan v. Gibson, 42 Mo. App. 234; Price v. Haeberle, 25 Mo. App. 201.

[85] See *ante*, § 620; McNaughton v. Moore, 1 Hayw. (N. C.) 189. See Bank of New York v. Vanderhorst, 32 N. Y. 553, where it was held that an authorized agent of a firm who continues to draw firm funds from a bank and apply them to firm uses after the death of one partner, both he and the bank being ignorant of the death, acts within the scope of his authority and his acts bind the firm.

[86] See *ante*, § 621; Rowe v. Rand, 111 Ind. 206. But not where the power was jointly and severally conferred. Wilson v. Stewart, 5 Penn. L. Jour. Rep. 450.

But while the authority is revoked, the question of the effect of the death upon the contract of employment is not so clear.

It has been held that the death of one of two partners does not relieve the firm of liability to an agent who has been engaged for a definite period,[87] but a contrary result has also been reached,[88] and it would seem that the former holding could be sustained only where the firm is not in fact dissolved, but goes on with the business substantially as before.[89]

§ 670. Death of principal dissolves authority of substitute.—The death of the principal not only dissolves the authority of the agent within the limits referred to, but also, so far as his acts might affect the principal, that of a substitute or subagent appointed by the agent, whether appointed with the consent and authority of the principal or not.[90]

b. By Death of the Agent.

§ 671. General rule—Death of agent terminates agency.—Upon the death of the agent invested with a mere power, the agency is terminated. There is then no one to exercise the derivative authority which must of course cease to flow. If the agent were one selected for his skill, judgment or discretion, this furnishes an additional reason why the authority should be held not to descend to the personal representatives of the agent, with whom the principal may be unacquainted and to whom he might be unwilling to confide the power.[91]

Where an agent holds property simply as agent his agency is terminated by his death, and the property will not pass to his personal representative.[92]

[87] Fereira v. Sayres, 5 Watts & Serg. (Penn.) 210, 40 Am. Dec. 496.

[88] Tasker v. Shepherd, 6 H. & N. 575; Burnet v. Hope, 9 Ont. Rep. 10; Hoey v. MacEwan, 5 Sc. Ct. Sess. (3d ser.) 814 (but compare Brace v. Calder, [1895] 2 Q. B. 253); Griggs v. Swift, 82 Ga. 392, 14 Am. St. Rep. 176, 5 L. R. A. 405; Greenburg v. Early, 30 Abb. N. Cas. 300.

[89] As in Hughes v. Gross, 166 Mass. 61, 55 Am. St. Rep. 375, 32 L. R. A. 620.

A dissolution of the partnership not by death but by the voluntary retirement of a partner does not terminate the contract so as to exempt from liability. Brace v. Calder, [1895] 2 Q. B. 253.

[90] Peries v. Aycinena, 3 W. & Serg. (Penn.) 64, 79.

[91] Gage v. Allison, 1 Brev. (S. C.) 495, 2 Am. Dec. 682; Merrick's Estate, 8 Watts & Serg. (Penn.) 402; Adriance v. Rutherford, 57 Mich. 170; Kimmell v. Powers, 19 Okla. 339; Love v. Peel, 79 Ark. 366; Bristol Savings Bank v. Holley, 77 Conn. 225; Tyson v. George's Creek Coal & Iron Co., 115 Md. 564.

[92] Tyson v. George's Creek Coal Co., *supra*.

§ 672. ——— Not when coupled with an interest.—Where, however, the agent has acquired with the power an estate or interest in the thing which is the subject of the agency, his death will not necessarily operate to defeat it. Thus the power of sale conferred upon a mortgagee is not revoked by his death, but may be exercised by his representatives or assigns.[93]

§ 673. When death of one of two agents terminates agency.—As has been seen, a power confided to two or more private agents must ordinarily be exercised by all of them jointly; the death of one of them therefore, where the authority is joint, renders the further execution of the agency as contemplated impossible, and it is therefore terminated.[94] Where however the agency is joint and several, or a several execution is otherwise authorized, the death of one agent does not terminate it.[95]

Even in the case of joint agents, moreover, since the rule requiring joint execution is based upon the presumed intention of the principal, the rule will not apply if, after the death of one, the principal recognizes the continued existence of the agency of the survivor.[96]

A power coupled with an estate in several or a power in trust to several, would however not ordinarily be terminated by the death of one.[97]

§ 674. Dissolution of artificial person which was the agent.—Where, instead of a natural person, an artificial person is constituted the agent, as in the case of a corporation, the legal "death" or dissolution of that artificial person, would ordinarily terminate the agency. The same result has been held to follow where a partnership had been appointed the agent and the partnership was dissolved.[98]

§ 675. Effect on substitute.—Where the agent has appointed a substitute or subagent without direct authority, and for his own convenience merely, the death of the agent annuls the authority of the subagent or substitute,[99] and this rule also applies even though the agent was expressly given the right of substitution.[1] Where, how-

[93] Collins v. Hopkins, 7 Iowa, 463; Harnickell v. Orndorff, 35 Md. 341; Merrin v. Lewis, 90 Ill. 505; Lewis v. Wells, 50 Ala. 198.

[94] Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180; Martine v. International L. Ins. Society, 53 N. Y. 339, 13 Am. Rep. 529; Rowe v. Rand, 111 Ins. 206.

[95] See Wilson v. Stewart, 5 Penn. L. J. Rep. 450; Douglass v. Baker, 79 Tex. 499.

[96] Davidson v. Provost, 35 Ill. App. 126.

[97] See *In re* Bacon, 76 L. J. Ch. 213.

[98] Larson v. Newman, 19 N. D. 153.

[99] Jackson Ins. Co. v. Partee, 9 Heisk. (Tenn.) 296.

[1] Lehigh Coal & Nav. Co. v. Mohr, 83 Penn. St. 228, 24 Am. Rep. 161; Watt v. Watt, 2 Barb. (N. Y.) Ch. 371; Peries v. Aycinena, 3 Watts &

ever, the subagent, though appointed by the agent, derives his authority directly from the principal, it will not be affected by the death of the agent.[2]

2. By Insanity of One of the Parties.

a. By Insanity of the Principal.

§ 676. In general.—The act of every agent exercising a bare power or authority necessarily presupposes, as has been seen, the existence of a principal competent to perform the same act himself in his own behalf. It is his will that is being carried out through the medium of the agent. If for any reason, therefore, the principal becomes incapable of acting and exercising an intelligent will in regard to the transaction, it is evident that an essential element in the relation is lacking, and while that element remains absent, the further exercise of the relation must be suspended.

§ 677. General rule.—It is the general rule, therefore, that the after-occurring insanity of the principal, or his incapacity to exercise any volition upon the subject by reason of an entire loss of mental power, operates as a revocation or suspension for the time being, of the authority of an agent acting under a bare power.[3] "If, on the recovery of the principal," it is said, "he manifests no will to terminate the authority, it may be considered as a mere suspension, and his assent to acts done during the suspension may be inferred from his forbearing to express dissent when they come to his knowledge." [4]

The insanity here referred to, of course means something more than mere mental weakness or delusions respecting particular matters. It must be either general dementia or at least such unsoundness as renders the principal incapable of acting with reference to those matters to which the authority relates.[5]

Serg. (Penn.) 79. See also Union Casualty Co. v. Gray, 52 C. C. A. 224, 114 Fed. 422.

[2] Smith v. White, 5 Dana (Ky.), 376.

[3] Davis v. Lane, 10 N. H. 156, 160; Matthiesson, etc., Co. v. McMahon, 38 N. J. L. 536; Hill v. Day, 34 N. J. Eq. 150; Bunce v. Gallagher, 5 Blatch. (U. S. C. C.) 481; Drew v. Nunn, 4 Q. B. Div. 661; Renfro v. City of Waco (Tex. Civ. App.), 83 S. W. 766; Spencer v. Reynolds, 9 Pa. Co. Ct. Rep. 249.

Cases of attorney and client.—Yonge v. Toynbee, [1910] 1 K. B. 215; Joost v. Racher, 148 Ill. App. 548; McKenna v. McArdle, 191 Mass. 96; Chase v. Chase, 163 Ind. 178.

[4] Davis v. Lane, *supra.*

[5] Drew v. Nunn, *supra;* Leggate v. Clark, 111 Mass. 308.

§ 678. ——— Ignorance of insanity.—But this general rule is subject to the exception ordinarily made in dealing with an insane person, that when third persons in good faith, relying upon an apparent authority and in ignorance of the principal's insanity have given a consideration of value, they will be protected, where the contract is fully executed, was fair and reasonable, and the parties cannot be restored to their original situation.[6] "The liability of the lunatic in such cases is upheld, not on the ground of the contract, but on the fact that the lunatic has received and enjoyed an actual benefit from the contract."[7] And where the principal while sane has expressly accredited an agent to the third person, the latter, it has been held, will be protected in continuing to supply goods to the agent until he has notice of the insanity.[8]

§ 679. When authority coupled with an interest.—And where the authority of the agent is given by way of security, etc., as previously explained, or is coupled with such an estate or interest that he may exercise it in his own name, the after-occurring insanity of the principal will not affect it.[9] Thus a mortgagee's power of sale is not revoked by the after-occurring insanity of the mortgagor,[10] or a power of attorney to confess judgment given as part of the security for money loaned.[11]

Whether the same principle is applicable to those authorities which, as has been seen, are not revocable during the principal's life though they may be revoked by his death, seems not to have been determined, though it has been suggested, and it is thought rightly, that such powers also would be preserved.[12]

§ 680. What evidence of insanity sufficient.—A judicial determination of insanity, after regular proceedings, is usually deemed evidence to all the world,[13] and it has been held that the insanity of the principal must be established as a fact by an inquisition before it would revoke the agency.[14] This view is approved by Chancellor Kent[15] in

[6] Matthiesson v. McMahon, 38 N. J. L. 536; Merritt v. Merritt, 43 N. Y. App. Div. 68; Davis v. Lane, 10 N. H. 156; Drew v. Nunn, 4 Q. B. Div. 661.

[7] Matthiesson v. McMahon, *supra*.

[8] Drew v. Nunn, *supra*. *Cf.* Yonge v. Toynbee, *supra*.

[9] Davis v. Lane, 10 N. H. 156; Matthiesson v. McMahon, 38 N. J. L. 536; Hill v. Day, 34 N. J. Eq. 150.

[10] Berry v. Skinner, 30 Md. 567; Van Meter v. Darrah, 115 Mo. 153; Bevin v. Powell, 83 Mo. 365; Lundberg v. Davidson, 72 Minn. 49, 42 L. R. A. 103; Laughlin v. Hibben, 129 Ind. 5.

[11] Spencer v. Reynolds, 9 Pa. Co. Ct. Rep. 249.

[12] Davis v. Lane, *supra*.

[13] See Hughes v. Jones, 116 N. Y. 67, 15 Am. St. R. 386, 5 L. R. A. 637; Joost v. Racher, 148 Ill. App. 548.

[14] Wallis v. Manhattan Co., 2 Hall (N. Y.), 495.

[15] II Kent's Com. 645.

his Commentaries, but, as is declared by the court in New Jersey,[16] it is believed that "the weight of authority, as well as sound reasoning, leads to the conclusion that the after-occurring insanity of the principal operates, *per se*, as a revocation or suspension of the agency, except in cases where a consideration has previously been advanced in the transaction which was the subject-matter of the agency so that the power became coupled with an interest, or where a consideration of value is given by a third person, trusting to an apparent authority in ignorance of the principal's incapacity." The mere fact that a guardian has been appointed over the principal as an insane person is not sufficient without proof that the insanity was of such a character as disqualified him from making a valid contract.[17] Nor the mere fact that one has gone to a hospital or asylum for the care or cure of the insane.[18]

b. By Insanity of the Agent.

§ 681. In general.—The proper exercise of the authority conferred implies in every case the exercise of more or less intelligence upon the part of the agent, and the subsequent loss of that intelligence by the agent renders the proper performance of his duty thereafter impossible. This is especially true where the agent was selected for his mental capacity or endowments, as in the case of an attorney, architect or author.

§ 682. General rule—Terminates agency unless coupled with an interest.—The after-occurring insanity of the agent to such a degree as to incapacitate him from further execution of the agency, operates as a dissolution, or suspension for the time being, of his authority in all cases, unless he has with it an estate or interest in the thing which is the subject-matter of the agency.[19] Mere partial derangement or monomania would not necessarily have that effect, unless the mania related to the subject-matter of the agency, or destroyed the agent's capacity for its proper execution.

[16] Matthiesson v. McMahon, 38 N. J. L. 536. See also Davis v. Lane, 10 N. H. 156; Bunce v. Gallagher, 5 Blatch. (U. S. C. C.) 481.

[17] Motley v. Head, 43 Vt. 633.

[18] See Leggate v. Clark, 111 Mass. 308; McKenna v. McArdle, 191 Mass. 96.

[19] See Corson v. Lewis, 77 Neb. 446, where an attorney became temporarily insane and his office was closed. *Held*, to annul the contract of employment.

But master was held liable for tort of an insane servant, acting within the course of his employment. Chesapeake, etc., Ry. Co. v. Francisco, 149 Ky. 307.

§ 683. How when insanity unknown.—Executed dealings had by third persons with the agent in good faith and in ignorance of his insanity, could not be affected by it, where no advantage had been taken of it and the parties could not be restored to their original situation.

§ 684. Insanity of one of two or more agents.—For the same reason that the death of one of two or more joint agents operates to dissolve the agency, the insanity of one of two or more joint agents has the same effect.[20] If, however, the agency was joint and several, it may be executed by the others.

§ 685. Effect on subagents.—The termination of the agent's authority would also bring to an end the authority of the substitutes and subagents who derived their powers from him. But if the subagent was appointed with the authority of the principal, and the authority of the subagent was capable of an independent execution, the insanity of the agent would not necessarily operate to dissolve the subagent's authority.

3. By Bankruptcy of One of the Parties.

§ 686. In general — Effect of bankruptcy.—Bankruptcy, in its legal effect, differs obviously and radically from death or insanity. It does not result in civil death or work a general legal incapacity. It simply operates with reference to the bankrupt and his then estate, and the claims of his then creditors. He is entirely free to engage in new business and make new contracts either in person or through an agent.

a. Bankruptcy of Principal.

§ 687. General rule—Bankruptcy of principal terminates agent's authority.—The legal bankruptcy of the principal or his general assignment for the benefit of creditors operates to revoke the authority of the agent for the transaction of the principal's business affected by the bankruptcy or assignment. By this event the principal's control and management of his affairs so affected is divested and confided to the assignee or trustee for the benefit of his creditors, who is thereupon entitled to collect and possess the bankrupt's credits and property, and the subject-matter of the agency passes under his control.[21]

[20] Salisbury v. Brisbane, 61 N. Y. 617; Rowe v. Rand, 111 Ind. 206.

[21] Minett v. Forrester, 4 Taunt. 541; Drinkwater v. Goodwin, Cowper, 251; Parker v. Smith, 16 East, 382; Wilson v. Harris, 21 Mont. 374. Where the agent, in pursuance of a previous direction of his principal, does an act which is in itself an act of bankruptcy, his authority does not terminate until the act is done, and then it is too late to question it. *Ex parte* Helder, 24 Ch. Div. 339.

The bankruptcy, however, would not terminate an authority respecting matters not affected by it, or for the performance of acts which the bankrupt might still perform.[22]

§ 688. Mere insolvency not enough.—The mere insolvency, or inability of the principal to pay his debts when due, would not have this effect. It only results from the operation of the law when, either voluntarily or involuntarily, the principal surrenders and the law assumes the control of his affairs.

Particular situations may undoubtedly arise, in which continued solvency on the part of the principal may expressly or by implication be a condition to the continuance of the authority. And the insolvency of the principal may justify the agent in refusing to continue; but these are not the questions here involved.

§ 689. Agent's authority not dissolved when coupled with an interest.—Where however the authority of the agent is given by way of security, or is "coupled with an interest," the bankruptcy of the principal will not dissolve it.[23] Thus the power of sale conferred upon a mortgagee is not revoked by the mortgagor's bankruptcy.[24]

§ 690. How when bankruptcy unknown.—Where after the act of bankruptcy but before adjudication, the agent deals by virtue of the power with third persons who are ignorant of the bankrupcty, and who with good faith part with value upon the strength of the agent's authority, their rights—not acquired in violation of the terms of the statute—will ordinarily be protected.[25]

b. Bankruptcy of the Agent.

§ 691. General rule.—The bankruptcy of a business agent, as for example, an agent appointed to sell merchandise,[26] or to receive payment of money due his principal,[27] operates as a revocation of his authority, but not where his authority is merely to do some formal act,

[22] See Dixon v. Ewart, 3 Meriv. 322.

[23] Power of attorney to sell given as adjunct to a pledge is not terminated by bankruptcy. Renshaw v. Creditors, 40 La. Ann. 37; Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351.

So where authority to a bank to collect was deemed coupled with an equitable assignment of the debt. Farmers' Bank v. Kansas City Pub. Co., 3 Dillon, 287, Fed. Cas. No. 4,652. Same effect: Clark v. Iron Co., 26 C. C. A. 423, 81 Fed. 310.

[24] Hall v. Bliss, 118 Mass. 554, 19 Am. Rep. 476.

[25] *Ex parte* Snowball, L. R. 7 Ch. App. 534, 548; Elliott v. Turquand, 7 App. Cas. 79.

[26] Audenried v. Betteley, 8 Allen (Mass.), 302; Scott v. Surman, Willes (K. B.), 400; Hudson v. Granger, 5 Barn. & Ald. 27.

[27] Hudson v. Granger, *supra*.

as the execution of a deed in the name of his principal, or the carrying out of some existing trust which is incumbent upon him.[28]

The mere insolvency of the agent would not of itself terminate an authority, but a known or notorious condition of insolvency might very well be deemed to terminate many sorts of authority, especially those involving trust and credit in financial affairs.[29] It would doubtless be good ground for the termination of definite contracts of employment in any case in which keeping his credit good might fairly be regarded as an implied term.

4. *By Marriage.*

§ 692. a. Marriage of principal.—The marriage of the principal will, in certain cases, operate to revoke a power previously given, that is to say, where the execution of the power will defeat or impair rights acquired by the marriage.

Thus where a man gave a power of attorney to another to sell his homestead, but before a sale was effected the principal married, it was held that the marriage operated as a revocation of the power. By the marriage the wife acquired interests in the property of which she could only be divested with her consent, evidenced by her joining in the deed, or in the power of attorney by virtue of which the deed was executed.[30] The rule would not apply, however, where the execution of the power would not defeat or impair the rights acquired by the wife, as, for example, where an executory contract for the sale of land may be executed by the husband which would leave the wife's dower rights unimpaired.[31]

So, at the common law, the subsequent marriage of a *feme sole* operated to revoke a power of attorney previously given by her where its execution would defeat the rights acquired by the husband, and the same rule would still apply wherever the modern married women's acts have not clothed her with full capacity to deal as *sole* with reference to the interests in question, or where, under the law, the husband acquires an immediate interest in the property by the marriage.[32]

A power given by way of security, or a power coupled with an in-

[28] Dixon v. Ewart, 3 Mer. 322; Hudson v. Granger, *supra*.

[29] See McLeod v. Despain, 49 Oreg. 536, 124 Am. St. R. 1066, 19 L. R. A. (N. S.) 276.

[30] Henderson v. Ford, 46 Tex. 627.

[31] Joseph v. Fisher, 122 Ind. 399.

[32] Judson v. Sierra, 22 Tex. 365; Brown v. Miller, 46 Mo. App. 1; Wambole v. Foote, 2 Dak. 1; Gilmer v. Veatch, 56 Tex. Civ. App. 511.

terest, however, like the power of sale contained in a valid mortgage, would not be revoked by the marriage of the grantor.[33]

§ 693. b. Marriage of agent.—The marriage of the agent is not usually an event which, in itself, can affect the continuance of the agency. There may be express stipulations for an unmarried agent, and there may be cases, especially where the agent is a woman, in which the legal subordination of the agent's will to that of the principal may be inconsistent with rights or powers acquired by the other party to the marriage. It is easier, however, to imagine cases in which the marriage of the agent, and especially again a female agent, would be likely to lead to situations justifying a termination of the relation than it is to foresee cases in which the marriage renders the continuance of the relation legally impossible.[34]

5. By War.

§ 694. In general—War between countries of principal and of agent terminates commercial agency.—Every kind of trading, or commercial dealing, or intercourse, whether by transmission of money or goods, or of orders for the delivery of either, between two countries at war, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission are prohibited.[35]

It results, therefore, that war between the state or country of the principal and that of the agent, as a general rule, renders further prosecution of the agency for such purposes unlawful and operates to dissolve the relation.

Many other cases, than those involving war between the respective countries of the principal and the agent, can easily be imagined in which the breaking out of war would affect agency. Thus, a war in their common country, or a war in the country in which the authority

[33] A power of attorney to confess judgment has been put on the same ground. Eneri v. Clark, 2 Pa. St. 234, 44 Am. Dec. 191.

[34] See Edgecomb v. Buckhout, 146 N. Y. 332, 28 L. R. A. 816, where it was held that the mere fact that a woman, engaged while single as housekeeper for an unmarried man, proposed to marry did not justify her discharge where it appeared that she promised and her proposed husband was willing that she should continue to render the same services as formerly and where there had been in fact no failure to render the same service.

[35] Williams v. Paine, 169 U. S. 55, 42 L. Ed. 658; Kershaw v. Kelsey, 100 Mass. 561, 1 Am. Rep. 142; Woolsey, International Law, § 117; Montgomery v. United States, 15 Wall. (U. S.) 395, 400, 21 L. Ed. 97.

was to be exercised, may easily create such changes in the possibility, desirability or risk of performance as necessarily to suspend, if not to terminate, the prosecution of the enterprise contemplated before the war occurred.

The case of war between their respective countries, however, is the one which has chiefly been considered, and to which most of the judicial utterances have applied.

§ 695. ——— It is said by a learned judge:[86] "That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years, that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition it must follow that no active business can be maintained either personally or by correspondence or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same state with the debtor. But this indulgence is subject to restrictions. In the first place it must not be done with the view of transmitting the funds to the principal during the continuance of the war, though if so transmitted without the debtor's connivance, he will not be responsible for it.

"In the next place, in order to the subsistence of the agency during the war, it must have the assent of the parties thereto,—the principal and the agent. As war suspends all intercourse between them, preventing any instructions, supervision, or knowledge of what takes place on the one part, and any report or application for advice on the other, this relation necessarily ceases on the breaking out of hostilities even for the limited purpose before mentioned, unless continued by the mutual assent of the parties. It is not compulsory; nor can it be made so on either side, to subserve the ends of third parties. If the agent continues to act as such, and his so acting is subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money for the use of the principal into the agent's hands; but not otherwise. It is not enough that there was an agency prior to the war. It would be contrary to reason that a man without his consent should continue to be bound by the acts of one whose relations to him have undergone such

[86] Bradley, J., in Insurance Co. v. Davis, 95 U. S. 425, 24 L. Ed. 453.

a fundamental alteration as that produced by a war between the two countries to which they respectively belong; with whom he can have no correspondence, to whom he can communicate no instructions, and over whom he can exercise no control. It would be equally unreasonable that the agent should be compelled to continue in the service of one whom the law of nations declares to be his public enemy. If the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war and to restore it faithfully at its close. This is all. * * *

"What particular circumstances will be sufficient to show the consent of one person that another shall act as his agent to receive payment of debts in an enemy's country during war may sometimes be difficult to determine. Emerigon says that if a foreigner is forced to depart from one country in consequence of a declaration of war with his own, he may leave a power of attorney to a friend to collect his debts and even to sue for them.[37] But though a power of attorney, to collect debts, given under such circumstances, might be valid, it is generally conceded that a power of attorney cannot be given during the existence of war by a citizen of one of the belligerent countries resident therein, to a citizen or resident of the other; for that would be holding intercourse with the enemy which is forbidden. Perhaps it may be assumed that an agent *ante bellum,* who continues to act as such during the war in the receipt of money or property on behalf of his principal where it is the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed unless the contrary be shown; but that where it is against his interests, or would impose upon him some new obligations or burdens, his assent will not be presumed, but must be proved, either by his subsequent ratification or in some other manner. In some way, however, it must appear that the alleged agent assumed to act as such and that the alleged principal consented to his so acting." [38]

[37] Traite des Assurances, Vol. 1, 567.

[38] Upon this question see also New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789; Ward v. Smith, 7 Wall. (U. S.) 447, 19 L. Ed. 207; Brown v. Hiatts, 15 Wall. (U. S.) 177, 21 L. Ed. 128; Fretz v. Stover, 22 Id. 198, 22 L. Ed. 769. The decisions in the state courts do not seem to be altogether harmonious. See Shelby v. Offutt, 51 Miss. 128; Darling v. Lewis, 11 Heisk. (Tenn.) 125; Howell v. Gordon, 40 Ga. 302; Robinson v. Life Ass'n Co., 42 N. Y. 54, 1 Am. Rep. 490; Sands v. Life Ins. Co., 50 N. Y. 626, 10 Am. Rep. 535; Manhattan Life Ins. Co. v. Warrick, 20 Gratt. (Va.) 614, 3 Am. Rep. 218; Jones v. Harris, 10 Heisk. (Tenn.) 98; Blackwell v. Willard, 65 N. C. 555, 6 Am. Rep. 749.

§ 696. ——— In a later case[39] before the same court, it is said: "It is entirely plain, as we think, that the mere fact of the breaking out of a war does not necessarily and as a matter of law revoke every agency. Whether it is revoked or not depends upon the circumstances surrounding the case and the nature and character of the agency." "Where it is obviously and plainly against the interest of the principal that the agency should continue, or where its continuance would impose some new obligation or burden, the assent of the principal to the continuance of the agency after the war broke out, will not be presumed but must be proved, either by his subsequent ratification or in some other manner. And on the other hand, where it is the manifest interest of the principal that the agency, constituted before the war, should continue, the assent of the principal will be presumed. Or, if the agent continues to act as such, and his so acting is subsequently ratified by the principal, then those acts are just as valid and binding upon the principal as if no war had intervened."

In this case it was held that a power of attorney, executed in one of the northern states before the civil war by a married woman then residing there, was not revoked by the fact that, when the war broke out, she and her husband removed to one of the southern states, where he entered the confederate service and where she resided until the close of the war. So a power of sale contained in a mortgage of lands was not revoked by the war.[40]

6. By Destruction of Subject-matter.

§ 697. Destruction of subject-matter usually terminates agency respecting it.—Where the authority is created to be exercised upon or respecting some particular subject-matter, whose continued existence is essential to the exercise of the authority, the subsequent destruction of that subject-matter must ordinarily operate to terminate the authority. Thus, for example, it is held that the destruction of a house by fire will terminate an authority to sell it.[41]

[39] Williams v. Paine, 169 U. S. 55, 42 L. Ed. 658.

[40] University v. Finch, 85 U. S. (18 Wall.) 106, 21 L. Ed. 818.

[41] Cox v. Bowling, 54 Mo. App. 289. (Here all parties seem to have known of the fire.) So where an attorney was employed to protect and obtain supposed interests of his client in land, his authority is terminated when it is discovered that his client has no interest. Palms v. Howard, 129 Ky. 668.

Whether the principal would incur any liability for so terminating, if the destruction were by his act, is a question not now involved.

7. By Termination of Principal's Interest in Subject-matter.

§ 698. Termination of principal's interest usually terminates authority.—It must also be true, as a general rule, that the termination or extinguishment of the principal's interest in the subject-matter, over or concerning which the authority is to be exercised, must operate to terminate the authority.[42] Reference has already been made to this, where the termination of the principal's interest results from his disposing of such subject-matter or of his estate or interest therein.[43]

8. By Termination of Principal's Authority.

§ 699. Principal's removal from office removes subordinates.—Where the principal's power of appointing agents is derived from his occupying an office or position of a fiduciary character, his ceasing to longer occupy the position operates to determine the authority of those also who were his subordinates in the performance of the trust.[44]

9. By Change in Law.

§ 700. Change in law rendering prosecution of agency unlawful.—Although it were lawful when created, a subsequent change in the law which makes the execution of the authority or the further prosecution of the agency unlawful, must usually operate to terminate it.[45]

10. Notice of the Termination.

§ 701. Notice generally not necessary where authority terminated by operation of law.—It is, in general, true that notice is not required to be given of the termination of authority by operation of law, in order to prevent future acts which shall be binding upon those who succeed in law to the principal's rights. The reason commonly given

[42] See Foster v. Bookwalter, 152 N. Y. 166; Kelly v. Brennan, 55 N. J. Eq. 423.

[43] See *ante*, § 619.

[44] Livermore on Agency, § 307.

[45] See Justice v. Lairy, 19 Ind. App. 272, 65 Am. St. R. 405 (a partnership case).

for this is, that the event which works the termination is either in itself of a public nature, or is so associated with acts tending to publicity, that it may fairly be assumed that everybody will know of it. Termination by the breaking out of war between the country of the principal and that of the agent, would furnish a typical illustration. The same principle is also said to apply to termination by death, which usually involves elements of publicity; and by bankruptcy;[46] marriage, perhaps;[47] judicial determination of insanity; and the like.

§ 702. ——— The true reason in these latter cases may well be practical necessity; but another reason may doubtless be found elsewhere for certain of them. The case likely to present itself is not whether the agent can continue to bind the principal but whether his acts, done after the happening of the alleged terminating event, can bind his estate in the hands of those who succeed by law to the interests of the former principal—in the case of death, whether the heirs or representatives are affected; in the case of insanity, whether the estate is affected; and the like. Assuming that the liability of the principal who has not given notice is based upon the doctrines of estoppel, it will be evident that there is here no room for their application. The person who created the authority is not responsible for its termination. The persons sought to be estopped neither created the agency nor terminated it; they have done no acts upon which the persons asserting estoppel could rely; they have done nothing to mislead but have simply succeeded to rights with which the law clothes them; they may have had no knowledge or means of knowledge of the existence of the authority; they have succeeded to property, not to personal relations.

§ 703. ——— If the question were whether in case of marriage or bankruptcy the principal himself might continue to be bound, different considerations would apply. As to him, it might well be in certain cases that the event did not dissolve the authority, however

[46] Notice of the dissolution of a partnership by bankruptcy, is held not to be necessary. Eustis v. Bolles, 146 Mass. 413, 4 Am. St. R. 327. But an assignment for the benefit of creditors is held not to be an event of which all persons are bound to take notice. Kuser v. Wright, 52 N. J. Eq. 825.

[47] In Little v. Hazlett, 197 Pa. 591, it was held by the court below that marriage of a woman terminates a partnership by operation of law without notice. The judgment below was affirmed by a *per curiam* opinion without discussion of this question. In Henderson v. Ford, 46 Tex. 627, the marriage of a man was said to terminate an authority to sell a homestead, but, although the grantee did not know of the marriage at the time of the purchase, he did know of it before he accepted the deed and paid the price.

much it might be held inoperative against those who had acquired rights by the event. It would be conceivable, for example, that a wholesale dealer might give such authority to his travelling salesman to bind him by executory contracts of sale that he would continue to be personally bound after his bankruptcy even though no damages for the breach of such a contract could be allowed out of the estate in the hands of the assignee. Marriage, at common law, of a male principal would not affect his status as would the marriage of a female principal, and the marriage of the latter, under modern statutes, might have a very narrow effect upon existing agencies created by her.

OF THE AUTHORITY CONFERRED; ITS NATURE AND EFFECT

CHAPTER I

OF THE NATURE AND EXTENT OF THE AUTHORITY IN GENERAL

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§ 704. Purpose of Book II.—It has been seen in earlier chapters how the relation of principal and agent may be created and how it may be terminated. The purpose of creating the agency is to confer authority upon the agent,—to clothe him to a greater or less extent, and for a shorter or longer period, with a portion of that power with which nature and the laws of society have invested the principal. For the time being, and in some capacity, the principal has another self, who, by his will and act, is invested with the power to speak and do with like effect as if he himself should speak or do.

It will be very evident that to those persons who may have occasion to deal with the principal through this other self, the question of how fully, how certainly and for how long a time, he has invested the latter with his own personality, becomes exceedingly important. And not only this, but these matters being ascertained, it is no less important to determine whether any given act assumed to be done by virtue thereof, is, in reality, within the fullness, the certainty and the term of the investment.

It will be equally evident that these are questions not always easy of solution, not only because men are notoriously careless and indefinite in their words and acts, but because even if, in a given case, a power has been conferred in terms the most express and definite, the questions may still arise whether the express words embrace the act assumed to be done by virtue of them; whether the mode of doing has been that contemplated by the language used; whether subsequent changes in the circumstances of the parties, or the condition of the subject-matter have warranted any departure from that mode; whether in consideration of the nature of the act to be done, or the time and place of doing it, custom or necessity have added to, or subtracted from, the powers originally conferred.

It is the purpose of Book II to ascertain the principles upon which the solution of these questions rests.

§ 705. Scope of the questions involved.—It will be evident, also, upon reflection, that these questions can not well be considered in the abstract. It may indeed seem at first thought that the authority of an agent will always be a fixed and definite quantity, and that there must be certain rules which may invariably be applied to determine its existence and to measure its scope and extent. Further consideration, however, will show this to be an error. Authority, at least in the practical sense in which it is here dealt with, is an exceedingly concrete matter, it has very little abstract value, it is a variable quantity, it is affected by relations, it may present one aspect to one person and a different one to another person, it can not be separated from its environment. It will be evident, therefore, that we must consider not only its relation to persons, but the relation of persons to it. We must consider their duty to ascertain its existence, to interpret it properly, and to apply it correctly to the affairs in question.

§ 706. Distinctions based upon nature and extent of authority.—In doing this, aid may perhaps be derived from certain of the familiar distinctions based upon the nature and extent of the authority. Thus it is common to say that in its nature the authority may be express or implied; and, as to its extent, that it may be either universal, general or special. It is certain that distinguishable ideas underlie these classifications, however much there may be difference of opinion as to their importance.

I.

EXPRESS AND IMPLIED AUTHORITY.

§ 707. Where authority is express—Effect of limitations.—It has been seen in another place how the creation of an authority may be either express or implied, and nothing more need now be said upon that particular subject. But in determining the scope of the authority the question whether it is express or implied becomes important.

If the grant be an express one, the extent of the authority conferred, and the time, place and manner of its exercise may be expected to be clearly defined. And to the degree to which this is done, the limits fixed are necessarily conclusive upon all parties who have or are charged with notice of them.[1] So, to the extent to which the grant is

[1] Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Brown v. Johnson, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; Hurley v. Watson, 68 Mich. 531; Chaffe v. Stubbs, 37 La. Ann. 656; Rust v. Eaton, 24 Fed. 830; Stainback v. Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Wood Mow. & Reap. Machine Co. v. Crow, 70 Iowa, 340; Siebold v. Davis, 67 Iowa, 560; Bohart v. Oberne, 36 Kan. 284.

express it is exclusive of every other main authority,[2] for while usage and necessity may often determine the mode in which the authority is to be exercised, they cannot operate to change the essential character of the authority conferred.[3]

Duty to observe extent.—Parties dealing with an agent known by them to be acting only under an express grant, whether the authority conferred be general or special, are bound to take notice of the nature and extent of the authority conferred. They must be regarded as dealing with that grant before them, and are bound at their peril to notice the limitations thereto prescribed either by its own terms or by construction of law.[4]

Where written authority exists.—So, where the act assumed to be done by the agent is one for which the authority is required by law to be conferred by a written instrument or by a writing under seal, the parties dealing with him must take notice of that fact, and they will be bound by any limitations or restrictions contained therein, although they have not had actual knowledge of them.[5]

The fact that the agent signs *"per* power of attorney,"[6] or, perhaps, merely *"per procuration"*[7] and the like, is ordinarily sufficient to put the party dealing with him upon inquiry.

[2] "No authority will be implied from an express authority. Whatever powers are strictly necessary to the effectual exercise of the express powers will be conceded to the agent by implication." Jackson v. National Bank, 92 Tenn. 154, 36 Am. St. R. 81, 18 L. R. A. 663.

[3] Robinson v. Mollett, L. R. 7 H. of L. 802, reversing the same case in L. R. 7 C. P. 84.

[4] Mt. Morris Bank v. Gorham, 169 Mass. 519; Ferguson v. Davis, 118 N. C. 946; Reeves v. Corrigan, 3 N. Dak. 415; Gorham v. Felker, 102 Ga. 260; Wells v. Mich. Mut. L. Ins. Co., 41 W. Va. 131; Dyer v. Duffy, 39 W. Va. 148, 24 L. R. A. 339; Stainback v. Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; The Floyd Acceptances, 7 Wall. (U. S.) 666, 19 L. Ed. 169; Whiteside v. United States, 93 U. S. 247, 23 L. Ed. 882; Lewis v. Commissioners, 12 Kan. 186; Craycraft v. Selvage, 10 Bush (Ky.), 696; Dozier v. Freeman, 47 Miss. 647; Baxter v. Lamont, 60 Ill. 237; Cruzan v. Smith, 41 Ind. 288; Blackwell v. Ketcham, 53 Ind. 184; Silliman v. Fredericksburg, etc., R. R. Co., 27 Gratt. (Va.) 119; Snow v Warner, 10 Metc. (Mass.) 132, 43 Am. Dec. 417.

See also *per* Moulton, L. J., in Smith v. Prosser, [1907] 2 K. B. 735.

[5] Mt. Morris Bank v. Gorham, 169 Mass. 519; Peabody v. Hoard, 46 Ill. 242; Weise's Appeal, 72 Penn. St. 351; National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Miller v. Wehrman, 31 Neb. 388; Thompson v. Green River Power Co., 154 N. Car. 13.

[6] Mt. Morris Bank v. Gorham, *supra.*

[7] So declared in Alexander v. Mackenzie, 6 C. B. 766; Attwood v. Munnings, 7 B. & C. 278.

But in Smith v. McGuire, 3 H. & N. 554, it is said by Pollock, C. B.: "The expression 'per procuration' does not always necessarily mean that the act is done under procuration. All that it in reality means is

§ 708. Where authority is implied.—The same general principles apply so far as possible where the authority is implied, though from the nature of the case the limits of an implied authority cannot be defined so sharply as where the authority is express. As has been seen in another place, authority is constantly implied from the words and conduct of the parties or from the circumstances of the case. Even here, however, the authority so implied is not without limits; it cannot exceed the necessary and legitimate effect of the facts from which it is so inferred, the facts must be given their natural and appropriate significance, and when the authority is inferred from the recognition or adoption of acts of a certain sort, its scope must be limited to the performance of like acts under like circumstances.[8]

this: 'I am an agent not having any authority of my own.'"

The Negotiable Instruments Act provides that "A signature by 'procuration' operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority." Section 21.

[8] See Graves v. Horton, 38 Minn. 66, where Mitchell, J., says: "It is true that agency may be proved from the habit and course of dealing between the parties; that is, if one has usually or frequently employed another to do certain acts for him, or has usually ratified such acts when done by him, such person becomes his implied agent to do *such acts;* as, for example, the case of the manager of a plantation in buying supplies for it, or the superintendent of a sawmill in making contracts for putting in logs for the use of the mill, which are the cases cited by respondent. It is also true, as was said in Wilcox v. Railroad Co., 24 Minn. 269 (which involved the question of the authority of the person to whom goods were delivered to receive them), a single act of an assumed agent, and a single recognition of it, may be of so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do *similar* acts for the principal beyond question. It is also true that the performance of subsequent as well as prior acts, authorized or ratified by the principal, may be evidence of agency, where the acts are of a similar kind, and related to a continuous series of acts embracing the time of the act in controversy, as indicating a general habit and course of dealing; as for example, the acts of the president of a railroad company in making drafts in the name of the company, which were honored by it, which was the case of Olcott v. Railroad Co., 27 N. Y. 546, 84 Am. Dec. 298, cited by counsel. But we think the books will be searched in vain for a case where it was ever held that authority to negotiate for the sale of property to one person at one time on certain terms, the transfer to be made by the principal in person, was evidence of authority to sell and transfer the same property at some former time to another person on different terms." See also McAlpin v. Cassidy, 17 Tex. 449; Gordon v. Loan & Tr. Co., 6 N. Dak. 454; Gregory v. Loose, 19 Wash. 599; Hallady v. Underwood, 90 Ill. App. 130; Rusby v. Scarlett, 5 Esp. 76; Baines v. Ewing, L. R. 1 Exch. 320; Day v. Boyd, 6 Heisk. (Tenn.) 458; Cooley v. Willard, 34 Ill. 68, 85 Am. Dec. 296; Johnson v. Wingate, 29 Me. 404; Washington Bank v. Lewis, 22 Pick. (Mass.) 24.

And so, as has been elsewhere noticed, the authority, if implied at all, can only be implied from facts. It is not to be created by mere presumption, nor by any abstract considerations, however potent, that it would be expedient or proper or convenient that the authority should exist.[9] The facts, moreover, must be those for which the principal is responsible. The authority if it exists at all must find its source in the act or acquiescence of the principal, either expressed or implied. If such a source cannot be shown, the authority cannot exist.[10]

II.

THE ELEMENTS OF AUTHORITY.

§ 709. Authority an attribute of character bestowed by the principal.—By the creation of the agency, the principal bestows upon the agent a certain character. For some purpose, during some time and to some extent, the agent is to be the *alter ego*,—the other self, of the principal. This purpose, time and extent are determined by the principal to suit the needs or objects which he has in view, and which the agent is expected to accomplish. These, however, are matters in which third persons have no part; they are considered and determined by the principal alone. What third persons are interested in, is, not the secret processes of the principal's mind, but the visible result of those processes,—the character in which the agent is held out by the principal to those who may have occasion or opportunity to deal with him. This character is a tangible, discernible thing, and, so far as third persons are concerned, must be held to be the authorized, as it is the only, expression and evidence from which the principal intends that they shall determine his purposes and objects. They must conclude, and have a right to conclude, that the principal intends the agent to have and exercise those powers, and those only, which naturally and properly belong to the character in which he holds him out.[11]

Authority cannot usually be inferred from the authorization or adoption of a single act. (Green v. Hinkley, 52 Iowa, 633, and other cases cited *ante*, § 262); but it may be if the adoption is sufficiently comprehensive and positive (Wilcox v. Chicago, etc., R. Co., 24 Minn. 269, and other cases cited *ante*, § 262).

No inference of authority to sign a contract can properly be drawn from the fact that the alleged agent had on two occasions drawn up and signed contracts dictated by the principal. Fadner v. Hibler, 26 Ill. App. 639.

[9] Bickford v. Menier, 107 N. Y. 490.

[10] Law v. Stokes, 32 N. J. L. 249, 90 Am. Dec. 655.

[11] Cited and approved: Harrison v. Kansas City Ry. Co., 50 Mo. App. 332.

The authority of an agent in any given case, therefore, is an attribute of the character bestowed upon him in that case by the principal. Thus if the principal has by his express act, or as the logical and legal result of his words or conduct, impressed upon the agent the character of one authorized to act or speak for him in a given capacity, authority so to speak and act, follows as a necessary attribute of the character, and the principal having conferred the character will not be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to impose so much authority, or that he had given the agent express instructions not to exercise it.[12] The latter question is one to be settled between the agent and himself. It rested with the principal to determine in the first instance what character he would impart, but having made the determination and imparted the character, he must be held to have intended also the usual and legal attributes of that character.

§ 710. Limitations—"Apparent authority" not to be limited by secret instructions.—It is not to be inferred, however, that third persons have the right to attribute to the agent any authority they please, and by so doing bind the principal. It is lawful for the principal to confer as much or as little authority as he sees fit. He may impose all such lawful restrictions and limitations upon it as he thinks desirable, and these restrictions and limitations will be as binding and conclusive upon third persons who know of them, or who are charged with notice of them under the rules hereafter discussed, as they are upon the agent, provided the principal has done nothing to waive or nullify them.[13] But on the other hand, as will be seen, instructions or limitations which are not disclosed cannot be permitted to affect an authority apparently unlimited and attended by no circumstances which, according to the ordinary habits and experiences of mankind, would suggest the possibility of such limitations.

The criterion in this case, as in others, is the character bestowed by the principal. He may not hold the agent out in the character of one having a general or special authority, and bind third persons who have relied thereon in good faith, by secret limitations and restrictions upon the agent's authority which are inconsistent with the character bestowed. Although the agent violates his instructions or exceeds the limits set to his authority, he will yet bind his principal to such third

[12] Cited and approved: Hibbard v. Peek, 75 Wis. 619; Austrian v. Springer, 94 Mich. 343, 34 Am. St. R. 350.

[13] See Van Santvoord v. Smith, 79 Minn. 316; American Lead Pencil Co. v. Wolfe, 30 Fla. 360, citing and approving text.

persons, if his acts are within the scope of the authority which the principal has caused or permitted him to appear to possess.[14] But if the agent be not held out as one possessing other than the limited and restricted authority, then the instructions and the authority may coincide.

§ 711. ——— Rather anomalously, as it would seem, it is held that these rules apply as strongly where the principal was undisclosed at the time of the transaction as where he was disclosed,[15]—a matter

[14] Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Walker v. Skipwith, Meigs (Tenn.), 502, 33 Am. Dec. 161; Commercial Bank v. Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Topham v. Roche, 2 Hill (S. C.), 307, 27 Am. Dec. 387; Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Bentley v. Doggett, 51 Wis. 224, 37 Am. Rep. 827; Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Williams v. Getty, 31 Penn. St. 461, 72 Am. Dec. 757; Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78; Carmichael v. Buck, 10 Rich. (S. C.) L. 332, 70 Am. Dec. 226; Butler v. Maples, 9 Wall. (U. S.) 766, 19 L. Ed. 822; Union Mut. Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222, 20 L. Ed. 617; Paine v. Tillinghast, 52 Conn. 532; Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427; Home Life Ins. Co. v. Pierce, 75 Ill. 426; Murphy v. Southern Life Ins. Co., 3 Baxter (Tenn.), 440, 27 Am. Rep. 761; Cruzan v. Smith, 41 Ind. 288; Bell v. Offutt, 10 Bush (Ky.), 632; Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Morton v. Scull, 23 Ark. 289; Furnas v. Frankman, 6 Neb. 429; Willard v. Buckingham, 36 Conn. 395; Golding v. Merchant, 43 Ala. 705; Adams Express Co. v. Schlessinger, 75 Penn. St. 246; Palmer v. Cheney, 35 Iowa, 281; Williams v. Mitchell, 17 Mass. 98; Odiorne v. Maxcy, 13 Mass. 178; Hough v. Doyle, 4 Rawle (Penn.), 291; Shelhamer v. Thomas, 7 Serg. & R. (Penn.) 106; Wilcox v. Routh, 9 Smedes & M. (Miss.) 476; Howry v. Eppinger, 34 Mich. 29; Davenport v. Peoria, etc., Ins. Co., 17 Iowa, 276; Kane v. Barstow, 42 Kan. 465, 16 Am. St. R. 490; Banks v. Everest, 35 Kan. 687; Winchell v. Nat. Expr. Co., 64 Vt. 15; Hirschorn v. Bradley, 117 Iowa, 130; Pacific Biscuit Co. v. Dugger, 40 Oreg. 302; Kansas City, etc., R. Co. v. Higdon, 94 Ala. 286, 33 Am. St. R. 119, 14 L. R. A. 515; LaFayette Ry. Co. v. Tucker, 124 Ala. 514; Rosenberger v. Marsh, 108 Iowa, 47; Merchants' Nat. Bank v. Clifton Mfg. Co., 56 S. Car. 320; Allis v. Voigt, 90 Mich. 125; Hamill v. Ashley, 11 Colo. 180; Wilson v. Assur. Co., 51 S. Car. 540, 64 Am. St. R. 700; Ruggles v. Ins. Co., 114 N. Y. 415, 11 Am. St. R. 674; Wachter v. Assur. Co., 132 Pa. 428, 19 Am. St. R. 600; Brown v. Ins. Co., 165 Mass. 565, 52 Am. St. R. 534; Sanford v. Ins. Co., 174 Mass. 416, 75 Am. St. Rep. 358; Austrian v. Springer, 94 Mich. 343, 34 Am. St. R. 350; Hall v. Hopper, 64 Neb. 633; Smith v. Droubay, 20 Utah, 443; Shaw v. Williams, 100 N. Car. 272; Dispatch Printing Co. v. National Bank, 109 Minn. 440.

[15] See *post*, § ——; Hubbard v. Tenbrook, 124 Pa. 291, 10 Am. St. 585, 2 L. R. A. 823; Watteau v. Fenwick, L. R., [1893] 1 Q. B. 346; McCracken v. Hamburger, 139 Pa. 326; Lamb v. Thompson, 31 Neb. 448; Patrick v. Grand Falls Merc. Co., 13 N. Dak. 12; Ernst v. Harrison, 86 N. Y. Supp. 247; Napa Valley Wine Co. v. Casanova, 140 Wis. 289; Mississippi Valley Const. Co. v. Abeles, 87 Ark. 374; Allison v. Sutlive, 99 Ga. 151.

which is more fully considered in a later chapter where the obligations of an undisclosed principal are discussed.

712. **Distinction between authority and power.**—Although the two terms are constantly used synonymously, there are occasions in which it may be helpful to draw a distinction between *authority* and *power*. There are undoubtedly many cases in which the agent may have it in his power to bind his principal when it is not within his authority as between the principal and the agent. Thus as has just been pointed out, the agent may often bind his principal to third persons by doing the very acts which the principal has expressly forbidden the agent to do. So, although the agent's authority has terminated or been revoked, as the agent knows, the agent may have it in his power to continue to bind his principal to third persons until notice of the revocation has been given to them, in accordance with rules considered in a preceding chapter. Many other illustrations will also suggest themselves.

§ 713. **What constitutes authority.**—The point has now been reached at which it becomes necessary to ascertain what constitutes the authority of an agent. Enough has already been said to show that this is a question which cannot be given a categorical answer. Authority is almost if not quite always a conglomerate, made up of a variety of elements which must be pointed out. It is also usually like a figure with two unequal dimensions,—it has a narrower and a wider aspect, the former of which is usually presented when looked at from the standpoint of the agent's relations to his principal, and the latter—the wider one,—when the question concerns the relations of third persons to the principal.

§ 714. **Elements of authority—I. Authority intentionally and directly conferred.**—In determining the question of the existence and extent of the agent's authority, the starting point must, of course, always be to ascertain the authority, if any, which was expressly, consciously and intentionally conferred by the principal upon the agent. Any act so authorized binds the principal upon the clearest doctrines of agency, and for this reason questions in this field very rarely arise.

Where the declared authority was a single and specific one, the ascertainment of this starting point is usually not difficult. What was the thing which the principal *in terms* authorized the agent to do?

Where the declared authority was not thus to do a single and specific act, but a series of acts or a group of acts or a class of acts, the question is still the same, though it is often less definite and more difficult to state in terms.

Where, however, there never was any express or declared authorization, but the question whether the agent was authorized to act at all, and if so in what field, must be determined from more or less confused or conflicting acts or circumstances, the task of finding this central body becomes often one of great difficulty. Nevertheless it must be found, and segregated as in the preceding cases.

When this central authority has thus been ascertained, the determination of the authority has usually just begun, for, around this nucleus of central or main authority, there usually gathers an area of additional authorities just as important to be determined as the nucleus itself.

§ 715. ——— II. Incidental powers — Ordinary and necessary acts.—It is a fundamental principle in the law of agency that every delegation of authority whether "general" or "special," carries with it, unless the contrary be expressed, implied authority to do all of those acts, naturally and ordinarily done in such cases, which are reasonably necessary and proper to be done in this case in order to carry into effect the main authority conferred. This doctrine rests upon the presumed intention of the principal that the main authority shall not fail because of the lack of express authority to do the incidental acts reasonably necessary to make that authority effective,[16] and also upon the presumption that the principal expects the business to be done in the usual and ordinary way.

The determination of this incidental authority is not a matter which lends itself readily to any hard and fast rule. It is almost wholly a question of fact. The authority here involved is not that which arises from proof of a *specific* usage, or the existence of any *special* necessity or emergency,—both of which will soon be considered. The acts which are to be deemed authorized under this rule are those which are naturally and ordinarily necessary,—which therefore are the usual incidents of the act in question,—the acts which the principal presumptively would have included without question if his attention had been called to them,—the acts which the ordinary competent person already familiar with the situation and with the ordinary methods of business, or a similar person having the situation made clear to him,—like a juror,—and considering the matter in the light of every day experi-

[16] "An agent to conduct a given business for his principal necessarily has authority to do everything which is essential to the performance of his duties as agent." Baldwin v. Garrett, 111 Ga. 876; National Bank v. Old Town Bank, 50 C. C. A. 448; Bayley v. Wilkins, 7 Com. B. 886.

ence, would say without serious hesitation formed a natural and ordinary part of the main act authorized.[17]

This is the most common and most familiar principle involved in the construction of authority. The authority of an agent, for the sale and conveyance of land, to make the conveyance; of an agent, for the sale and delivery of chattels, to receive so much of the price as is to be paid at the time of delivery; of a broker, to make the necessary memorandum; of an auctioneer, to accept a bid; of the general manager of a hotel, to contract for necessary supplies,—these are but few of the almost countless illustrations of this rule, many more of which will be found in the following chapter.

This rule ordinarily operates equally as between principal and agent and between the principal and third persons. As to either the principal may narrow the range by express notice, but prohibitions given to the agent alone, against the exercise of such incidental powers, could not affect third persons reasonably dealing with the agent in ignorance of them.

§ 716. ——— III. Authority conferred by custom or usage.—A particular usage or custom also may operate to affect the range of an agent's powers. Where the principal confers upon his agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well defined and publicly known usage, it is the presumption of the law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage. This presumption affects agent and third persons alike, but third persons who deal with the agent in good faith and in the ex-

[17] See the elaborate discussion in St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. App. 270.

"*Reasonably necessary.*"—"To be necessary, in this sense," it is said in Murphy v. K. of C. Bldg. Co., 155 Mo. App. 649, 658, "the act need not be so indispensable that without it the agent can not move toward achieving the main object of the agency, or having commenced to move, must stop; but it must have been requisite for such achievement, according to the desire and intention of the principal—necessary in the sense that the main scope and object of the agency must fail unless it is done. Whether it was necessary in that sense is a question to be submitted to the jury under proper instructions, where the conclusion to be drawn from the facts and circumstances is not obvious."

But in United States Bedding Co. v. Andre, — Ark. —, 150 S. W. 413, 41 L. R. A. (N. S.) 1019, it is said: "It is not sufficient that the act of the agent is advantageous to or convenient for his alleged principal, or even effectual in transacting the business in which he is engaged. The act of the agent must be practically indispensable and essential, in order to execute the duty actually delegated to him." There is also elaborate discussion of the question in Rexroth v. Holloway, 45 Ind. App. 36, which, however, was a tort case.

ercise of reasonable prudence, will be protected against limitations upon the usual authority, of which they had no notice.[18]

In order to give the usage this effect it must be reasonable;[19] it must not violate positive law;[20] it must be shown by clear and satisfactory evidence;[21] and it must have existed for such a time, and become so widely and generally known, as to warrant the presumption that the principal had it in his view at the time of the appointment of the agent.[22] But if the usage was a purely local and particular one, the principal may ordinarily repel this presumption of knowledge by showing that in fact he had no notice of it.[23] Where, however, the

[18] Watts v. Howard, 70 Minn. 122; Westurn v. Page, 94 Wis. 251; Milwaukee Invest. Co. v. Johnston, 35 Neb. 554; Durkee v. Carr, 38 Oreg. 189; Rohrbough v. U. S. Expr. Co., 50 W. Va. 148, 88 Am. St. R. 849; Reese v. Bates, 94 Va. 321; Kansas City, etc., R. Co. v. Higdon, 94 Ala. 286, 33 Am. St. 119, 14 L. R. A. 515; Mabray v. Kelly-Goodfellow Shoe Co., 73 Mo. App. 1; Cawthorn v. Lusk, 97 Ala. 674; Bailey v. Bensley, 87 Ill. 556; Phillips v. Moir, 69 Ill. 155; Adams v. Pittsburgh Ins. Co., 95 Penn. St. 348, 40 Am. Rep. 663; Williams v. Getty, 31 Penn. St. 461, 72 Am. Dec. 757; Chouteaux v. Leech, 18 Penn. St. 224, 57 Am. Dec. 602; McMasters v. Pennsylvania R. R. Co., 69 Penn. St. 374, 8 Am. Rep. 264; York County Bank v. Stine, 24 Md. 447; Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196; Minor v. Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. Ed. 47; Mount Olivet Cemetery v. Shubert, 2 Head (Tenn), 116; Schuchardt v. Allens, 1 Wall. (U. S.) 359, 17 L. Ed. 642; Greely v. Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; Day v. Holmes, 103 Mass. 306; Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45; Smith v. Tracy, 36 N. Y. 79; Goodenow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22; Frank v. Jenkins, 22 Ohio St. 597; Willard v. Buckingham, 36 Conn. 395; Randall v. Kehlor, 60 Me. 37, 11 Am. Rep. 169; Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; Pickert v. Marston, 68 Wis. 465, 60 Am. Rep. 876; Larson v. Aultman, 86 Wis. 281, 39 Am. St. R. 893; American Cent. Ins. Co. v. McLanathan, 11 Kan. 533; Brady v. Todd, 9 C. B. (N. S.) 592; Pollock v. Stables, 12 Q. B. 765; Sutton v. Tatham, 10 Ad. & El. 27.

The other party, of course, cannot rely on the usage in the face of a known limitation. Smith v. Provident L. Ass'n Co., 65 Fed. 765, 13 C. C. A. 284.

The authority of a public agent cannot be enlarged by custom. State v. Chilton, 49 W. Va. 453; Walters v. Senf, 115 Mo. 524.

[19] Merchants' Ins. Co. v. Prince, 50 Minn. 53, 36 Am. St. 626; Knowles v. Dow, 22 N. H. 387, 55 Am. Dec. 163; Minnesota Cent. R. R. Co. v. Morgan, 52 Barb. (N. Y.) 217; Wadley v. Davis, 63 Barb. (N. Y.) 500.

[20] Commonwealth v. Cooper, 130 Mass. 285; Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66; Farnsworth v. Hemmer, 1 Allen (Mass.), 494, 79 Am. Dec. 756.

[21] Greenwich Ins. Co. v. Waterman, 54 Fed. 839, 4 C. C. A. 600; Rhodes v. Belchee, 36 Oreg. 141.

[22] Adams v. Pittsburgh Ins. Co., 95 Pa. 348, 40 Am. Rep. 662; Citizens' Bank v. Grafflin, 31 Md. 507, 1 Am. Rep. 66; Smith v. Wright, 1 Caines (N. Y.), 43, 2 Am. Dec. 162; Porter v. Hills, 114 Mass. 106; Fowler v. Pickering, 119 Mass. 33; Milwaukee Invest. Co. v. Johnston, 35 Neb. 554.

[23] Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Bradley v. Wheeler, 44 N. Y. 495; Higgins v. Moore, 34

agent, for example a broker or factor, is authorized to deal in a particular place or market, as upon a certain stock exchange, at which particular rules or usages prevail, it is presumed, in the absence of evidence to the contrary, that the principal expected and intended that the agent should conform to such rules and usages, although in fact the principal may have been ignorant of what they were. This is upon the ground that the principal as a reasonable man must have anticipated that such rules and usages were likely to prevail and therefore must have authorized the dealing in contemplation of them, where no contrary intention was disclosed.[24]

The same doctrine, with some conflict as to its application to the usage of a single bank rather than to the usages of the place, has been extended to the case of banks authorized to collect.[25]

Usage may also operate to limit authority, as well as to enlarge it, under the same conditions as in the latter case.[26]

Usage, however, cannot operate to change the intrinsic character of the relation,[27] nor will it be permitted as between the principal and the agent, or as between the principal and third persons having notice of them, to contravene express instructions,[28] or to contradict an express

N. Y. 417; Barnard v. Kellogg, 10 Wall. (U. S.) 383, 19 L. Ed. 987; Fisher v. Sargent, 10 Cush. (Mass.) 250; Caldwell v. Dawson, 4 Metc. (Ky.) 121; Pennell v. Delta Transp. Co., 94 Mich. 247.

In Gould v. Cates Chair Co., 147 Ala. 629, it is said that it cannot be presumed that a manufacturer doing business in North Carolina had knowledge of customs prevailing at one place in Alabama.

[24] Taylor v. Bailey, 169 Ill. 181; Cothran v. Ellis, 107 Ill. 413; Samuels v. Oliver, 130 Ill. 73; Union Stock Yards Co. v. Mallory, 157 Ill. 554, 48 Am. St. R. 341; Bailey v. Bensley, 87 Ill. 556; Lyon v. Culbertson, 83 Ill. 33, 25 Am. Rep. 349; U. S. L. Insurance Co. v. Advance Co., 80 Ill. 549; Byrne v. Schwing, 6 B. Mon. (Ky.) 199; Skiff v. Stoddard, 63 Conn. 198, 21 L. R. A. 102; Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 64 L. R. A. 443; Bayley v. Wilkins, 7 Com. B. 886.

[25] See 1 Morse on Banks, § 221; Mills v. U. S. Bank, 11 Wheat. (U. S.) 431, 6 L. Ed. 512; Washington Bank v. Triplett, 1 Pet. (U. S.) 25, 7 L. Ed. 37; Farmers' Bank v. Newland, 97 Ky. 464; Carolina Nat. Bank v. Wallace, 13 S. Car. 347, 36 Am. Rep. 694.

Compare Jefferson County Bank v. Commercial Bank, 98 Tenn. 337; Sahlien v. Lonoke Bank, 90 Tenn. 221; Grissom v. Commercial Nat. Bank, 87 Tenn. 350, 10 Am. St. 669, 3 L. R. A. 278; Mahaiwe Bank v. Douglass, 31 Conn. 170; Bank of Commerce v. Miller, 105 Ill. App. 224.

[26] Where the principal relies upon custom to impose restrictions he must show that it was so universal that the other party can well be presumed to have known of it. Bentley v. Doggett, 51 Wis. 224, 37 Am. Rep. 827.

[27] Robinson v. Mollett, L. R. 7 H. of L. 802; Gates Iron Works v. Denver Engine Works, 17 Colo. App. 15.

[28] Barksdale v. Brown, 1 Nott. & M. (S. C.) 517, 9 Am. Dec. 720; Hall v. Storrs, 7 Wis. 253; Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467; Hutchings v. Ladd, 16 Mich. 493; Leland

contract [29] to the contrary. So a usage not known to the principal, cannot operate to authorize the making of an invalid instead of a valid contract, or to bind him to take one thing when he has ordered another.[30]

These doctrines apply to "special" as well as to "general" agents.

§ 717. ——— IV. **The customs of the particular business, or an established course of dealing in it.**—The customs of a particular trade, or the habits of dealing of the particular parties, may also, in accordance with well settled rules, be material where the parties are found to have dealt with reference to them.

But more than this is true. The methods of dealing of the particular principal may be material, frequently by way of estoppel as shown in a later section, but often also to show actual authority. For it is entirely clear that the continued conduct of the principal may be used to show how a grant of power was intended to be interpreted, and, further, the voluntary acquiescence of the principal in the known course of conduct of the agent may serve to show that such conduct was in fact authorized.[31] This does not depend upon estoppel but is an inference of fact to be drawn from conduct. It is, therefore, not essential—as it is in cases resting upon estoppel—that the other party shall have known of the facts at the time and relied upon them, but he may, as in other cases of actual authority, prove the authority though he was ignorant of it at the time of the act.[32] A very good statement of this rule by Justice Pitney may be found in a late case [33] in New Jersey: "Normally, an agency arises from some contract or other transaction or transactions that are between the principal and the agent, and not ordinarily known to outside parties, and a third party is entitled to hold the principal on a contract made by the agent in the name of the principal, even though the party does not at the time of making the contract know the particular source of the agent's authority. In cases of the class now before us the third party, when

v. Douglass, 1 Wend. (N. Y.) 490; Clark v. Van Northwick, 1 Pick. (Mass.) 343; Catlin v. Smith, 24 Vt. 85; Day v. Holmes, 103 Mass. 306; Parsons v. Martin, 11 Gray (Mass.), 111.

[29] Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463; Randall v. Smith, 63 Me. 105, 18 Am. Rep. 200; Rogers v. Woodruff, 23 Ohio St. 632, 13 Am. Rep. 276; Grinnell v. Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485.

[30] Perry v. Barnett, 15 Q. B. Div. 388.

[31] Murphy v. Cane (N. J. L.), 82 Atl. 854; Blake v. Domestic Mfg. Co., 64 N. J. Eq. 480; Fifth Ward Savings Bank v. First National Bank, 48 N. J. L. 513; Fifth Nat. Bank v. Navassa Phosphate Co., 119 N. Y. 256; Martin v. Webb, 110 U. S. 7, 28 L. Ed. 49.

[32] See Murphy v. Cane, *supra;* Blake v. Domestic Mfg. Co., *supra.*

[33] Murphy v. Cane, *supra.*

litigation necessitates proof of the agency, may adduce evidence of the customary exercise by the alleged agent of the authority appropriate to such an agent under circumstances that give rise to the inference of knowledge and acquiescence on the part of the principal—not necessarily to show that the principal is estopped in favor of the third party to deny the agency, but rather to show that such agency was in fact created."

This rule has undoubtedly been usually applied to cases in which the principal was a corporation, but it does not depend upon that fact.

§ 718. ——— V. Authority by necessity—Emergency.—Within a limited area, more sharply defined in England than in the United States, the authority of an agent may be enlarged by some particular necessity or by some sudden emergency, arising under circumstances in which it is still the duty of the agent to act, and in which the advice or directions of his principal cannot be obtained. It is, of course, ordinarily for the principal to determine what shall be done in such cases of necessity or emergency as were not provided for by the original authorization. He may prefer that nothing shall be done, or, if something must be done, that the situation shall be met by means of his own devising. He certainly will be vitally interested in being informed of the situation and given an opportunity to deal with it himself. If, however, there be a real necessity or emergency, and the principal cannot be communicated with because of the limitations of time or place or means, and something must be done to protect the interests of the principal, authority to do a fair and reasonable act, apparently adapted to the needs, and not going beyond the demands of the occasion, may properly be implied.[84]

[84] See *ante*, § 339 *et seq.;* Georgia Pac. R. Co. v. Propst, 85 Ala. 203; Tennessee Riv. Transp. Co. v. Kavanaugh, 101 Ala. 1; Sloan v. Central Iowa Ry. Co., 62 Iowa, 728; Fox v. Chicago, etc., Ry. Co., 86 Iowa, 368, 17 L. R. A. 289; Terre Haute, etc., R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752 (for other cases of this sort, see *post*, § 994); Short v. Del. & Hud. Co., 41 Pa. Super. 141; Evans v. Crawford County Mut. F. Ins. Co., 130 Wis. 198, 118 Am. St. R. 1009, 9 L. R. A. (N. S.) 485.

"The emergency of an accident or an unusual condition which requires prompt action, may invest the representative of the company highest in authority who is then present with power to do such things as are reasonable to meet the emergency." Short v. Del. & Hud. Co., *supra* (citing Bank v. Reed, 1 W. & S. 101; Quinn v. Ry. Co., 7 Pa. Super. 19; Heinrich v. Ry. Co., 36 Pa. Super. 612; Terre Haute, etc., R. Co. v. McMurray, *supra;* Northern Ry. Co. v. State, 29 Md. 420).

In Jackson v. Bank, 92 Tenn. 154, 36 Am. St. R. 81, it is said: "No authority will be implied from an express authority. Whatever powers are strictly necessary to the effectual exercise of the express powers will

All of these conditions are essential. There must be a real necessity or emergency, judged by the reasonable interpretation of the facts as they appear to those who have to deal with them. Inability to communicate with the principal is an indispensable condition.[35] The need of action for the principal's protection must be apparently unquestionable. The means adopted to meet the situation must not be extreme or fanciful or unreasonable. The act must go no further than to reasonably meet the exigency,[36] and the implied authority must cease with the passing of the emergency.

The necessity here considered is obviously not the ordinary necessity of doing the business in the usual way, which has previously been considered, but some special and unusual necessity or emergency.

Neither, it would scarcely seem necessary to say, is it the necessity of dealing with a particular person in a particular way simply because he happens to be unwilling to deal upon any other basis. It must be a general necessity,—a necessity inhering in the situation or in the very nature of the case.

The authority here involved, as will also be obvious, is one implied in fact from the general act of the principal, and does not rest for its validity upon any doctrine of "appearances" or upon the doctrine of

be conceded to the agent by implication. In order, therefore, that the authority to make or draw, accept and indorse commercial paper as the agent of another may be implied from some other express authority, it must be shown to be strictly necessary to the complete execution of the express power. The rule is strictly enforced that the authority to execute and indorse bills and notes as agent will not be implied from an express authority to transact some other business, unless it is absolutely necessary to the exercise of express authority."

Where the transaction of business absolutely requires the power to borrow money in order to carry it on, then the power is conferred as an incident to the employment. But it must be absolutely necessary not merely more effectual, convenient or advantageous. Consolidated Nat. Bank v. Pac. Coast Steamship Co., 95 Cal. 1, 29 Am. St. R. 85.

"There is no rule of law that an agent may, in a case of emergency suddenly arising, raise money and pledge the credit of his principals for its repayment." *Per* Alderson, B., in Hawtayne v. Bourne, 7 M. & W. 595.

[35] "The impossibility of communicating with the principal is the foundation of the doctrine of an agent of necessity." *Per* Smith, L. J., in Gwilliam v. Twist, [1895] 2 Q. B. 84. So in Hawtayne v. Bourne, 7 M. & W. 595, Alderson, B., said of an agent's alleged power to borrow money because of emergency suddenly arising, that it could not arise in that case because "there was ample time and opportunity for him to have applied to his principals."

[36] "This power must be prudently exercised, and must not be carried beyond the real or apparent necessity." Tennessee Riv. Transp. Co. v. Kavanaugh, *supra*.

estoppel. It may be just as applicable to a "special" as to a "general" agent.

§ 719. ——— It is to be observed also that emergency may conceivably operate to diminish rather than to enlarge authority; for it may be entirely clear, in view of the special circumstances in question, that it could never fairly have been within the contemplation of the principal that so wide an authority, as that originally conferred, should continue to be exercised in the face of the emergency which has radically changed the contemplated conditions. This is a matter of which both agent and third persons may fairly be required to take notice.

§ 720. ——— **VI. Apparent authority.**—It is also frequently said that the principal will be bound to third persons by acts within the "apparent authority" of the agent, even though they would not be within his real authority. The expression "apparent authority," however, though one of constant use in this connection, seems unfortunately to have no fixed meaning. It seems naturally to suggest a distinction between what is real and what is only apparent; though such a distinction is not essential, since what is apparent may be real and what is real may be apparent. Another use is, to designate that class of incidental authorities which are implied from the express or declared authority, and which the third person dealing with the agent may properly assume to go with the declared authority unless the contrary is made known. Another use is that of the California code (followed in several of the neighboring states) that "an agency is ostensible [apparent] when the principal intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Other authorities, still, divide the cases covered by this statutory definition into two classes, thus: "Apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or holds him out as possessing;" while "Agency, or authority, by estoppel arises in those cases where the principal by his culpable negligence permits his agent to exercise powers not granted to him, even though the principal have no notice or knowledge of the conduct of the agent." "Apparent authority is not founded in negligence of the principal, but in the conscious permission of acts beyond the powers granted, whereas the rule of estoppel has its basis in the negligence of the principal in failing properly to supervise and control the affairs of the agent." [87]

[87] Dispatch Printing Co. v. National Bank, 109 Minn. 440, s. c. 115 Minn. 157. In Columbia Mill Co. v. National Bank, 52 Minn. 224, however, cited by the court, it is said: "The rule

§ 721. ——— The distinction last mentioned, however, is not entirely satisfactory. Either sort of act,—if amounting to a course of conduct as opposed to an isolated instance, at least,—is undoubtedly enough to actually create a new authority or enlarge an existing one; and there can probably be no doubt, as a matter of contract, that a contract may be formed either by consciously or by negligently assenting to terms, and this is true whether it be done in person or through an agency or an agent.

Unless the conduct therefore is such as to raise an inference of agency in fact, or unless the act can be treated as the direct act of the principal, it is difficult to see how the act can be sustained as the act of an agent, where the person who did it was not an agent of the alleged principal. If, for example, A is really the broker of Y and knows nothing of X, but X sends B to A to make a contract upon the assurance that A is the agent of X, and a contract is made which A intends and supposes to be for Y, but which B intends and supposes to be for X, can B hold X upon the contract? Must not B's remedy against X be based upon some theory of estoppel, or else upon some other theory of misrepresentation?

If, in the cases contemplated by the rule quoted, it be assumed that the agent is implicated in the "appearance;"—that is, if with the latter's consent he is being treated by the alleged principal as his agent, is there not the foundation for the inference of real agency and not merely an "apparent" one?

The only legitimate use of this expression, then, if it has any, would be either, (1) that referred to in the preceding section, namely, to designate that class of incidental and usual powers, already considered, which, it is presumed, attach to the express authority, unless the principal has made known a contrary intention. (These, however, as has been pointed out, are not simply apparent: they are objectively real until the contrary has been made known.) Or, (2) and more properly, to designate the class of cases referred to in the following section.

If the conclusions here presented are sound, there is no room for the proposed classification, *i. e.*, as a separate and distinct class, and the cases which can not be disposed of on the other grounds suggested must be referred to the following section.

§ 722. ——— **VII. Liability by estoppel.**—So far as powers depend upon what is usual or necessary in special cases, and so far as

as to apparent authority rests essentially on the doctrine of estoppel." In North Dakota, see Corey v. Hunter, 10 N. Dak.

they are regarded as incidental to the main authority conferred because that is the regular and ordinary way of doing the business, they do not rest upon any doctrine of estoppel, but are inferences of fact tracing their origin to the same source as the main power itself. So far as third persons are concerned, who can know only that which is open to be learned, they constitute part of the actual authority though commonly included under the description of apparent authority. In other words, so far as third persons are concerned, this apparent authority is included in the real authority. There seems to some to be an inconsistency here which has given rise to considerable discussion,[38] but the situation is believed to be no more anomalous than in the numerous other cases in the law of contract and of crime wherein for practical purposes it is essential that the law shall determine intention from the voluntary manifestations of it by the person concerned.[39] It is said in one case,[40] "To lead a person reasonably to suppose that you assent to an oral arrangement, is to assent to it, wholly irrespective of fraud. Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words."

When, however, the authority is not one included within the foregoing categories, but is one sought to be deduced from special circumstances of recognition, acquiescence or holding out, the principle of estoppel or something akin to it at least, must be invoked. The act is not within either the real or the apparent authority (using apparent in the sense above indicated) but the party insists that he was led by the special circumstances reasonably to believe that the authority existed in that particular case and that he has acted upon that belief in such a way that he will be prejudiced if the authority be denied.

The chief practical difference between the two cases is found in the fact that in the former it is not essential that the person seeking to enforce the authority should actually have known and relied upon the circumstances from which the inference of authority in fact is based [41] (any more than it is essential in any case of authority that the person

[38] See 13 Green Bag, 50; 15 Harvard Law Review, 324; 16 Harvard Law Review, 186; 5 Columbia Law Review, 36; 5 Columbia Law Review, 354; 5 Columbia Law Review, 456; 5 Columbia Law Review, 261; 6 Columbia Law Review, 34.

[39] See Holland's Jurisprudence (9th ed.) p. 250; Pollock on Contract (7th ed.) pp. 2, 5.

[40] O'Donnell v. Clinton, 145 Mass. 461.

[41] See Murphy v. Cane, — N. J. L. —, 82 Atl. 854; Blake v. Domestic Mfg. Co., 64 N. J. Eq. 480. Compare Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 59 L. R. A. 657.

who ultimately seeks to enforce it shall have relied upon it at the time as, for example, in the case of an undisclosed principal), while in the latter case it is the essence of his complaint that he was led by the circumstances in question to rely upon the existence of the authority, and proof of his knowledge and reliance upon them must be made.[42]

In this respect the case is like that of the liability of an "apparent" partner; where knowledge of the "appearances" and reliance upon them is essential to the plaintiff's case.[43]

Estoppel, it may be noticed, may operate as strongly between the principal and the agent, as between the principal and third persons, though the occasion for its exercise is not so frequent.

§ 723. ——— There is, in many places, a tendency to include under the one head of "apparent powers" those deduced from usage or from the character in which the agent is authorized to act, and also those resulting from estoppel. In very many cases it is entirely immaterial practically, because there is enough in the proof to satisfy the requirements of either rule; and in many cases also usage and estoppel may unite to account for the powers exercised.

In its legitimate sphere, however, there is a distinct field for the operation of estoppel, and it is constantly relied upon to sustain powers in whose existence the party complaining has reasonably been led to believe by the words or conduct of the alleged principal.

§ 724. ——— Inasmuch as the whole doctrine of powers by estoppel rests upon the theory that the other party has been led to rely upon appearances to his threatened detriment, it is obvious that the doctrine can apply only in those cases in which this element of reliance was present. It can therefore apply only to cases in which credit has been extended, action has been induced, delay has been obtained, or some other change of position has occurred, in reliance upon the appearance of authority,[44] and not to cases of mere tort, such as negligence, trespass, assault. Actions based upon the contract furnish, of course, the most frequent opportunity, but actions for deceit or misrepresentation may also be included within the category.[45] Re-

[42] See Domasek v. Kluck, 113 Wis. 336; Gosliner v. Grangers' Bank, 124 Cal. 225; Rodgers v. Peckham, 120 Cal. 238; Maxey v. Heckethorn, 44 Ill. 437; Rawson v. Curtiss, 19 Ill. 456; Cash v. Taylor, 8 L. J. K. B. 262.

[43] See Thompson v. First National Bank, 111 U. S. 536, 23 L. Ed. 507; Hahlo v. Mayer, 102 Mo. 93.

[44] It is perhaps questionable whether the mere making of an executory contract can be regarded as a prejudicial act within the rule. Mr. Ewart in his article seems to be of opinion that it is enough.

[45] See Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. R. 878.

liance upon appearances, however, does not ordinarily induce to assault, slander, trespass, or negligent injury, and the cases must be very rare, if any, in which it could be an element.[46]

§ 725. ——— It is indispensable to keep in mind here that, as against the principal, there can be reliance only upon what the principal himself has said or done, or at least said or done through some other and authorized agent. The acts of the agent in question can not be relied upon as alone enough to support an estoppel. If his acts are relied upon there must also be evidence of the principal's knowledge of and acquiescence in them.[47]

§ 726. ——— Moreover, in any case, the reliance must have been a reasonable one, consistent with the exercise of reasonable prudence, and the party who claims reliance must not have closed his eyes to warning or inconsistent circumstances. Authority is not "apparent" simply because the party claiming has acted upon his conclusions. It is not "apparent," in contemplation of law, simply because it looked so to him. It is not a situation where one may read while he runs. It is only where a person of ordinary prudence, conversant with business usages and the nature of the particular business, acting in good faith, and giving heed not only to opposing inferences but also to all restrictions which are brought to his notice, would reasonably rely, that a case is presented within the operation of the rule. If the inferences against the existence of the authority are just as reasonable as those in favor of it, there can be no reliance within this rule.[48]

§ 727. ——— **VIII. Liability by ratification.**—And, lastly, it must be kept in mind, in making up the extent of the liability which may exist in a given case, that subsequent ratification may supply the lack of prior authorization. What the circumstances are under which this principle may be invoked have been so fully treated in another place that they do not need to be considered here.[49]

§ 728. **What constitutes authority—Recapitulation.**—Putting all of these principles together, it will be seen that the authority of the

[46] Stables v. Eley, 1 C. & P. 614, did of course give some color to the opposite view, but that case has long since been repudiated. See Pollock's Dig. Partn. (6th ed.) 54; Lindley, Partn. 214; Smith v. Bailey, [1891] 2 Q. B. 403. Compare Sherrod v. Langdon, 21 Iowa, 518; Maxwell v. Gibbs, 32 Iowa, 32; Shapard v. Hynes, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675.

[47] See Farmers' Co-operative Shipping Ass'n v. Adams, 84 Neb. 752, and many other cases cited in earlier chapters.

[48] See Johnston v. Milwaukee Investment Co., 46 Neb. 480; General Cartage Co. v. Cox, 74 Ohio St. 284, 113 Am. St. R. 959; Corey v. Hunter, 10 N. Dak. 5.

[49] See *ante*, Book I, Chapter VII.

agent, so far as it concerns the rights of third persons, may be a composite matter made up of a number of elements. It may consist:

First, and primarily, of the authority directly and intentionally conferred by the voluntary act of the principal.[50]

Second, of those incidental powers which naturally and ordinarily attend such an act, and which are reasonably necessary and proper to carry into effect the main power conferred and which are not known to be prohibited.

Third, of those powers which particular usage or custom has added to the main power, and which the parties are to be deemed to have had in contemplation at the time of the creation of the agency, and which are not known to have been forbidden.

Fourth, of powers justified by the particular course of dealing or the customs of the particular business.

Fifth, of those powers which some special necessity or emergency may justify the agent in exercising.

Sixth, of all such other powers as the principal has, by his direct act or by negligent omission or acquiescence, caused or permitted the person dealing with the agent reasonably to believe that the principal had conferred, and upon which that person has relied.

Seventh, (so far as result is concerned, though ratification is a means of curing the lack of authority rather than a means of conferring it) of all those other powers whose exercise by the agent, the principal has subsequently, with full knowledge of the facts, ratified and confirmed.

This may, perhaps, be rendered somewhat clearer by the diagram on the following page.

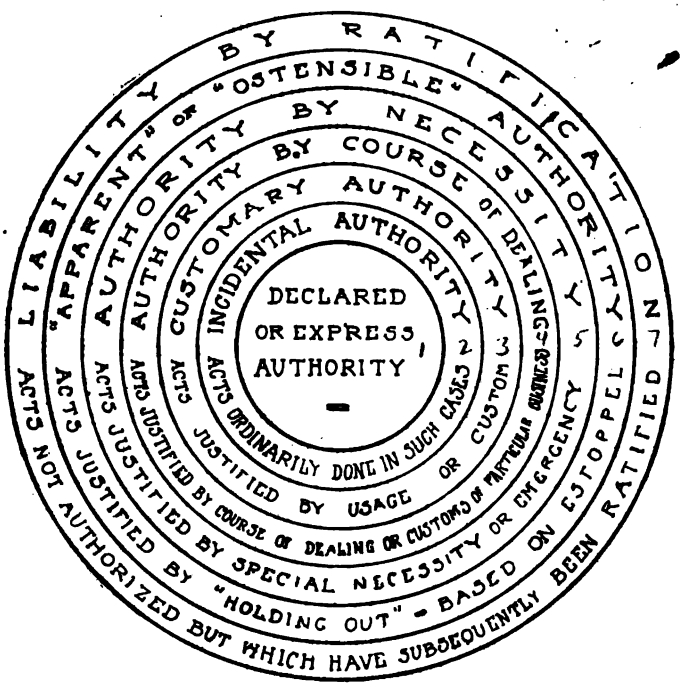
§ 729. ——— For the acts done in pursuance of those powers which were directly conferred or which were incidental to those powers and not prohibited, the principal is of course responsible, because they are the direct result of his voluntary and intentional act. He is likewise responsible, and for the same reasons, for those acts which he has intentionally led third persons to believe that he had authorized. He is responsible for the acts of the agent which he has, by negligent omission or acquiescence, led the persons dealing with the agent to believe he has authorized, because to deny them would be a fraud upon innocent persons.[51] He is responsible for those acts which he

[50] This of course follows directly as the result of the maxim, *Qui facit per alium, facit per se.*

[51] The general rule is so well stated by Depue, J., in Law v. Stokes, 3 Vroom (N. J.), 249, 90 Am. Dec. 655, as to warrant its full quotation: "A principal is bound by the acts of his agent within the authority he has actually given him, which includes

has subsequently ratified and confirmed, upon the ground that such a ratification is equivalent to a precedent authority.

As between the agent and the principal, the authority would consist of the same elements as in the case of third persons, with the excep-



tion that the forbidden powers and secret limitations, which would not affect third persons who were ignorant of them, bind the agent who must necessarily have knowledge of them.

not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it or is necessary to its performance. Beyond that he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent within the scope of the authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible; because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. And when established it cannot, on the one hand be qualified by the secret instructions of the principal, nor on the other hand be enlarged by the unauthorized representations of the agent."

§ 730. The province of "instructions"—Authority cannot be limited by secret instructions.—As has already been pointed out, a conflict is often deemed to arise between "authority" and "instructions," and the rule is constantly declared to be that "an apparent authority cannot be limited by secret instructions." Many cases have already been cited in which such a rule, though in varying forms, has been declared.

§ 731. ——— What constitute instructions.—When, however, it is thus said that an apparent authority cannot be limited by secret instructions, it still remains to determine what is meant by "secret instructions" within the purview of the rule. In the first place it is necessary to free the case of any odium necessarily to be attached to the word "secret." To do this, the meaning and import of "instructions" must be determined. Here, as in so many other cases, it will be found that the same word is used in a variety of senses. Thus, a master who has a servant already employed and authorized generally to act, may give him "instructions" as to the manner in which he shall act either regularly or upon particular occasions. In this case the instructions constitute no part of the authority: they are simply directions as to how an authority already existing shall be exercised. They may or may not be designed to be kept secret. If, for example, a master puts into the charge of his servant a team of horses and directs him, because the day is hot or the load heavy, to drive slowly, or cautions him, on meeting other teams, to keep to the right, these directions have no secret character, they do not go to the root of the authority, and the master would undoubtedly be liable to a third person injured because the servant negligently disregarded his instructions and drove too rapidly or ignored the rule of the road. If, on the other hand, a master, who manufactures goods by a secret process, directs his servant how to act but enjoins secrecy as to methods, the secrecy of the instructions may be material to the preservation of the master's monopoly, but that fact neither makes the instructions the authority, nor changes the master's liability for injuries caused by their violation.

§ 732. ——— Suppose also that an insurance company puts an agent into the field with apparent authority to accept applications, issue policies, receive payment of premiums, and the like, but then or later instructs him not to accept certain risks, not to make oral contracts to insure, not to waive certain conditions, and the like; these directions are instructions merely, they are designed merely to control the manner of acting, and a disobedience of them, while it might make the agent liable to the company, would not relieve the company of lia-

bility to a third person who had dealt with the agent in ignorance of them.[52]

Suppose that an implement company sends out an agent to make ordinary contracts of sale, and supplies him with a blank form of contract which by reason of its protective phraseology it directs him to use; the agent nevertheless makes a contract of sale in the usual terms and of the general sort contemplated but writes it on other blanks or uses no blank at all. Certainly the direction to use the printed form supplied must usually be regarded as a mere instruction, and the company will be bound to a person who was ignorant of it.[53]

So if a person puts another in general charge of his store with authority to carry it on in the usual way, but directs him not to buy goods of a certain person, not to exceed a certain amount, not to carry certain ordinary goods in stock, and the like, these directions are usually simply instructions and not limitations upon authority.[54]

Further illustrations of this sort are needless, as an indefinite number will immediately suggest themselves. The instructions in these cases have no necessarily secret character. The principal's purposes would be furthered rather than hindered by their disclosure, and he may have relied upon the agent to make them known.

§ 733. ——— But suppose that a principal who has a horse for sale authorizes an agent to sell it, but because of certain unsoundness, "instructs" him to be careful not to say or do anything which may be construed as a warranty, or not voluntarily to disclose the age or defects of the horse; these instructions may well be intended only for the secret ear of the agent, but they like the others do not go to the matter of the authority to sell.

Suppose again that a principal who has a horse for sale employs an agent to sell it, and as to the price directs him to endeavor to get $150, but, if he cannot get that, to sell for $100; these directions as to price are certainly mere instructions and are as certainly designed to be kept secret, because the principal never intended that the agent should say to a prospective purchaser, "the price is $150, but if you will not pay that, you may have the horse for $100."

[52] See, for example, Brown v. Franklin Mut. Ins. Co., 165 Mass. 565, 52 Am. St. R. 534; Sanford v. Orient Ins. Co., 174 Mass. 416, 75 Am. St. R. 358; Ruggles v. American Cent. Ins. Co., 114 N. Y. 415, 11 Am. St. R. 674; Wachter v. Phoenix Ins. Co., 132 Pa. 428, 19 Am. St. R. 600; Wilson v. Commercial Un. Assur. Co., 51 S. Car. 540, 64 Am. St. R. 700. See also Van Santvoord v. Smith, 79 Minn. 316.

[53] See Armour v. Ross, 110 Ga. 403.

[54] Harrington v. Bronson, 161 Pa. 296; Hubbard v. Tenbrook, 124 Pa. 291, 10 Am. St. R. 585, 2 L. R. A. 823; Watteau v. Fenwick, L. R., [1893] 1 Q. B. 346; Rhodes Furniture Co. v. Weeden, 108 Ala. 252.

On the other hand, suppose one man to say to another, whom he has not previously employed and who is not a horse buyer or dealer, "Buy for me A's black horse." Here clearly is not authority to buy *a* horse with *instructions* to buy a certain one, but the authority is to buy a certain one only, and the purchase of any other would not bind the principal. Suppose again that one man says to another, whom he has not previously employed and who is not a horse buyer, "Buy for me a black horse, five years old, fifteen hands high, of Morgan stock, for not more than $150." What have we here? Is there authority to buy *a* horse, with *instructions* that it shall be black, of certain age, height, breed and price, or is there authority to buy such a horse and none other? Test it in this way: A proposed seller, endeavoring, as he must, to ascertain the agent's authority, may ask the agent for his authority. What will the agent say? "I am instructed to buy a horse," or "I am instructed to buy a certain sort of horse?" But inasmuch as what the agent may say as to his authority is not conclusive, the proposed seller may inquire of the principal. What will the latter naturally say? "I instructed him to buy me a horse," or, "He is authorized to buy only a horse with these characteristics, etc." If the principal is likely to say the former, he clearly regards the specifications as mere instructions. If he is likely to say the latter, as it is believed he would be, then we have a different case. Here the instructions constitute the "authority." They are not secret because the agent's authority can only be shown by disclosing them, they bound and limit the authority, and a departure in any particular would not bind the principal. The instructions here, then, would constitute a real limitation upon the authority.

§ 734. ——— It will be apparent upon reflection that directions are more frequently mere instructions (rather than limitations upon authority) in the case of an agent already authorized to do the act than in the case of an agent then for the first time authorized; and more frequently in the case of a "general" agent than a "special" one;[55] but neither of these facts after all is the test. The test is, Were the alleged instructions designed and calculated to fix and determine the character of the agent, or merely to prescribe the manner in which he should exercise the powers incident to a character already or otherwise imposed? As bearing upon this, were the alleged instructions

[55] Letters which amount merely to a "communication of speculation and advice from the principal to his brokers, which presume a general authority in the brokers, with a desire on the part of the principal to direct them in the exercise of it," are properly regarded as instructions and not as limitations. Whitehead v. Tuckett, 15 East, 400.

designed to be made known to those dealing with the agent or concealed, and, as bearing upon this, would their disclosure promote or defeat the purposes which the principal had in mind? Where their disclosure would defeat his purposes, as it pretty clearly would in some of the cases supposed, it is certain that the principal never intended them to be made known. They are in such a case simply instructions and not limitations upon authority.

§ 735. ——— Within the same category must be included such attempted limitations upon authority as, according to the usual practice and experience of mankind, are not to be anticipated in such a case. Agency is pre-eminently a practical matter. Agents are appointed to be dealt with, and third persons must be able, in the exercise of reasonable prudence, to deal with them with ordinary safety. A principal who sends an agent out to deal with third persons must be deemed to represent that there are no unusual, whimsical or fanciful limitations upon the agent's authority, unless the principal makes that fact known. Most authorities are not unlimited; many kinds of limitation are so usual and to be expected that there is nothing unreasonable in the assumption that the person who deals with the agent will anticipate their possibility, and protect himself against them; others may be so unusual and so unexpected that it is only fair to require the principal to disclose them, if he desires them to be observed. His failure to do so may fairly be regarded as a representation that none of that sort exist.

III.

UNIVERSAL, GENERAL AND SPECIAL AGENTS.

§ 736. In general.—The common classification of agencies, based upon the extent of the authority conferred, into universal, general and special, has already been referred to in another place.[56] As has been stated, cases of true universal agency are very rare. They can only be created by clear and unequivocal language and will not be inferred from any general expressions, however broad.[57] No special attention therefore will be given to them in this connection, what may be said in reference to general agencies applying *a fortiori* to the universal.

The more or less vague nature of the distinction between the general and the special agency, and the difficulty experienced in defining

[56] See *ante*, § 58 *et seq.*

[57] Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

it, have also been referred to in another place. Notwithstanding this difficulty, however, the distinction has a root in a certain real difference—albeit a difference of degree and not of kind—though, as will be seen, the distinction has doubtless often been too greatly magnified. It has, at any rate, such a place in our law that any general discussion of the existence, nature and extent of an agent's authority must take it into account.

§ 737. General and special agents.—Consideration has already been given to the question of the general nature of authority, and the elements which compose it, and some general principles have been stated which were deemed applicable to the subject. These principles apply to all cases. If by express appointment, or by long acquiescence, recognition or course of dealing, one man has conferred upon another the character of one possessing the requisite authority to represent him in a general way during some more or less continuous period in the transaction of all of his business of a certain kind, or at a particular place, or to perform all acts of a certain kind or class, he must be held to have conferred upon him the attributes and powers inherent in the character so bestowed. Such an agent, the law denominates, for convenience sake, a general agent.

But if, on the other hand, in a single instance, either by express terms or by his conduct, he confers upon the other the character of one having authority to do a single thing, perhaps in a specific way, he must be held to have conferred upon him those attributes and powers, and those only, which are inherent in that character. This agent, for the same convenience, is termed a special agent.

In either case, the question of the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the *character* bestowed and not merely upon the *instructions* given or upon the authority as it was *declared* to the agent in express terms. In other words, the principal is bound to third persons who have acted in good faith and in justifiable ignorance of any limitations or restrictions, by the authority he has *apparently* given to the agent, and not by the *express* or *declared* authority where that differs from the apparent, and this, too, whether the agency be a general or a special one.[58]

[58] Smith v. McGuire, 3 H. & N. 554; Whitton v. Sullivan, 96 Cal. 480. It has been said by a learned judge: "The authority of a general agent may be more or less extensive; and he may be more or less limited in his action within the scope of it. The limitation of his authority may be public or private. If it be public, those who deal with him must regard it, or the principal will not be bound. If it be private the principal will be

§ 738. ——— Distinctions made.—The distinction between a general and a special agency has been deemed to be one of great importance, and a large number of decisions have been made to turn upon it. It is believed, however, that the distinction, as it is ordinarily drawn, is highly artificial and unsatisfactory, if not positively misleading, and that it might well be dispensed with.

The importance of this distinction, has been said by Mr. Parsons,[59] whose language has been much quoted, to lie in the rule that "if a particular agent exceed his authority, the principal is not bound; but if a general agent exceed his authority, the principal is bound, provided the agent acted within the ordinary and usual scope of the business he was authorized to transact, and the party dealing with the agent did not know that he exceeded his authority." This rule, however, cannot be regarded as strictly accurate. So far as the rights of third persons, who have no knowledge of limitations on his authority are concerned,—and this is what the rule given contemplates,—the agent must be deemed to have authority to do those acts which are

bound when agent is acting within the scope of his authority, although he should violate his secret instructions. A special agent is one employed for a particular purpose only. He also may have a general authority to accomplish that purpose, or be limited to do it in a particular manner. If the limitation respecting the manner of doing it be public or known to the person with whom he deals, the principal will not be bound if the instructions are exceeded or violated. If such limitation be private, the agent may accomplish the object in violation of his instructions, and yet bind his principal by his acts." Shepley, J., in Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96. And by another: "Where the authority is limited in a *bona fide* manner, and the limitation is to be disclosed by the agent and is disclosed either with or without inquiry, any departure from such authority or instructions will not bind the principal; but where the authority or instructions given are in the nature of private instructions and so designed to be, they will not be binding upon the parties dealing with the agent. And if the instructions are of such a nature that they would not be communicated if an inquiry was made (even though it be the duty of the person dealing with the agent to make the inquiry), it is not necessary that it should be made for it would not be communicated if made." Eastman, J., in Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

"While the rule is that an agent must act within the scope of his authority, yet when the agent's act affects innocent third parties the principal will be bound to the extent of the apparent authority conferred by him on his agent. A principal is bound equally by the authority which he actually gives, and by that which by his own act he appears to give." Webster v. Wray, 17 Neb. 579. See also Van Duzer v. Howe, 21 N. Y. 531; Redlich v. Doll, 54 N. Y. 234, 13 Am. Rep. 573; Garrard v. Haddan, 67 Pa. 82, 5 Am. Rep. 412; Hatch v. Taylor, 10 N. H. 538; Carmichael v. Buck, 10 Rich. (S. C.) 332, 70 Am. Dec. 226.

[59] Parsons on Contracts (9th Ed.) Vol. I, p. 42. Same, Broom on Common Law (8th Ed.) 575.

within the ordinary and usual scope of the business he was empowered to transact. Such an act therefore cannot be deemed to be in excess of his authority.

But many statements of the rule go still further and it is frequently declared that if the special agent exceeds his instructions the principal is not bound; while if the general agent exceeds his instructions, the principal will be bound. This statement is still more misleading than the other, and no little confusion has crept in to the books because of it. As has been seen instructions, even in case of a special agent, are not in every case the measure of authority. They *may* exactly encompass the authority, but they do not *necessarily* do so. They may be intentionally or negligently waived or disregarded by the act of the principal. Even in the case of a special agent, it is the character bestowed,—the authority apparently conferred,—which is the test, and not the instructions given.

Mr. Parsons himself says further on: "We think the distinction between a general agency and a special agent useful, and sufficiently definite for practical purposes, although it may have been pressed too far, and relied upon too much in determining the responsibility of a principal for the acts of an agent. It may, indeed, be said that every agency is, under one aspect, special, and under another, general. No agent has authority to be in all respects and for all purposes an *alter ego* of his principal, binding him by whatever the agent may do in reference to any subject whatever; and, therefore the agency must be special so far as it is limited by place or time, or the extent or character of the work to be done. On the other hand every agency must be so far general that it must cover not merely the precise thing to be done, but whatever usually and rationally belongs to the doing of it. Of late years, courts seem more disposed to regard this distinction and the rules founded upon it, as altogether subordinate to that principle which may be called the foundation of the law of agency, namely, that a principal is responsible, either when he has given to an agent sufficient authority, or, when he justifies a party dealing with his agent in believing that he has given to this agent this authority." [60]

[60] Contracts (9th Ed.) Vol. I., pp. 43, 44, quoted with approval in Gore v. Canada L. Ins. Co., 119 Mich. 136. "There are in the books many loose expressions concerning the distinction between a general and a special agency. The distinction itself is highly unsatisfactory and will be found quite insufficient to solve a great variety of cases. It is unprofitable to dwell on that distinction." Comstock, J., in Mechanics' Bank v. New York, etc., R. R. Co., 13 N. Y. 599. See also Cross v. Atchison, etc., Ry. Co., 141 Mo. 132.

§ 739. ——— **The true distinction.**—But it is none the less true that the scope of the authority of a special agent is ordinarily much more restricted than that of a general agent. The fact that the authority is conferred not for a continuing term but in a special instance, to do a specific act naturally leads to, if it does not positively require, much more minuteness of direction and much greater restrictions and limitations. From the very nature of the case, particularity of instructions and singleness of method are to be expected, and of this persons dealing with the agent may well be required to take notice.[61]

On the other hand, where the agent is authorized to transact all the principal's business of a certain kind, or all the acts of a certain class, the very breadth of the employment, the duration of time involved and the variety of the duties to be performed necessarily involve more or less of discretion and choice of methods, and render impracticable, if not impossible, much of particularity or precision, either as to the exact means and method to be employed, or as to the scope or extent of the authority itself. Where so little is expressed, more may well be implied. The fact of such an authority, of itself, presupposes a general confidence bestowed upon the agent, and a general committal to his discretion and judgment of all beyond the essential objects to be attained and the outlines of the course to be pursued. It may not unreasonably be presumed, where nothing is indicated to the contrary, that such an agent possesses those powers which are commensurate with his undertaking, and which are usually and properly exercised by other similar agents under like circumstances. This presumption may well be and is constantly relied upon by persons dealing with such agents, and so reasonable, proper and necessary is this reliance, that it may justly be required that if the principal would impose unusual restrictions upon the authority of such an agent, he should make them known to persons who may have occasion to deal with the agent.

And herein, it is believed, lies the true distinction between these two classes of authority. One is in its nature temporary, special and naturally suggests limitations of power. Of these limitations thus suggested third persons must inform themselves, unless the principal has by his words or conduct held out the agent as one upon whose authority such limitations are not imposed.[62] The other is, in its na-

[61] Quoted with approval in Bleeker v. Satsop R. Co., 3 Wash. 77.

[62] Dyer v. Duffy, 39 W. Va. 148, 24 L. R. A. 339; Ferguson v. Davis, 118 N. C. 946; Cleveland v. Pearl, 63 Vt. 127, 25 Am. St. R. 748; Brown v. West, 69 Vt. 440; Montgomery Furniture Co. v. Hardaway, 104 Ala. 100; Yates v. Yates, 24 Fla. 64; Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480.

ture, general, continuing and unrestricted by other limitations than those which confine the authority within the bounds of what is usual, proper and necessary under like circumstances. If there are other limitations, the principal must disclose them.[63]

Neither of these rules denies even to the special authority its natural and ordinary incidents, and neither dispenses with that which devolves upon every person the duty of ascertaining not only the fact of the agency but also the nature and extent of the authority which the principal has apparently conferred. And neither of them permits that authority to be defeated by secret limitations.

§ 740. General agency not unlimited.—It is not, however, to be supposed that the general agent's authority is entirely unlimited. He is far from being a universal agent or a mere autocrat, and while his apparent authority is not to be restricted by undisclosed limitations, it must, on the other hand, be confined to such transactions and concerns as are incident and appurtenant to the business of his principal and to that branch of the business which is entrusted to his care;[64] unusual and unnatural acts are not to be tolerated; strained constructions are to be avoided; inferences of fact are to be limited to those which are reasonable, natural and ordinary; and, as has been so often pointed out, inferences are to be drawn only from facts for which the

[63] Hirschhorn v. Bradley, 117 Iowa, 130; Liddell v. Sahline, 55 Ark. 627; Catholic Bishop v. Troup, 61 Ill. App. 641; Harrington v. Bronson, 161 Pa. 296; Hall v. Hopper, 64 Neb. 633; Potter v. Springfield Milling Co., 75 Miss. 532; Whaley v. Duncan, 47 S. Car. 139; Smith v. Droubay, 20 Utah, 443; Hall v. Union Cent. L. Ins. Co., 23 Wash. 610, 51 L. R. A. 288, 83 Am. St. R. 844; Allis v. Voigt, 90 Mich. 125; Hamill v. Ashley, 11 Colo. 180; Ruggles v. Am. Cent. Ins. Co., 114 N. Y. 415, 11 Am. St. R. 674; Brown v. Franklin Mut. L. Ins. Co., 165 Mass. 565, 52 Am. St. R. 534; Wachter v. Phoenix Assur. Co., 132 Pa. 428, 19 Am. St. R. 600.

Presumption that known agency general rather than special.—As has already been seen (§ 69), it is sometimes said that agency is presumed to be general rather than special. But the law never makes an abstract presumption one way or the other. If, however, agency is admitted, but nothing more is known, the court can not, without proof, presume any particular limitations, except such as inhere in the very nature of such an agency as this is admitted to be. In that sense only, it would be presumed to be general. See Trainer v. Morison, 78 Me. 160, 57 Am. Rep. 790; Sharp v. Knox, 48 Mo. App. 169; Missouri Pac. R. Co. v. Simons, 6 Tex. Civ. App. 621; Oak Leaf Mill Co. v. Cooper, — Ark. —, 146 S. W. 130; Austrian v. Springer, 94 Mich. 343, 34 Am. St. R. 350; Hillyard v. Hewitt, 61 Or. 58; Midland Sav. & L. Co. v. Sutton, 30 Okla. 448.

[64] See Odiorne v. Maxcy, 13 Mass. 178; Stewart v. Woodward, 50 Vt. 78, 28 Am. Rep. 488; Shaw v. Stone, 1 Cush. (Mass.) 228; Holloway v. Stephens, 2 Thomp. & Cook (N. Y.), 562; Ricker Nat. Bank v. Stone, 21 Okla. 833; Pacific Lumber Co. v. Moffatt, 67 C. C. A. 442, 134 Fed. 836; and many other cases.

principal is responsible and not from mere considerations of convenience or policy. The mere fact that one is found to be a general agent justifies neither court nor jury in guessing that given acts are within the scope of his authority.[65]

§ 741. General agent binds principal only within the scope of his authority.—The general agent, therefore, binds his principal when, and only when, his act is justified by the authority conferred upon him. This authority being in its nature general and not specific, being often gathered from a variety of sources and composed of different elements, the question of its sufficiency becomes largely one of fact, and may be stated thus:

Having in mind the powers expressly conferred, making all justifiable inferences, taking into consideration the object to be attained and the means open to adoption, giving due weight to such usages as were had in contemplation, considering whatever of extension or of modification has been wrought by subsequent conduct, is the act in controversy fairly included within the limits, or, as it is ordinarily stated, within the scope, of this authority? If it is, the principal is bound; if it is not, the act of the agent binds himself alone or no one.[66]

§ 742. Special agent's authority must be strictly pursued.—The authority of the special agent being in its nature limited,—suggesting restrictions and qualifications which may be discovered upon investigation,—its scope is much more easy of determination and must not be exceeded; or, as the rule is ordinarily stated, his authority must be strictly pursued, and if it is not, the principal will not be bound.[67] A

[65] Gore v. Canada Life Assur. Co., 119 Mich. 186.

[66] Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; Goodloe v. Godley, 13 Smedes & M. (Miss.) 233, 51 Am. Dec. 159; Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706; McCoy v. McKowen, 26 Miss. 487, 59 Am. Dec. 264; Carmichael v. Buck, 10 Rich. (S. C.) L. 332, 70 Am. Dec. 226; Savings Fund Society v. Savings Bank, 36 Pa. 498, 78 Am. Dec. 390; Coweta Falls Mfg. Co. v. Rogers, 19 Ga. 416, 65 Am. Dec. 602; Asher v. Sutton, 31 Kan. 286; Robinson v. Chemical Nat. Bank, 86 N. Y. 404; Reed v. Ashburnham R. R., 120 Mass. 43; Abrahams v. Weiller, 87 Ill. 179; Lewis v. Shreveport, 108 U. S. 282, 27 L. Ed. 728; Booth v. Wiley, 102 Ill. 84; Nicholson v. Moog, 65 Ala. 471; American Express Co. v. Milk, 73 Ill. 224; Kelton v. Leonard, 54 Vt. 230; Lewis v. Bourbon, 12 Kans. 186; Dodge v. McDonnell, 14 Wis. 553; Rhoda v. Annis, 75 Me. 17, 46 Am. Rep. 354; Ward's, etc., Co. v. Elkins, 34 Mich. 439, 22 Am. Rep. 544; New York Life Ins. Co. v. McGowan, 18 Kan. 300; Morton v. Scull, 23 Ark. 289; Massachusetts Life Ins. Co. v. Eshelman, 30 Ohio St. 647; Planters' Ins. Co. v. Sorrells, 1 Baxter (Tenn.), 352, 25 Am. Rep. 780; Noble v. Cunningham, 74 Ill. 51.

[67] Blane v. Proudfit, 3 Call. (Va.) 207, 2 Am. Dec. 546; Thompson v.

person dealing with a special agent, it is constantly said, "acts at his own peril," [68] he is "put upon inquiry," [69] he is "chargeable with notice of the extent of his authority," [70] "it is his duty to ascertain," [71] "he is bound to inquire," [72] "and if he does not, he must suffer the consequences." [73]

It is none the less true, however, as has been seen, that the scope of the general agent's authority must not be exceeded. Each acting within the scope of the authority conferred, binds his principal; each acting beyond that scope binds himself only or no one. But while these rules applying to the two classes are alike in kind, they differ, as has been shown, in degree. It is believed, however, that the difference is one of degree only, and not of principle.[74]

IV.

ASCERTAINING THE EXISTENCE OF AUTHORITY.

§ 743. Person dealing with agent must ascertain his authority.— In approaching the consideration of the inquiry whether an assumed authority exists in a given case, there are certain fundamental prin-

Stewart, 3 Conn. 171, 8 Am. Dec. 168; Beals v. Allen, 18 Johns. (N. Y.) 363, 9 Am. Dec. 221; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Baring v. Peirce, 5 Watts & Serg. (Penn.) 548, 40 Am. Dec. 534; Brown v. Johnson, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; Pursley v. Morrison, 7 Ind. 356, 63 Am. Dec. 424; Carmichael v. Buck, 10 Rich. (S. C.) L. 332, 70 Am. Dec. 226; Savings Fund Society v. Savings Bank, 36 Pa. 498, 78 Am. Dec. 390; Thomas v. Atkinson, 38 Ind. 248; Blackwell v. Ketcham, 53 Ind. 184; Baxter v. Lamont, 60 Ill. 237; Adams v. Bourne, 9 Gray (Mass.), 100; Silliman v. Fredericksburg, etc., R. R. Co., 27 Gratt. (Va.) 119; Wooding v. Bradley, 76 Va. 614; Strawn v. O'Hara, 86 Ill. 53; Campbell v. Sherman, 49 Mich. 534; Saginaw, etc., R. R. Co. v. Chappell, 56 Mich. 190; Cleveland v. Pearl, 63 Vt. 127, 25 Am. St. R. 748; Yates v. Yates, 24 Fla. 64; Montgomery Furniture Co. v. Hardaway, 104 Ala. 100; Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480; Sioux City, etc., Co. v. Magnes, 5 Colo. App. 172; History Co. v. Flint (Tex. Civ. App.), 15 S. W. 912; Cox v. Albany Brewing Co., 56 Hun (N. Y.), 489; Americus Oil Co. v. Gurr, 114 Ga. 624; Brown v. West, 69 Vt. 440.

[68] Sioux City, etc., Co. v. Magnes, 5 Colo. App. 172; Cleveland v. Pearl, 63 Vt. 127, 25 Am. St. Rep. 748; Montgomery Furniture Co. v. Hardaway, 104 Ala. 100; Schaeffer v. Mutual Ben. L. Ins. Co., 38 Mont. 459; Moore v. Skyles, 33 Mont. 135, 114 Am. St. R. 801, 3 L. R. A. (N. S.) 136.

[69] Michael v. Eley, 61 Hun (N. Y.), 180.

[70] Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480.

[71] Yates v. Yates, 24 Fla. 64; Americus Oil Co. v. Gurr, 114 Ga. 624.

[72] Michael v. Eley, *supra;* Rawson v. Curtiss, 19 Ill. 455.

[73] Young v. Harbor Point Club Ass'n, 99 Ill. App. 290.

[74] See the discussion in Manchester Bldg. & L. Ass'n v. Allee, 81 N. J. L. 605.

ciples which must not be overlooked. Among these are, as has been seen, (1) that the law indulges in no bare presumptions that an agency exists: it must be proved or presumed from facts; (2) that the agent cannot establish his own authority, either by his representations or by assuming to exercise it; (3) that an authority cannot be established by mere rumor or general reputation; (4) that even a general authority is not an unlimited one; and (5) that every authority must find its ultimate source in some act or omission of the principal. An assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to "stop, look and listen." It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it.[75]

§ 744. ——— What is meant by this rule.—It is material, however, in dealing with this rule to see what is meant by it. As has already been seen, the person who asserts agency has usually the burden of proving it. Where he can prove an actual authority, under any of the rules above referred to, it is not usually necessary that he should have known of it, or relied upon it, at the time of dealing with the

[75] "Whoever deals with an agent is put on his guard by that very fact, and does so at his risk. It is his right and duty to inquire into and ascertain the nature and extent of the powers of the agent, and to determine whether the act or contract about to be consummated comes within the province of the agency and will or not bind the principal." Bermudez, C. J., in Chaffe v. Stubbs, 37 La. Ann. 656. It is the duty of third persons at their peril to ascertain what kind of an agent one is who represents himself as such and the extent of his powers. Tompkins Mach. & Imple. Co. v. Peter, 84 Tex. 627.

To same effect: Gore v. Canada L. Ins. Co., 119 Mich. 136; Rice v. Peninsular Club, 52 Mich. 87; Busch v. Wilcox, 82 Mich. 336, 21 Am. St. 563; Hurley v. Watson, 68 Mich. 531; Snow v. Warner, 10 Metc. (Mass.) 132, 43 Am. Dec. 417; Metzger v. Huntington, 139 Ind. 501; Dickinson County v. Mississippi Valley Ins. Co., 41 Iowa, 286; Roberts v. Rumley, 58 Iowa, 301; Beringer v. Meanor, 85 Penn. St. 223; Weise's Appeal, 72 Pa. 351; Dozier v. Freeman, 47 Miss. 647; Davidson v. Porter, 57 Ill. 300; Reitz v. Martin, 12 Ind. 306, 74 Am. Dec. 215; Bleeker v. Satsop R. Co., 3 Wash. 77; Rosendorf v. Poling, 48 W. Va. 621; Lester v. Snyder, 12 Colo. App. 351; LaFayette Ry. Co. v. Tucker, 124 Ala. 514; and scores of others too numerous to mention.

Judge Philips says: "An exception to this general rule is found in the dealings of insurance agents." Potter v. Phenix Ins. Co., 63 Fed. 382.

agent. Even a then undisclosed principal may ordinarily be held, when subsequently discovered. Where the person asserting agency can not prove an actual authority, but relies upon an apparent one to estop the principal, it is then part of his case that he so relied at the time.

But the difficulty at which the rule of the preceding section is aimed, does not usually arise in the cases just referred to, but attends upon this situation:—In many of the cases which come before the courts, the act in controversy can not be shown to have been authorized; the actual or apparent authority is not enough to sustain it, neither are there any of the ordinary elements of estoppel. The act in fact was not authorized, yet the party seeking to recover believed it was authorized, and acted upon that belief. Not to enforce it now, causes disappointment or loss to him. To enforce it now, causes disappointment or loss to the principal. Which one shall suffer? Over this question, a perpetual warfare wages; it is urged, on one side, that the party dealing with the agent shall be protected; on the other, that the principal who has not authorized the act can not be held; and the victory goes here to one party and there to the other, as one or the other of these demands secures recognition. The party dealing with the agent says to the principal, "You selected this agent and sent him out, and you should answer for his defaults." The principal replies, "Even if I did, it was lawful to employ him; I used due care; and the loss you complain of would not have happened if you had used due care not to trust him without investigating his authority, as you might have done." The situation, in some respects, is not dissimilar to cases of negligence. The plaintiff charges the defendant with negligence. The defendant replies, "If it had not been for your contributory negligence, my alleged negligence would not have harmed you." It is here that the rule laid down in the preceding section is invoked. The party dealing with the agent must ascertain his authority; if he had made due investigation, he would have found that there was no authority, and he would thus have saved himself from loss.

§ 745. ——— What such person is bound to ascertain.—Under this rule, the person dealing with an alleged agent is bound to ascertain, *i. e.*, be prepared to prove, (1) that the alleged agent is really such, (2) that he is an agent of the sort he purports to be (or at least of the sort that the third person deals with him as being), and (3) that the act done is within the limits of his authority, as already explained. This includes (*a*) the observance of known limitations, and (*b*) the ascertainment and observance of those limitations with the knowledge

of which third persons are charged. These, as has been pointed out, include, but go no further than, such limitations as, according to the ordinary experience and practice of mankind, may not unreasonably be expected to exist in such a case. Even in the case of the so-called special agent this is true. A third person, dealing with a special agent to sell, may fairly be charged with notice that there may be limitations as to kind, amount, price, or credit, because such limitations are not unusual; but he is not bound to anticipate or inquire after unusual, whimsical or fantastic limitations, as that the agent shall deal only with people of an arbitrary class, or write his contracts only upon paper of a certain hue, or, to borrow an illustration from Justice Cowen, to write his acceptances only with a steel pen. If the principal wishes such limitations observed, he must make them known.

§ 746. ——— **Not an unfair rule.**—This is not, in general, an unfair or unreasonable rule. In many cases the persons dealing with an alleged agent are in a much better situation to protect themselves than the principal is to protect either himself or them. In the case of the mere pretender this is most strikingly true. The alleged principal may have had no sort of dealings with the pretended agent, and be wholly ignorant of his claims to authority or of his very existence. Unless the party dealing with the pretended agent in such a case protects himself, nobody can protect him. It is, moreover, in any case entirely within the power of the person dealing with the agent to satisfy himself that the agent has the authority he assumes to exercise, or to decline to enter into relations with him.

So far as the law imposes upon the person dealing with an alleged agent the burden of ascertaining that he is an agent, there seems to be but little room for question.

But our actual law goes further. It requires not only that the person so dealing shall ascertain the fact of the agency, but also,—subject to the rules respecting "general agents," "apparent authority," and "secret limitations," as already explained,—imposes upon such person the burden of observing the nature and the extent of the authority conferred, within the limits stated in the preceding section.

It is here, as has been seen, that the real difficulty presents itself, and many other methods of dealing with it have been suggested.

§ 747. ——— **Other theories.**—It is frequently said that if the person acting be in fact an agent, and especially if he be in fact an agent of the sort which he pretends to be, the question whether he keeps within the limitations prescribed by his principal ought to be one to be solved between the principal and the agent alone. If such an

agent exceeds his authority, where the other party has acted in good faith, let the principal be bound and seek redress against the agent. Such a rule, it is urged, will make the principal more careful in the selection of his agents, and principals, if such a rule be enforced, will learn to protect themselves by requiring security from their agents, and thus the loss caused by their agents' defaults will be made to fall—where of course it belongs,—upon the agent through the principal, rather than primarily upon the other party who may then seek redress from the agent.

This suggestion has plausibility. In the case of agents who are regularly employed, it would be entirely feasible for the principal to require security; but in the case of the occasional agent, or the one casually employed,—and it is as to this class that the need of the rule is greatest, since they are almost always "special" agents whose authority is narrowest and most strictly construed,—it would put such an impediment of inconvenience, expense and delay in the way of the employment of a most natural and useful instrumentality, as to either make it impracticable or lead the principal to take the risk without security.

It is not to be forgotten also that this means of protection is open to the party who deals with the agent as well as to the principal.

It is also to be borne in mind that, if a rule is unfair or unjust, its nature is not changed by the fact that people may learn how to guard themselves against its consequences.

§ 748. ——— It is often suggested that the case of an agent exceeding his authority should be dealt with like the case of the servant who is guilty of negligence in the course of his employment. Making an unauthorized contract or otherwise exceeding or violating his authority, it is urged, is simply a wrongful act, and like other wrongful acts of a servant or agent should be dealt with under the tort rule rather than the contract one. Let the principal respond for this as he responds for other torts in the course of the employment.

Two answers to this suggestion may be made: 1. It would be a marked extension of an already over-worked rule. 2. It is inappropriate.

The distinction between the case of a person having contractual relations with an agent and that of the person injured by the tort of a servant, is usually an obvious and significant one. The person injured by the trespass or negligence of the servant is frequently, if not generally, a total stranger to the servant. He may never have consented to come into any relations either with the servant or his master. He has ordinarily no warning, and no time or opportunity to protect

himself, by stipulation or otherwise. He usually has no expectation of profit to himself from any aspect of the situation, but is merely an unwilling, unconsenting victim of another's wrongful act.

The case of the person dealing with an alleged agent is very different. He need not deal with the agent unless he so desires. The whole matter is voluntary. He has ample time to investigate. He can require the alleged agent to produce his credentials or refuse to treat with him. He may exact warranties, pledges or assurances to suit his wishes. He decides to deal, presumably, because he thinks it advantageous to himself to do so. He anticipates profit or gain to himself as the result of the transaction. It surely is no hardship to require him to exercise care for his own protection.

§ 749. ——— The dilemma of choosing between two innocent persons.—It is also frequently said that these cases are to be solved by the "general principle" that "when one of two innocent persons must suffer the loss should be borne by him whose act made the loss possible," or, "who first trusted," etc., etc., practically all of which forms hark back to the statement of Holt, C. J., in Hern v. Nichols,[76]

[76] 1 Salk. 289. In Mussey v. Beecher, 3 Cush. (Mass.) 511, Shaw, C. J., stating the maxim as being that "where one of two innocent persons must suffer, he who reposed confidence in the wrongdoer must bear the loss," *held* that the person who so reposed the confidence in that case was not the principal, but the person dealing with the agent. Wilde, J., however, stating the maxim in the form given in Lickbarrow v. Mason, following, held that it was the principal who was affected. Various statements of the maxim have been made as will be seen in the following, which are a few of the many cases.

In Lickbarrow v. Mason, 2 T. R. 63, at page 70, Ashhurst, J., says: "Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." This is a most common form. In County of Macon v. Shores, 97 U. S. 272, 279, "Where a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it in his power to do the wrong, rather than by a stranger." And in Bank of Kentucky v. Schuylkill Bank, 1 Parsons' (Pa.) Eq. Cas. 180, 248: "Where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act." In O'Connor v. Clark, 170 Pa. 318, 321, 29 L. R. A. 607, "Where one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss should fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud." In Bartlett v. First Nat. Bank, 247 Ill. 490, 498, "Where one of two innocent parties must suffer loss by reason of the wrongful acts of a third party, the rule is almost universal that the party who has made it possible, by reason of his negligence, for the third party to commit the wrong must stand the loss."

How easy it is to misapply as well as to misstate the rule in question, is shown in the recent case of Higin-

"for, seeing somebody must be a loser by this deceit, it is more reason that he who employs and puts a trust and confidence in the deceiver should be a loser, than a stranger." A moment's reflection, however, will suffice to show that, as stated in some of its most common forms, there is no such general principle. The simple case of the conflict between the innocent bailor—lender, hirer, conditional seller—of a chattel, which is wrongfully sold by the bailee to an innocent purchaser, will suffice as an illustration. Here, according to many statements of the alleged "principle," the innocent purchaser ought to succeed, whereas every one knows that in our law the precisely opposite result is reached. The maxim is often put in the form of "one of two *equally* innocent parties," etc.; but for this case it is clear that, in general, there is no reason for preferring one of two equally innocent parties, and the loss must in general lie where it has fallen. It seems perfectly clear that the incidence of the loss can only be shifted where the parties were *not* equally innocent, and that, before the loss can be thrown upon the principal, he must be shown to have been guilty of some misconduct,—that his conduct must have contributed in some way, which reasonable care would have avoided, to the perpetration of the wrong. Certainly the mere employment of an agent in the ordinary way is not such misconduct, unless we are prepared to say that one avails himself of this common, useful and supposedly lawful instrumentality at his risk, and this has not hitherto been deemed to be the law.

§ 750. ——— Through whom must ascertainment be sought.— Attention must also be given to the question, Of whom shall inquiry as to authority be made? Must the other party go to the principal or may he rely upon the statements of the agent or of strangers? To this question, the law in general gives but one answer: The party dealing with the agent must not rely on what the agent alone may say or do, and *a fortiori* not on what mere strangers say or do, but he must be able to trace the authority on which he relies back to some word or deed of the principal.

botham v. Pauch, 232 Pa. 620. "It was said in the charge, that if one of two innocent parties must suffer loss, the loss must be borne by the one least to blame, and that it was for the jury to determine which of the parties to the action was least to blame and to find a verdict accordingly. This was an inaccurate statement of the rule that where one of two equally innocent parties must suffer by reason of the fraud of another, the loss should fall upon him whose *negligent* act or omission has enabled the wrongdoer to commit the fraud, and it was a misapplication of the rule to the facts of the case."

It is not meant by this that the party dealing with the agent must always go and make inquiries of the principal in person. Such a rule would often be inconvenient and impracticable. What is meant, as has been stated, is, that the party dealing with the agent must be able to deduce the authority relied upon from the acts of the principal whom he seeks to charge. He may rely on evidence furnished by the principal, and that evidence may consist of facts and circumstances, of things done and things omitted, of words and acts,—provided always that it can be shown that the principal did in fact supply this evidence, that it was adequate to the purpose, and that it had not spent its force. What the agent himself said or did is ordinarily immaterial, unless the principal's assent or acquiescence in it can also be shown. Limitations upon the agent's authority cannot be defeated simply because the agent failed to disclose them or even denied their existence.[77] There must be some act of the principal reasonably to be construed as waiving their operation or as indicating their nonexistence.

Ordinarily in our law it is not within the power of an agent to bind his principal by the evidence which he alone puts forward as to his own authority. The principal may, of course, give him that power. He may supply him with documentary or other evidence to be exhibited; he may refer persons to him to disclose his authority; he may agree to be bound by whatever the agent may assume to do; and all this may be done expressly or impliedly, and where it is done the principal will be bound accordingly. These cases, however, are exceptional and anomalous.

§ 751. Persons dealing with agent must act in good faith.—It is evident that the rules which have been discussed are established for the protection of third persons who act in good faith. Collusion with the agent to take advantage of the apparent at the expense of the real authority, the willful shutting of eyes to restrictions which would otherwise be obvious, or any other practice or device to pervert the rules of law to a purpose not contemplated by them, should be fatal to a recovery. This is especially true where the party seeking to recover claims the benefit of an apparent authority, a holding out, or any conduct alleged

[77] Since an agent cannot bind his principal by any express statement as to his authority he "cannot by mere silence concerning limitations on his authority, render such limitations ineffective." Mitrovich v. Fresno Fruit Packing Co., 123 Cal. 379. Neither can the principal be bound merely because the agent falsely asserts that a given act is within his authority. Edwards v. Dooley, 120 N. Y. 540.

to work an estoppel: only those who have relied in good faith are entitled to protection.[78]

§ 752. Persons dealing with agent must exercise reasonable prudence.—The person dealing with the agent must also act with ordinary prudence and reasonable diligence. Obviously, if he knows or has good reason to believe that the agent is exceeding his authority, he can not claim protection.[79] So if the suggestions of probable limitations be of such a clear and reasonable quality, or if the character assumed by the agent is of such a suspicious or unreasonable nature, or if the authority which he seeks to exercise is of such an unusual or improbable character, as would suffice to put an ordinarily prudent man upon his guard, the party dealing with him may not shut his eyes to the real state of the case, but should either refuse to deal with the agent at all, or should ascertain from the principal the true condition of affairs.[80]

This is particularly true where the agent is a stranger or one with whom the party has not dealt as agent. Care should be taken in such a case not to rely upon appearances which may be as consistent with

[78] Schneider v. Lebanon Creamery Co., 73 Ill. App. 612; Rail v. City Nat. Bank, 3 Tex. Civ. App. 557; Jacoby v. Payson, 85 Hun (N. Y.), 367; Peabody v. Hoard, 46 Ill. 242; Proctor v. Bennis, 36 Ch. Div. 740.

[79] "No principle is better settled in law, nor is there any founded on more obvious justice, than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, and it is immaterial whether the agent is a general or a special one, because a principal may limit the authority of the one as well as that of the other." Quinlan v. Providence, etc., Ins. Co., 133 N. Y. 356, 28 Am. St. 645. Same effect: Brown v. West, 69 Vt. 440; Wood Mow. & Reap. Mach. Co. v. Crow, 70 Iowa, 340; *In re* Kern's Estate, 176 Pa. 373; Lewis v. Lewis, 203 Pa. 197; Littleton v. Loan Ass'n, 97 Ga. 172; Carter v. Aetna Loan Co., 61 Mo. App. 218; National Union F. Ins. Co. v. Spry Lumber Co., 235 Ill. 98; Ryan v. American Steel & Wire Co., 148 Ky. 481.

[80] "The law is well settled," says Champlin, J., in Hurley v. Watson, 68 Mich. 531, "that a person who deals with an agent is bound to inquire into his authority, and ignorance of the agent's authority is no excuse. * * * The principal may be careless in reposing confidence in his agent, yet this does not make him liable to a third party, who, in dealing with such agent fails to exercise the diligence usual with good business men under the circumstances. If there is anything likely to put a reasonable business man upon his guard as to the authority of the agent, it is the duty of the third party to inquire how far the agent's acts are in pursuance of the principal's limitation." See also National Bank v. Munger, 95 Fed. 87, 36 C. C. A. 659 (approving text); The Thos. Gibson Co. v. Carlisle, 1 Ohio N. P. 398 (approving text); Baldwin v. Tucker, 112 Ky. 282, 57 L. R. A. 451; Savage v. Pelton, 1 Colo. App. 148.

other conditions as with the relation of principal and agent. Thus the mere fact that a stranger has in his possession and offers for sale the property of another as his agent, is as consistent with the fact that the pretended agent is a mere bailee or perhaps a thief, as that he actually has the authority which he assumes to possess.

§ 753. ——— Notice of limitations.—No particular method of giving notice of limitations upon the agent's authority can be insisted upon. Express and actual notice will, of course, suffice, but where the principal relies upon something less than that it must be of such a nature that failure to observe it is not consistent with the good faith and reasonable prudence which the law requires. It is frequently attempted to give notice by terms inserted in or warnings printed upon the contracts, orders, bill-heads or other papers made or used by the parties. Such a notice is efficacious if actually observed, or if so plain and obvious that the other party, as a reasonable man, cannot be heard to say that he did not observe it.[81]

§ 754. ——— Notice of adverse interests.—It is fundamental that an agent, without the full knowledge and consent of his principal,[82] will not be permitted to act as agent in transactions in which he is personally interested. It is often said that his endeavor to do so operates as an immediate revocation of his authority.[83] That an agent undertakes to do so is therefore enough to put the other party on his guard. This is clearly so where they are negotiating directly, and even where the other party claims rights traced through an agent's acts he must take warning when the chain of title shows that the agent has been exercising his powers in his own behalf.[84]

[81] Law v. Stokes, 32 N. J. L. 249, 90 Am. Dec. 655; McKindly v. Dunham, 55 Wis. 515, 42 Am. Rep. 740; Gorham v. Felker, 102 Ga. 260; Reeves v. Corrigan, 3 N. D. 415; Wood Mow. & Reap. Mach. Co. v. Crow, 70 Iowa, 340. Not when obscurely printed or otherwise not reasonably noticeable. Kinsman v. Kershaw, 119 Mass. 140; Putnam v. French, 53 Vt. 402, 38 Am. Rep. 682; Trainer v. Morison, 78 Me. 160, 57 Am. Rep. 790; Luckie v. Johnston, 89 Ga. 321.

[82] "If such a power is intended to be given it must be expressed in language so plain that no other interpretation can rationally be given it, for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time." *Per* Peckham, J., in Bank of N. Y. v. Am. Dock & Trust Co., 143 N. Y. 559.

[83] "As long as the agent is conducting negotiations for his principal with third parties, he may act on his behalf: but the moment he undertakes, without the knowledge of his principal, to conduct them with himself, his agency ceases and the powers and liabilities of that relation no longer exist." Pine Mt. Iron & Coal Co. v. Bailey, 94 Fed. 258, 36 C. C. A. 229. See also Metzger v. Huntington, 139 Ind. 501.

[84] Corn Exchange Bank v. Amer. Dock & Trust Co., 163 N. Y. 332;

§ 755. ——— Effect of principal's negligence.—It has been said in one or two cases that "the scope of an agency is to be determined not alone from what the principal may have told the agent to do, but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction." [85] On the other hand, where the trial court had charged the jury that if the principal knew the agent was violating his instructions "or could have known it by the exercise of ordinary diligence, he is estopped to deny the authority," the supreme court of Alabama said, "Though mere negligence, mere want of ordinary diligence, may furnish the agent an opportunity of undue assumption of authority, it does not of itself work an estoppel. A principal is not required to distrust his agent, nor to keep a vigilant watch over the manner in which he exercises his authority, and to see that his instructions are obeyed. He may act on the presumption that third parties, dealing with his agent, will not be negligent in ascertaining the extent of his authority, as well as the existence of his agency. And negligence, to constitute a ground of liability, must have caused the plaintiff to repose trust on the authority of the agent, and the negligence of plaintiff must not have proximately contributed to the loss. The charge exacts of the principal a degree of diligence not required by the law." [86]

The truth of the matter undoubtedly lies in the combination of these rules. The principal is not obliged to suspect his agent or to set another agent to watch him. He has a right to rely upon the other

Bank of N. Y. v. Am. Dock & Trust Co., 143 N. Y. 559; Hanover Nat. Bank v. Am. Dock & Trust Co., 148 N. Y. 612, 51 Am. St. R. 721; Gerard v. McCormick, 130 N. Y. 261, 14 L. R. A. 234; Wilson v. Metropol. El. Ry. Co., 120 N. Y. 145, 17 Am. St. R. 625; Farrington v. South Boston R. Co., 150 Mass. 406, 15 Am. St. R. 222, 5 L. R. A. 849; Moores v. Citizens Nat. Bank, 111 U. S. 156, 28 L. Ed. 385; Lee v. Smith, 84 Mo. 304, 54 Am. Rep. 101; State v. Miller, 47 Or. 562, 6 L. R. A. (N. S.) 365; Hier v. Miller, 68 Kan. 258, 63 L. R. A. 952; Stainback v. Bank, 11 Gratt. (Va.) 269; Stainback v. Read, 11 Gratt. 281, 62 Am. Dec. 648.

But see Cheever v. Pittsburg, etc., R. Co., 150 N. Y. 59, 55 Am. St. R. 646, 34 L. R. A. 69; where it was held that the mere fact that a note drawn by the president of a corporation had later been endorsed by the firm of which he was a member (but which was not the payee) was not enough to charge a holder with notice.

[85] Kingsley v. Fitts, 51 Vt. 414; quoted with approval in Little Pittsburgh Mine Co. v. Little Chief Min. Co., 11 Colo. 225, 7 Am. St. R. 226.

[86] Wheeler v. McGuire, 86 Ala. 398, 2 L. R. A. 808. The court quotes the rule laid down by Mr. Wharton in his work on Agency, § 123: "When a principal conducts his affairs so negligently as to lead third persons to reasonably suppose that his agent has full powers, then if the agent exceeds his authority the principal must bear the loss. It is true that the principal is not chargeable with *culpa levissima*. He is not chargeable, in other words, with the consequences of

party's diligence to protect his own interests. He is not charged with knowledge of every departure by the agent from his authority. But it must be held that he is aware of the general method in which his business is being conducted, and if he leads reasonably prudent men to believe that such method meets with his approval, he cannot complain if they are held entitled to rely upon it.[87]

§ 756. Must ascertain whether necessary conditions exist.—Again, where the nature of the authority is such that it must have been conferred by written instrument, or must be a matter of public record, the party dealing with the agent must, at his peril, take notice of this fact, and ascertain whether the instrument or record is sufficient for the purpose.

For similar reasons, if the authority is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event or the happening of the contingency or the performance of the condition, must ordinarily be ascertained by him who would avail himself of the results ensuing from the exercise of the authority.[88]

The subjects to which these conditions may relate may, of course, be of great variety. Thus, there may be conditions of time, amount, interest, person, territory, and the like. In many cases the question, whether the condition is being complied with, will, the facts being known, be entirely obvious. If it be one of a fixed and ascertained territory, for example, there can usually be no difficulty in observing whether the act is being done within that territory.[89] If the condition

those negligences into which good business men are liable to fall. But, if he is negligent to an extent beyond what is usual with good business men in his department, and if in consequence of his negligence, third parties repose trust on the supposed agent, then the loss, if loss accrue, must fall on the principal."

[87] See St. Louis Packet Co. v. Parker, 59 Ill. 23; Golding v. Merchant, 43 Ala. 705; Martin v. Webb, 110 U. S. 7, 15, 28 L. Ed. 49; Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 51 Am. St. R. 721.

A principal may be bound by the authority which through culpable negligence he permits the agent to appear to have. Columbia Mill Co. v. National Bank, 52 Minn. 224; Eggleston v. Advance Thresher Co., 96 Minn. 241.

[88] Baines v. Ewing, 4 H. & C. 511, L. R., 1 Exch. 320; Attwood v. Munnings, 7 B. & C. 278, 1 M. & R. 66; Mussey v. Beecher, 3 Cush. (Mass.) 511; Craycraft v. Selvage, 10 Bush (Ky.), 696; Weise's Appeal, 72 Pa. 351.

[89] *Territorial limitations.*—Authority may be subject to territorial limitations or it may not. Some such limitations must be express; some would be implied; some would naturally be anticipated; others would not be. Much would depend upon circumstances and the established methods of procedure. Would the state agent of an insurance company be thought to have equal authority

be one of a prescribed amount, and the agent is attempting in the given case to exceed that amount, the case is equally clear. So, of a fixed time limit, which is plainly being exceeded.

On the other hand, there may be many cases in which, though the limit is known, the fact whether it is being exceeded may not be easy to ascertain. Thus, though it may be known that an agent is authorized to borrow a certain sum only, and he attempts to borrow that sum or part of it of X, the question whether he is exceeding the known limit may depend upon whether he has already borrowed part or all of that sum of other persons, who are unknown to X, and whom he would have no means of identifying if he should seek to make inquiries. The same situation may exist in a great variety of other cases which will at once suggest themselves.

§ 757. ——— Agent's representations as to his authority not to be relied upon.—And not only must the person dealing with the

in another state? Would a local agent, residing and appointed in Portland, Maine, be thought to have the same authority in Portland, Oregon, if he should chance to be there? Would a clerk in a department store or the ticket agent of a railroad company be thought to have the same authority to sell goods or tickets when he was at his home, as when he was in his appointed place behind the counter or in the ticket office?

In Insurance Co. v. Thornton, 130 Ala. 222, 89 Am. St. R. 30, 55 L. R. A. 547, it was held that the local agent of a fire insurance company appointed for the town of Dothan "and vicinity" could not be deemed to have authority to do business in the town of Enterprise, thirty-five miles away, unless it could fairly be found under the circumstances that the latter place was within the "vicinity."

But in Lightbody v. North Am. Ins. Co., 23 Wend. (N. Y.) 18, an insurance agent appointed for "Troy and vicinity" was held to have power to bind the company by a policy upon property in Utica, one hundred miles away, the policy being issued at Troy, and the agent claiming to have authority to issue it, and the insured not being shown to have known that the company had an agent at Utica.

Where the insured knows of the territorial limitation, there can be no recovery in violation of it. Fireman's Fund Ins. Co. v. Rogers, 108 Ga. 191. So where he knows of the statutory policy of the state to require local agents, who have been appointed, he may not deal with agents in other states. Potter v. Phenix Ins. Co., 63 Fed. 382.

In several cases policies issued upon property outside the actual territory of the agent have been held binding, upon proof of recognition by the company of the policy as a valid one. Aetna Ins. Co. v. Maguire, 51 Ill. 342.

An agent subsequently appointed may act with reference to a policy upon property now in his territory, though it was not within his territory when the policy was issued. St. Paul, etc., Ins. Co. v. Parsons, 47 Minn. 352; Hahn v. Guardian Assur. Co., 23 Or. 576, 37 Am. St. R. 709.

Mr. Wood's statement in § 529 of his work on Insurance quoted in some of the cases is surely too broad.

In German F. Ins. Co. v. Columbia Tile Co., 15 Ind. App. 623, sometimes cited in this connection, there was no express territorial limit prescribed.

agent ascertain the existence of the conditions, but he must also, as in other cases, be able to trace the source of his reliance to some word or act of the principal himself if the latter is to be held responsible. As has often been pointed out, the agent alone can not enlarge or extend his authority by his own acts or statements, nor can he alone remove limitations or waive conditions imposed by his principal. To charge the principal in such a case, the principal's consent or concurrence must be shown.

§ 758. ——— Notwithstanding this difficulty in ascertaining, however, the general rule is that the person who deals with the agent takes the risk. To the objection that no one would be willing to deal with the agent upon this basis, it was replied by Chief Justice Shaw (in a case [90] in which the agent was known to have authority to buy goods upon credit, provided he did not exceed a certain amount at any one time): "This objection, we think, is answered by the consideration that no one is bound to deal with the agent; whoever does so is admonished of the extent and limitation of the agent's authority, and must, at his own peril, ascertain the fact upon which alone the authority to bind the constituent depends. Under an authority so peculiar and limited, it is not to be presumed that one would deal with the agent who had not full confidence in his honesty and veracity, and in the accuracy of his books and accounts. To this extent the seller of the goods trusts the agent, and, if he is deceived by him, he has no right to complain of the principal. It is himself, and not the principal, who trusts the agent beyond the expressed limits of the power; and therefore the maxim, that where one of two innocent persons must suffer, he who reposed confidence in the wrongdoer must bear the loss, operates in favor of the constituent, and not in favor of the seller of the goods."

§ 759. ——— **Facts peculiarly within agent's knowledge.**—An exception to this general rule has been established in New York after "an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor." Stated in the language of one of the leading cases [91] it is that "where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."

[90] Mussey v. Beecher, *supra.*

[91] Bank of Batavia v. New York, etc., R. Co., 106 N. Y. 195, 60 Am. Rep. 440.

This, obviously, is not intended to be a general rule. On the contrary it is an exceptional one. It rests upon the hypothesis that, in certain cases, the question of the existence of the conditions is so *"necessarily* and *peculiarly"* within the knowledge of the agent that the principal must be deemed to have authorized third persons to rely upon the agent's representations concerning it. Unless this situation exists, the exception would not be made.

It must also be kept in mind that the question here is not as to the *terms* or *extent* of the authority,—that is not a matter necessarily or peculiarly within the knowledge of the agent. It is only as to the existence of extrinsic facts or conditions, upon the presence of which the proper exercise of the authority depends, and of the existence of which the agent, because he is the man in charge, the man on the ground, must be deemed to have peculiar, if not exclusive, knowledge, that the exception here considered applies.

The typical cases have been those wherein an agent, authorized to issue notes only in his principal's business and for his account, has issued notes ostensibly for the principal's account but really for his own,[92] or wherein the freight agent of a railroad company, authorized to issue bills of lading for goods received for carriage, has issued one when no goods were in fact received,[93] or where the transfer agent of a corporation authorized to issue new certificates upon the surrender of old ones has issued certificates when no old one was in fact surrendered,[94] and the note, bill of lading or new certificate has come into the hands of a *bona fide* holder who relied upon its recitals. Warehouse receipts for goods not deposited raise the same question, and much the same situation is presented where the cashier of a bank authorized to certify as good a check drawn upon funds certifies to one when no funds are present, though some courts distinguish upon the true negotiable character of the check which the bill of lading, warehouse receipt or certificate of stock does not possess.

There seems to be very little question respecting the strictly negotiable instruments, like promissory notes and bills of exchange, as will be seen in the cases referred to above. But with reference to such

[92] North River Bank v. Aymar, 3 Hill (N. Y.), 362.

See also the elaborate discussion in *In re* Troy & Cohoes Shirt Co., 136 Fed. 420, aff'd on opinion below, 142 Fed. 1038. See also Fillebrown v. Hayward, 190 Mass. 472.

[93] Bank of Batavia v. New York, etc., R. Co., *supra*; Armour v. Michigan Central R. Co., 65 N. Y. 111, 22 Am. Rep. 603.

[94] New York, etc., R. Co. v. Schuyler, 34 N. Y. 30; Fifth Ave. Bank v. Forty-Second St. Ry. Co., 137 N. Y. 231, 33 Am. St. R. 712, 19 L. R. A. 331.

matters as the bill of lading, the warehouse receipt, and the certificate of stock, there is much question.

§ 760. ——— The views of the New York courts have been approved in several of the other states in the bill of lading cases,[95] and have been adopted in the Uniform Bills of Lading Act,[96] but they are opposed by the English and Canadian courts,[97] the supreme court of the United States,[98] and a number of the state courts,[99] and these opposing courts undoubtedly represent the weight of authority. Nevertheless the New York rule is believed to be sound. Although not strictly negotiable, the bill of lading has a well known commercial character which can not be ignored. The companies which issue them are not ignorant of it. The agent is put there to receive goods and issue bills of lading. His act of issuing one is a representation of a fact peculiarly within his own knowledge and which he is put there to determine. It is an act apparently within his actual authority. There is nothing to apprise a person relying upon it of the real state of the case. Suppose he undertakes to investigate: of whom shall he inquire whether the goods have actually been received? He would naturally go to the very agent who has already made a written certificate that the goods have been received. Why ask for further assurances? If he goes to the railroad company, at its principal office, and inquires, the course of business would be for a superior agent to inquire of the

[95] Brooke v. New York, etc., R. Co., 108 Pa. 529, 56 Am. Rep. 235; Sioux City R. Co. v. First Nat. Bank, 10 Neb. 556, 35 Am. Rep. 488; Wichita Savings Bank v. Atchison, etc., R. Co., 20 Kan. 519; Fletcher v. Elevator Co., 12 S. D. 643 (a warehouse receipt case). See also St. Louis, etc., R. Co. v. Larned, 103 Ill. 293; Sears v. Wingate, 3 Allen (Mass.), 103. By statute: Lazard v. Merchants' Transp. Co., 78 Md. 1.

The same principle has been approved in Wisconsin, though in cases involving different facts. Arnold v. Waupaca Bank, 126 Wis. 362, 3 L. R. A. (N. S.) 580.

[96] Section 23.

[97] Grant v. Norway, 10 C. B. 665; Hubbersty v. Ward, 8 Ex. 330; McLean v. Fleming, L. R. 2 H. L. Sc. 128; Brown v. Powell, L. R. 10 C. P. 562; Cox v. Bruce, 18 Q. B. Div. 147. In Canada: Erb v. Gt. West. Ry. Co., 42 U. C. Q. B. 90, 3 Ont. App. 446, 5 Can. S. C. 179.

[98] Friedlander v. Railway Co., 130 U. S. 416, 32 L. Ed. 991; St. Louis, etc., Railway Co. v. Knight, 122 U. S. 79, 30 L. Ed. 1077; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998; The Freeman v. Buckingham, 18 How. (U. S.) 182, 15 L. Ed. 341; American, etc., Co. v. Maddock, 36 C. C. A. 42, 93 Fed. 980.

[99] National Bank of Commerce v. Chicago, etc., R. Co., 44 Minn. 224, 20 Am. St. R. 566, 9 L. R. A. 263; Williams, Black & Co. v. Wilmington R. Co., 93 N. Car. 42, 53 Am. Rep. 450; Baltimore, etc., R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26 (immediately changed by statute); Louisiana Nat. Bank v. Laveille, 52 Mo. 380 (see Smith v. Missouri, etc., R. Co., 74 Mo. App. 48); Hunt v. Railroad Co., 29 La. Ann. 446; Dean v. King, 22 Ohio St. 118.

very agent who issued the bill of lading. Why inquire of him again when his assurance is already in hand?

Suppose an agent is placed in charge of a store with authority to buy, upon his principal's credit, such goods as are needed to keep up the stock. He buys of A all the goods which are actually needed, and then buys more of B telling him that the goods are needed and B relies in good faith upon his statement. Should not B recover of the principal, even though the goods were not needed and never came to his use?[1] Suppose an agent is authorized to issue notes in his principal's name for use in his business. He issues one in his principal's name, saying to the person who receives it, and who acts in good faith, that it is for use in the principal's business. Should not the principal be liable although the note was really put to an unauthorized use?[2]

The rule of the New York courts does not apply where it appears upon the face of the transaction that the agent was dealing with himself.[3]

§ 761. ——— Fixed pecuniary limit.—It is not infrequently said that, however sound the New York rule may be when applied to the sort of cases already referred to, it should have no application to cases in which there is a fixed pecuniary or numerical limit, as where the agent is authorized to buy or borrow or obtain credit to a certain prescribed amount but no further. It is true that where the limit is so fixed it is easier to compare the act with the authority, but there seems to be no other essential difference. A striking case in which the stricter rule was applied, though the New York rule might have been

[1] A partner in a firm of harness-makers who buys bits, ostensibly for the firm, binds the firm even though he appropriates the bits, when bought, to his own use. Bond v. Gibson, 1 Camp. 185.

[2] One who loans money to an agent authorized to borrow it, is not obliged to follow the money to see that it is properly applied. Donnell v. Lewis County Sav. Bank, 80 Mo. 165.

[3] See Corn Exchange Bank v. American Dock & Trust Co., 163 N. Y. 332; Hanover National Bank v. Am. Dock & Trust Co., 148 N. Y. 612, 51 Am. St. R. 721; Bank of New York v. Am. Dock & Trust Co., 143 N. Y. 559; Gerard v. McCormick, 130 N. Y. 261, 14 L. R. A. 234; Wilson v. Metropol. El. Ry. Co., 120 N. Y. 145, 17 Am. St. R. 625.

Same: Farrington v. South Boston R. Co., 150 Mass. 406, 15 Am. St. R. 222, 5 L. R. A. 849; Moores v. Citizens Nat. Bank, 111 U. S. 156, 28 L. Ed. 385.

But in Cheever v. Pittsburg, etc., R. Co., 150 N. Y. 59, 55 Am. St. R. 646, 34 L. R. A. 69, it was held that the mere fact that a note, drawn in the name of a railroad company by its president, was subsequently indorsed by a firm (not the payee) of which he was a member, was not enough to defeat the rights of an otherwise *bona fide* holder.

fitted to the facts, is the early case of Mussey v. Beecher [4] already referred to. There Beecher had, by formal writing, with whose terms plaintiff was acquainted, authorized one Pierce to buy goods upon Beecher's credit for a certain business carried on in another town, "provided, however, that said Pierce shall not make purchases or incur debts exceeding in amount at any one time the sum of two thousand dollars." Pierce bought goods from time to time of the plaintiff, whose contention was that he inquired on these occasions of Pierce whether the limit had been reached, and Pierce had replied that it had not. As a matter of fact it had been exceeded, at the time of the purchase in question, and this was the defense relied upon. The trial court instructed the jury, in effect, that if plaintiff inquired of Pierce and relied upon his statement in good faith he could recover even though the limit had then been exceeded. This was held to be erroneous in an opinion written by Chief Justice Shaw, who relied upon the general rule that such a known limit must be observed by the person dealing with the agent, and that the agent could not enlarge his authority by his own statements. One judge dissented. It will be observed that, under the circumstances, this was a case in which the essential fact, namely, of the extent of the credit already obtained, was one peculiarly within the knowledge of the agent. If plaintiff had inquired of defendant, the principal, in person, the latter could only reply by inquiring of Pierce, and plaintiff had no other means of learning, except by an examination of Pierce's books and accounts which might easily have been misleading even if he could have obtained access to them. To the argument that no one could safely deal with the agent under such a rule, Chief Justice Shaw replied that nobody was bound to deal with him, but that if any one chose to deal with him, with this limitation in his mind, he must be deemed to deal at his own risk of the agent's honesty and not at the principal's risk.

§ 762. ——— Corporate agents.—A doctrine somewhat similar to that employed in the New York cases has sometimes been applied to corporations. Thus where the authority of the corporation, or of its chief officers or agents, to act in a given situation depends upon some fact or condition which concerns what may be called the internal

[4] Mussey v. Beecher (1849), 3 Cush. (Mass.) 511. Persons who deal with an agent knowing that his authority is subject to a fixed pecuniary limit are bound by it, even though they do not actually find out what it is. Baines v. Ewing, 4 Hurl. & C. 511. This case, however, is clearly distinguishable from Mussey v. Beecher, because here, if the third person had ascertained the limit, the act on its face would have shown that it was in violation of it.

CHAPTER II

OF THE CONSTRUCTION OF THE AUTHORITY IN GENERAL

§ 764. Purpose of this chapter.

I. WHEN AUTHORITY IS CONFERRED BY WRITING

765. Construction of writing for court.
766. Intention to govern.
767. How intention discovered—Language used.
768. Entire writing—Other writings.
769. When drawn with reference to statute, to be interpreted in light of statute.
770. Admissibility of parol evidence—To show surroundings of the parties.
771. —— Latent and patent ambiguities.
772. —— Identifying subject-matter.
773. —— To show usage of business or of agents of a particular class.
774. —— Parol evidence cannot enlarge authority.
775. —— Parol evidence cannot contradict writing.
776. Effect must be given to every word and clause.
777. Transaction to be upheld rather than defeated.
778. Authority to be interpreted in light of *lex loci*.
779. Authority limited by ordinary meaning of words and by plain import of language.
780. General powers limited by specific object or recital.
781. Authority by joint principals usually to be exercised only in behalf of all jointly.
782. Power of attorney referring to several interests can not be applied to joint interests.
783. Power construed to apply only to principal's private business.
784. Formal powers strictly construed—Only those powers expressly given or necessarily implied.
785. Practical construction by the parties may aid.

II. WHERE AUTHORITY IS UNWRITTEN OR IMPLIED

786. Where authority is unwritten but express.
787. Where authority is unwritten but implied.
788. Authority to be construed in the light of established usages.
789. Authority carries with it every power necessary to accomplish object.
790. Implied authority not to be extended beyond its legitimate scope.
791. Implied power limited to principal's business.

III. WHERE AUTHORITY IS AMBIGUOUS.

792. Duty of principal to make his instructions clear.
793. When ambiguous, construction adopted in good faith sufficient.

§ 764. Purpose of this chapter.—An authority having been conferred and an attempt made to exercise it, it becomes important to determine whether the act assumed to be done by virtue of the given power is, in reality, embraced within it. This leads to the necessity of construction or interpretation of the authority.

In the main, the principles governing the construction of a power do not differ from those which prevail in regard to the interpretation of contracts generally. It is proposed in this chapter, to refer briefly to some of these and also to consider in full some of the more important rules that apply to it. In pursuance of this purpose the subject will, for convenience sake, be divided thus: I. When authority is conferred by written instrument. II. When authority is unwritten or arises from implication, and III. When authority is ambiguous.

I.

WHEN AUTHORITY IS CONFERRED BY WRITING.

§ 765. Construction of writing for court.—The construction or interpretation of writings is for the court. Hence where the authority is created by a written instrument, the writing must, in general, be produced, and the nature and extent of the authority thereby conferred must be determined by the court.[1]

§ 766. Intention to govern.—As has been seen, agency is, in general, the creature of intention. Courts sit, not to make contracts between parties, but to construe and enforce the contracts which the parties have themselves made. The same principle applies to instruments conferring authority. Hence the first and most important rule, in the construction of writings creating an authority, is to ascertain what authority the parties intended to create, and to give that intention effect,[2] provided it can be done consistently with the language used. But even though the intention to convey a certain power may be clear, the court can not read it into the instrument where the plain and unambiguous language used will not support it.[3]

§ 767. How intention discovered—Language used.—The intention of the parties is primarily to be determined from the language

[1] Savings Fund Society v. Savings Bank, 36 Pa. 498, 78 Am. Dec. 390; Keating Implement Co. v. Terre Haute Carriage Co., 11 Tex. Civ. App. 216; Tarbox v. Cruzen, 68 Minn. 44; White v. Furgeson, 29 Ind. App. 144; Petteway v. McIntyre, 131 N. C. 432.

[2] Marr v. Given, 23 Me. 55, 39 Am. Dec. 600; Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Commonwealth v. Hawkins, 83 Ky. 246; White v. Furgeson, 29 Ind. App. 144; McClanahan v. Breeding, 172 Ind. 457.

[3] Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 84 Am. St. R. 927.

used by them. And as a mistake of law does not ordinarily constitute a valid objection, parties cannot usually be heard to complain that they did not contemplate the legal effect of the language which they have deliberately chosen.[4]

§ 768. Entire writing—Other writings.—In this, as in other cases, the intention is to be gathered from the whole instrument, whether it be made up of one piece of paper or of many, provided that the several papers are either so physically attached, or so connected by reference, or so obviously relating to the same subject, that they must all be read together.[5] However much the agent might be bound by them, a third party dealing with the agent in good faith, and in the exercise of reasonable prudence, in reliance upon an apparently complete document, could not be bound by limitations contained in other writings of which he had no notice.[6]

§ 769. When drawn with reference to statute, to be interpreted in light of statute.—Where the authority is given to do some act provided for by a statute, or is otherwise related to the terms or purposes of the statute, the language and object of the statute are to be taken into account in determining the intent and the extent of the power.[7]

§ 770. Admissibility of parol evidence—To show surroundings of the parties.—And so, in doubtful cases, resort must be had to evidence of the situation, surroundings, and relations of the parties; for though the writing cannot, in general, be contradicted by oral evidence,

[4] Hunt v. Rousmanier, 1 Pet. (U. S.) 1, 7 L. Ed. 27; Holmes v. Hall, 8 Mich. 66, 77 Am. Dec. 444.

[5] Mexican National Coal Co. v. Frank, 154 Fed. 217 (power of attorney and contemporaneous letter); McClanahan v. Breeding, 172 Ind. 457.

[6] In Farrington v. Hayes, 65 Vt. 153, a principal telegraphed B, his agent to "Employ Farrington & Post. Letter will follow." B showed the telegram to the plaintiffs and employed them. Plaintiffs did not inquire for the letter or see it; the letter contained limitations as to compensation. It was held that the telegram was sufficient authority for plaintiffs retainer, and that as reasonable business men the plaintiffs were not put on inquiry as to the terms of the letter. To same effect on facts practically identical is Haubelt v. Rea & Page Mill Co., 77 Mo. App. 672. But in Butler v. Standard Guaranty Co., 122 Ga. 371, a party dealing with an agent was held bound by limitations upon the agent's authority printed on the back of the contract made with him.

[7] McClanahan v. Breeding, 172 Ind. 457.

Authority to sign "any and all remonstrance or remonstrances" against granting licenses for the sale of liquor is a continuing power and will justify signing a remonstrance against a renewal as well as in the first instance. McClanahan v. Breeding, *supra;* White v. Furgeson, 29 Ind. App. 144.

yet the circumstances may properly be used as aids, and, by putting the court more or less fully into the exact situation of the parties, to enable it to see the subject-matter as they saw it.

§ 771. ——— Latent and patent ambiguities.—In the same manner, an ambiguity or uncertainty not arising upon the face of the instrument, may be explained by parol.[8] Where, however, the ambiguity is in the writing itself, resort cannot thus be had to the aid of parol explanation.[9]

§ 772. ——— Identifying subject-matter.—If the subject-matter be not identified with sufficient certainty, parol evidence may be allowed to apply the description and identify the thing intended.[10]

But this would not ordinarily be true where there is an entire absence of any description whatever.[11] There is then nothing to apply.

§ 773. ——— To show usages of business or of agents of a particular class.—In as much as authority is ordinarily to be exercised in conformity with the established usages of business or of particular classes of agents, and may usually be supposed to have been conferred with such usages in view, parol evidence of these usages would ordinarily be admissible, not for the purpose of adding to or altering the writing, but for the purpose of showing the situation with reference to which the language used is to be interpreted.[12]

§ 774. ——— Parol evidence cannot enlarge authority.—In general, parol evidence is not admissible for the purpose of enlarging or extending the powers conferred by the written instrument, and the nature and extent of the authority must be ascertained from the instru-

[8] Bishop on Contracts, § 374.

[9] *Idem*, § 375.

[10] Pope v. Machias, etc., Co., 52 Me. 535; Norris v. Spofford, 127 Mass. 85; Linton v. Moornead, 209 Pa. 646; Janney v. Robbins, 141 N. C. 400; Rownd v. Davidson, 113 La. 1047; McDonald v. Hanks, 52 Tex. Civ. App. 140.

[11] A power to sell land which contains no description is void, at least in the absence of some showing that the land claimed was the only land the maker owned. Stafford v. Lick, 13 Cal. 240. In Ashley v. Bird, 1 Mo. 640, 14 Am. Dec. 313 the power ran "to act in all my business, as if I was present myself, and to stand good in law in all my land and other business in the Missouri Territory." Said the court: "We are entirely at a loss to know what effect this power of attorney is to have. Shall we say that this gives any power to sell land, or to make any covenant for the sale of land? The power does not give the least hint as to what this business is. Shall we guess at it? If the court should undertake to guess, we might entirely fail. There is such a thing as a power of attorney being void for uncertainty, and this one is nearly so." And they held it gave no authority to sell lands though it might, perhaps, give authority to pay taxes and take possession of land.

[12] See Frink v. Roe, 70 Cal. 296.

ment itself.[13] But, except where writing is indispensable, the principal may, notwithstanding this general rule, expressly extend or change the agent's powers by parol; or he may hold the agent out as possessing greater powers than those conferred by the writing; or he may so conduct himself as to be estopped from asserting that they were not greater.[14]

§ 775. ——— Parol evidence cannot contradict writing—Parol limitations on written powers.—It is also a familiar rule that, in the absence of fraud or mistake, parol evidence cannot be admitted for the purpose of varying or contradicting the written instrument.[15] This rule however, in its application to the law of agency, is substantially the same as the preceding, and is subject to the same exceptions.

So also secret reservations, qualifications or conditions cannot be set up to affect apparently unlimited powers conferred by the instrument.[16]

[13] Ashley v. Bird, 1 Mo. 640, 14 Am. Dec. 313; State v. Bank, 45 Mo. 528; Mechanics' Bank v. Schaumburg, 38 Mo. 228; Pile v. Bright, 156 Mo. App. 301.

Where a power is "plain and unambiguous," parol evidence of its purpose or meaning is inadmissible. Rogers v. Tompkins (Tex. Civ. App.), 87 S. W. 379.

A power of attorney, in plain terms, "to sell and convey" lands, can not, upon parol proof of intention, be construed to authorize a mortgage. Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 84 Am. St. R. 927.

[14] Hartford Ins. Co. v. Wilcox, 57 Ill. 180; Williams v. Cochran, 7 Rich. (S. C.) 45; Coleman v. National Bank, 53 N. Y. 388.

[15] Bishop on Contracts, § 169. In Plano Co. v. Eich (Iowa), 97 N. W. 1106, an action by the principal against the agent, it was held that parol evidence was inadmissible on behalf of the agent to prove that the principal consented to accept three notes in payment, when the written authority provided for an acceptance of but two. (See also Superior Drill Co. v. Carpenter, 150 Mich. 262.)

In an action by an agent against his principal for commissions for services performed under a written contract parol evidence of different terms agreed upon at the time of the execution of the contract is not admissible. Loxley v. Studebaker, 75 N. J. L. 599; McFadden v. Pyne, 46 Col. 319. See also Welke v. Wackershauser, 143 Iowa, 107.

In Haas v. Malto-Grapo Co., 148 Mich. 358, it was held that letters antedating and leading up to the execution of a written contract are inadmissible to vary its terms.

In Alvord v. Cook, 174 Mass. 120, parol evidence was held admissible to show the situation of the parties at the time the writing was made, in order to aid in its interpretation, but not admissible to enlarge, vary or contradict the writing itself.

[16] See Mabb v. Stewart, 147 Cal. 413; Kilpatrick v. Wiley, 197 Mo. 123; Furnace Run, etc., Lumber Co. v. Heller, 84 Ohio St. 201 (where the court said: "Certainly the plaintiffs in error are estopped to assert a limitation upon the written authority with which they clothed their agent, by proof of a parol understanding neither carried into the

§ 776. Effect must be given to every word and clause.—Wherever it is possible, effect is to be given to every word and clause used by the parties. It is to be presumed that the parties used the word or clause with some purpose, and that purpose is, if possible, to be ascertained and enforced.[17]

The mere fact that powers conferred are wide, or are subject to abuse, is no ground for not sustaining them, if they have clearly been conferred.[18]

§ 777. Transaction to be upheld rather than defeated.—So the intention of the parties is to be sustained rather than defeated if it can be done consistently with sound rules of construction.[19] If the writing be open to two reasonable constructions, one of which would uphold while the other would overthrow the contract, the former is, where possible without extending the scope of the power, to be chosen.[20] So if by one construction the contract would be illegal, and by another equally permissible construction it would be lawful, the latter is always to be chosen, as it will not be presumed that the parties intended to violate the law.[21]

So, in accordance with well settled rules, if the authority will justify the performance of a portion of an act but not the whole of it, and if the authorized portion can be separated from the residue, and given an effect consistent with the principal's purpose, that much will ordinarily be allowed to stand. So, if there be an excessive execution, but the excess can be severed from the residue, and there will then be left a proper execution of the power, that will be done.[22] And so, although the principal has attempted to authorize more, if execution

instrument, nor communicated to one who relied upon it").

[17] McClanahan v. Breeding, 172 Ind. 457.

[18] Daughters of Amer. Revolution v. Schenley, 204 Pa. 584.

[19] Holladay v. Daily, 19 Wall. (U. S.) 606, 22 L. Ed. 187.

But of two constructions, one of which enlarges the power and the other of which confines it strictly to the powers conferred and those necessarily to be implied, the latter is to be adopted. Stokes v. Dewees, 24 Pa. Super. 471.

[20] Muth v. Goddard, 28 Mont. 237, 98 Am. St. Rep. 553; Hemstreet v. Burdick, 90 Ill. 444; Wapples-Platter Grocer Co. v. Kinkaid, 86 Kan. 167. In the Illinois case, it is said: "But it is said the power must be strictly construed. This may be true, but it does not require that it shall be so construed as to defeat the intention of the parties. Where the intention fairly appears from the language employed, that intention must control. A strained construction should never be given to defeat that intention, nor to embrace in the power what was not intended by the parties."

[21] Bishop on Contracts, §§ 391, 392.

[22] Commonwealth v. Hawkins, 83 Ky. 246.

to the full extent contemplated is found to be impossible or unjustified, an act less than full execution, but within the general act contemplated and consistent with the principal's purpose, may be allowed to stand.[23]

§ 778. Authority to be interpreted in light of lex loci.—With respect of the construction of powers of attorney, it must be assumed, in the absence of anything to show a contrary intention, that the parties intended the power to be construed in accordance with the law under which it was made and with which they were presumptively familiar.[24] Where the authority is to be executed under a different law or where it is to deal with immovable property in another jurisdiction, the law of that place may be deemed to have been intended.[25] With respect of shipmasters, the general rule seems to be that the extent of the master's authority is to be determined by the law of the country to which the ship belongs, of which country the ship's flag is deemed to give notice.[26]

With respect of the manner of execution every authority given to an agent to transact business for his principal, must, in the absence of anything to show a contrary intent, be construed to empower him to transact it according to the laws of the place where it is to be done, of which laws the principal is presumed to have knowledge.[27]

§ 779. Authority limited by ordinary meaning of words and by plain import of language.—Formal instruments conferring power are, as will be seen, ordinarily, subject to a strict construction.[28] Words used will be presumed to have their ordinary meaning, and the authority itself will be confined to the plain import of the language, and will not be extended by mere construction to embrace that which is not fairly included within the terms of the instrument.[29]

[23] Thus a power of attorney to make a conveyance of realty, but defective because of improper acknowledgment, may be upheld to the extent of authorizing the agent to make an executory contract and to receive the purchase price. Joseph v. Fisher, 122 Ind. 399.

[24] See Hastings v. Hopkinson, 28 Vt. 108; King v. Sarria, 69 N. Y. 24, 25 Am. Rep. 128; Chatenay v. Brazilian Telegraph Co., [1891] 1 Q. B. 79; *In re* Cunningham, 36 Ch. Div. 532; Kerslake v. Clark, More's Notes 6.

See also Bar's Private International Law, (2d Ed.) 591; Savigny's Private International Law, (2d Ed.) 234.

[25] Morris v. Linton, 61 Neb. 537; Linton v. Moorhead, 209 Pa. 646.

[26] See Pope v. Nickerson, Fed. Cas. No. 11,274, 3 Story, 465; Lloyd v. Guibert, 6 B. & S. 100; The Karnak, L. R. 2 P. C. 505; The Gaetana, 7 P. Div. 137; The August, [1891] P. Div. 328.

[27] Owings v. Hull, 9 Peters (U. S.), 607, 9 L. Ed. 246.

[28] See *post*, § 784.

[29] Porges v. United States Mortgage Co., 203 N. Y. 181; Henry v. Lane, 62 C. C. A. 625, 128 Fed. 243; Reese v. Medlock, 27 Tex. 120, 84

§ 780. General powers limited by specific object or recital.—The meaning of general words used in the instrument must be construed with reference to the specific object to be accomplished and be limited by the recitals made in reference to such object.[30] Thus, in a case already referred to, the recital by the principal in the preamble of the power of attorney, that he designed appointing an agent to act for him during his absence from England, was held to limit the general words used in the appointing part of the instrument to the period of his ab-

Am. Dec. 611; Skaggs v. Murchison, 63 Tex. 348; Wynne v. Parke, 89 Tex. 413; Skirvin v. O'Brien, 43 Tex. Civ. App. 1; Frost v. Erath Cattle Co., 81 Tex. 505, 26 Am. St. R. 831; Gouldy v. Metcalf, 75 Tex. 455, 16 Am. St. R. 912; Baker v. Baird, 79 Mich. 255; Golinsky v. Allison, 114 Cal. 458.

In Porges v. United States Mortgage Co., *supra*, the court said: "The power of attorney, like any other contract, is to be construed according to the natural meaning of the words in view of the purpose of the agency and the needs to its fulfillment. The authority within it under such construction is not to be broadened or extended and the sole right of a court is to ascertain, through the rule stated, and apply the authority. The extent to which a principal shall authorize his agent is completely within his determination, and a party dealing with the agent must ascertain the scope and reach of the powers delegated to him and must abide by the consequences if he transcends them."

[30] Rountree v. Denson, 59 Wis. 522; Berry v. Harnage, 39 Tex. 638; Coquillard v. French, 19 Ind. 274; Hodge v. Combs, 1 Black (U. S.), 192, 17 L. Ed. 157; Frost v. Cattle Co., 81 Tex. 505, 26 Am. St. R. 831; Reynolds v. Rowley, 4 La. Ann. 396; Taylor v. Burns, 203 U. S. 120, 51 L. Ed. 116; Mexican National Coal Co. v. Frank, 154 Fed. 217; First National Bank v. Kirkby, 43 Fla. 376; Perry v. Holl, 2 DeGex, F. & J. 48; Esdaile v. La Nauze, 1 Y. & C. 394; Attwood v. Munnings, 7 B. & C. 278; Geiger v. Bolles, 1 Thomp. & C. (N. Y.) 129.

In White v. Young, 122 Ga. 830, 51 S. E. 28, it was held that a power of attorney authorizing the agent to institute suits for the recovery of certain land did not authorize him to take steps to defend suits in relation to the same land. "This was a formal power of attorney, apparently deliberately executed, attested and recorded. It will therefore be strictly construed in view of the controlling purpose; and the addition of general words will not be construed to extend the authority, so as to add new and distinct powers different from those expressly delegated." In Welch v. McKenzie, 66 Ark. 251, a general power of attorney, given by a widow, "to represent me and my interest in the estate of my late husband," was held not to authorize the agent to relinquish dower in lands her husband had conveyed in his lifetime. In Harrison v. Magoon, 14 Hawaiian, 418, a general power to act "in all matters connected with" a certain partnership business, was held not to authorize the formation of a new partnership including the old and new members. In Jacobs v. Morris, [1901] 1 Ch. 261, a power of attorney in very general terms to act with reference to purchases, and giving wide authority to execute bills, notes, etc., was held to be confined to such bills, etc., as might be made in purchasing, and not to warrant the borrowing of money.

sence.[31] So where an agent was appointed to accomplish the adjustment of his principal's affairs in the state of New York, and the instrument concluded with a general authority "to do any and every act in his name which he could do in person," it was held that this broad general power must be limited to the doing of those acts only which were contemplated by the specific object of the appointment.[32] And a power of attorney granting authority to the agent to ask, demand and receive of a debtor all money due from him to the principal, will be limited to this specific object, although it also confers in general terms power "to transact all business;" the words "all business" must be confined to business necessary for the receipt of the money.[33]

§ 781. Authority by joint principals, usually to be exercised only in behalf of all jointly.—As has already been seen in a preceding section,[34] an authority conferred by two or more principals jointly is usually deemed to be one to be exercised only in the name of all jointly, and with reference to property or other interest in which they are jointly interested. Thus a power of attorney to convey lands, executed by two or more jointly, is usually deemed to be confined in its operation to lands in which they are jointly interested, and does not justify the conveyance of lands belonging to one of them only.[35]

Where husband and wife join in the execution of a power of attorney, the wife apparently joining for the purpose of authorizing the release of her dower interest, the case falls within this rule and a conveyance of the husband's land, in which the wife has a dower interest, is justified.[36]

[31] Danby v. Coutts, L. R. 29 Ch. Div. 500. But this case was distinguished in Fell v. Puponga Coal Co., 24 New Zeal. 758, where the grantor in a power of attorney recited that he was about to leave the colony, and was desirous of appointing an agent to act for him in relation to certain affairs, but did not state that such agent was to act only in his absence.

[32] Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62.

[33] Hay v. Goldsmidt, cited in Hogg v. Snaith, 1 Taunt. 349.

[34] *Ante*, § 194.

[35] See Gilbert v. How, 45 Minn. 121, 22 Am. St. R. 724 (where the power of attorney gave authority to sell all lands "to which we are or may be in any way entitled or interested" and "for us and in our names" to execute and deliver deeds, it was held that no authority was conferred to deal with land owned by either principal separately); Dodge v. Hopkins, 14 Wis. 630 (where husband and wife gave a power to sell "our right" in any land, particularly certain lots "conveyed to us," and the agent sold land belonging to the husband, the contract was held invalid in the absence of any evidence "that there was no joint estate to which the letter of attorney could be applied").

[36] Tuman v. Pillsbury, 60 Minn. 520 (where the power referred to

Such a power of attorney would not however authorize the conveyance of land which the wife owned alone.[37] But where a statute requires the husband to join in a deed of the wife's land, and he joins in a power of attorney, apparently for that reason, authority is conferred to sell her land, in which he has no interest, and to sign his name to the deed.[38]

§ 782. Power of attorney referring to several interests can not be applied to joint interests.—On the other hand, it has been held that a power of attorney, in which a single principal authorizes an agent in terms to deal with his interest, must, unless there is something to indicate a wider scope, be deemed to refer to his separate and individual interest only.[39] Thus it is stated as the general rule that "where in powers, covenants, releases, or other contracts, a several interest is alone expressed and referred to, no general terms will allow the meaning to be extended to a joint interest." [40]

land which "we may hereafter acquire" or become "in any way interested" under act of congress granting homesteads to soldiers); Snell v. Weyerhauser, 71 Minn. 57 (a similar power); Finnegan v. Brown, 90 Minn. 396 (certain land, described as in "our possession," owned by husband as homestead, and also a similar homestead conveyed under joint authority from husband and wife to sell land which should come into "his possession"); Platt v. Finck, 60 N. Y. App. Div. 312 (where the power was to "our attorney" to sell and convey "my real or personal property," giving deeds "in our names," and there was no evidence that the wife had any interest except her dower rights in any property such as was described).

But in Holladay v. Daily, 86 U. S. (19 Wall.) 606, 22 L. Ed. 187, where the wife had no dower, owing to a peculiar statute, it was held that a power, specifically referring to land vested in the husband, authorized a sale of his separate interest notwithstanding that the authority read from husband and wife to "our agent."

[37] Roy v. Harrison Iron Mining Co., 113 Minn. 143, in which case the husband and wife "have appointed * * * attorney for me * * * [to sell land] which I now own" and it appeared that only the wife owned any land. The trial court considered this to be "the ordinary case of a married woman joining with her husband in the execution of an instrument affecting his lands and her dower interest therein" and a deed of her land was held invalid.

[38] Ellison v. Branstrator, 153 Ind. 146, where a deed of the wife's land, made under a joint power, was considered in equity to be valid under the statute, in spite of the neglect of the agent to sign for the husband.

[39] Stainback v. Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648.

[40] Johnston v. Wright, 6 Cal. 373 (release of rent due to tenants in common, executed under power referring to debts "due to me"). In Attwood v. Munnings, 7 Barn. & Cres. 278, 1 M. & R. 66, there was a power of attorney by the principal to accept bills "for him and on his behalf," which should be drawn "by his agents or correspondents." The bills in question had been drawn by

So, where authority is separately conferred upon the same agent by several principals having distinct interests, the agent would not ordinarily be justified in binding them by a joint obligation, and thus make one liable for the performance of the others.[41]

§ 783. Power construed to apply only to principal's private business.—A power of attorney given to an agent to act in the name and on behalf of his principal, though couched in general language, must, in the absence of anything showing a contrary intent, be construed as giving authority to act only in the separate, individual business of the principal and for his benefit. It cannot be construed as permitting the agent to engage in transactions foreign or repugnant to that business, or to bind the principal by acts done not for his benefit and in his behalf, but for the private benefit of the agent himself or of third persons.[42]

his partner and were drawn to take up other bills, the proceeds of which had been applied to the partnership debts. It was held that there was no authority to accept these bills, both because the bills had been drawn by a partner, not by an agent or correspondent, and because they were for the benefit of the partnership. Bayley, J., said, "The power gave an express authority to accept bills for the defendant and on his behalf. No such power was requisite as to partnership transactions, for the other partners might bind the firm by their acceptance. The words, therefore, must be confined to that which is their obvious meaning."

[41] Servant v. McCampbell, 46 Colo. 292 (several stockholders authorizing same agent to sell stock of each). Where each of several tenants in common makes a power of attorney to the same agent to sell his interest, and, if he takes a note for him for part of the purchase price, to endorse and sell it; and the agent takes a note payable to them all jointly, he is not authorized to endorse it by them all jointly. Harris v. Johnston, 54 Minn. 177, 40 Am. St. R. 312. See also, The Guiding Star, 10 C. C. A. 454, 62 Fed. 407, where the masters of several vessels attempted to authorize one agent to bind them by joint bills of lading. *Held*, that he could not create a joint maritime lien without regard to whether one or the other carried the goods.

[42] Platt v. Francis, —— Mo. ——, 152 S. W. 332; Lewis v. Lewis, 203 Pa. 194; Stainback v. Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; North River Bank v. Aymar, 3 Hill (N. Y.), 262; Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612; Wallace v. Branch Bank, 1 Ala. 565; Adams Express Co. v. Trego, 35 Md. 47; Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Camden Safe Dep. Co. v. Abbott, 44 N. J. L. 257; Sewanee Mining Co. v. McCall, 3 Head (Tenn.), 619; Hazeltine v. Miller, 44 Me. 177; Robertson v. Levy, 19 La. Ann. 327; Bank of Hamburg v. Johnson, 3 Rich. (S. C.) L. 42; Attwood v. Munnings, 7 Barn. & Cres. 278.

In Muth v. Goddard, 28 Mont. 237, 98 Am. St. R. 553, one C, expecting to be absent during the winter had given to his son a power of attorney in very comprehensive terms, authorizing among other things the execution of notes and mortgages. Nine years later, while the principal was in his last illness, the affairs of

§ 784. Formal powers strictly construed—Only those powers expressly given or necessarily implied.—Formal instruments conferring authority will be strictly construed [43] and can be held to include only those powers which are expressly given and those which are necessary, essential and proper to carry out those expressly given.[44] It will indeed be presumed that the principal in conferring a power, intended to confer with it the right to do those things without which the object contemplated could not be accomplished, but beyond this the authority will not be extended by construction. The principle is an-

a partnership of which he and one R were members, became involved, a creditor of the firm demanded immediate adjustment, and threatened immediate attachment of C's property. In order to meet this demand, notes for the amount due were executed in the firm name, and endorsed by the son under this power of attorney, and the son as such agent made a deed of trust of his father's land to secure the notes. At substantially the same time the other partner, R, made an assignment of all of his interest in the property of the firm to C, which assignment was accepted by the son as agent for his father, this, however without any assumption of the debt by C. In an action after C's death to restrain an enforcement of the deed of trust, it was held that this exercise of the power by the son did not conflict with the principle stated in this section. The court distinguished the present case from that of Attwood v. Munnings, resting its finding on the practical emergency in which the agent found his principal involved, and said: "Such action [immediate attachment] might have entailed great loss upon the solvent partner, Clarke; and it appears that this state of affairs would inevitably have resulted, had it not been for the prompt action of Clarke's attorney in fact, and, under these circumstances, it seems clear, that he acted for his principal's use and benefit."

[43] Mexican, etc., Iron Co. v. Frank, 154 Fed. 217; Welch v. McKenzie, 66 Ark. 251; White v. Young, 122 Ga. 830; Young v. Harbor Point Club House Ass'n, 99 Ill. App. 290; Penfold v. Warner, 96 Mich. 179, 35 Am. St. Rep. 591; Kuite v. Lage, 152 Mich. 638; Gilbert v. How, 45 Minn. 121, 22 Am. St. Rep. 724; Coulter v. Portland Trust Co., 20 Oreg. 469; Campbell v. Foster Home Ass'n, 163 Pa. 609, 40 Am. St. R. 818, 26 L. R. A. 117; Wilson v. Wilson-Rogers, 181 Pa. 80; Union Trust Co. v. Means, 201 Pa. 374; MacDonald v. O'Neil, 21 Pa. Sup. Ct. 364; Califf v. First Nat. Bank, 37 Pa. Sup. Ct. 412; Frost v. Erath Cattle Co., 81 Tex. 505, 26 Am. St. R. 831; Skirvin v. O'Brien, 43 Tex. Civ. App. 1; Teagarden v. Patten, 48 Tex. Civ. App. 571; Hotchkiss v. Middlekauf, 96 Va. 649, 43 L. R. A. 806; Winfree v. First Nat. Bank, 97 Va. 83; Bowles v. Rice, 107 Va. 51; Dimmick v. Sprinkel, 59 Wash. 329.

[44] Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Franklin v. Ezell, 1 Sneed (Tenn.), 497; Strong v. Stewart, 9 Heisk. (Tenn.) 137; Farrar v. Duncan, 29 La. Ann. 126; McAlpin v. Cassidy, 17 Tex. 449; Mechanics' Bank v. Schaumburg, 38 Mo. 228.

alogous to the one which applies to the powers of corporations, *i. e.* those powers only which are expressly given or which arise from necessary implication. The rule has been thus stated by a learned judge:— "A formal instrument delegating powers is ordinarily subjected to strict interpretation, and the authority is not extended beyond that which is given in terms, or which is necessary to carry into effect that which is expressly given. They are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc. in commercial transactions which are interpreted most strongly against the writer, especially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations." [45]

§ 785. Practical construction by the parties may aid.—Even though authority be conferred by written instrument, its meaning may often be made more clear by showing what the parties have uniformly recognized as acts properly falling within it. Where, though the authority was conferred by writing, an oral authorization would have sufficed, the field for the application of this rule is wider, for conduct may often serve to show an enlarged authority, as has been already seen. But even where writing is required, a long practical construction may serve to aid in the interpretation of the language, though of course not to so change it that it can no longer be deemed to be an authority in writing.

II.

WHERE AUTHORITY IS UNWRITTEN OR IMPLIED.

§ 786. Where authority is unwritten but express.—Where the authority, though not conferred by written instrument, is express and limited, it is, so far as the meaning of the words is concerned, subject to the same general rules of construction that apply to a written power. When not so expressly limited, a more liberal rule of construction applies than in those cases wherein the authority is conferred by a formal instrument in writing. The rules, however, which are based merely upon the fact that the instrument is in writing, would have no application here.

[45] Craighead v. Peterson, *supra;* cited and followed in Porges v. United States Mortgage Co., 203 N. Y. 181. Informal documents, like letters, are more liberally construed. American Bonding Co. v. Ensey, 105 Md. 211, 11 Ann. Cas. 883.

§ 787. Where authority is unwritten but implied.—As has been seen, a large part of the authority exercised in the modern business world is not expressly conferred, but arises from the conduct and relations of the parties. Some of the rules which govern in determining whether an agency has been created or not, have heretofore been referred to. When it has been found that an agency has been so created, it then becomes as necessary to rightly interpret the authority so conferred, as in those cases in which it is evidenced by a written instrument. And in general the same rules apply. But it is obvious from the very nature of the case that greater liberality of construction may often be indulged in. If the principal desires to set exact and definite limits to the authority, he may do so by conferring it only by express and definite action; but where he leaves it to be inferred from his conduct, he cannot complain if the rules of interpretation applied are more flexible than might have governed had the authority been express.

If from his neglect to make the limits certain, it is difficult to determine exactly along what lines they lie, it is but just to innocent persons who may be misled thereby, to give them the benefit of the doubt, and construe the authority most strictly against him.

§ 788. Authority to be construed in the light of established usages. In determining the extent of the authority of the agent, it is often necessary and proper to take into account the usages and customs prevailing in similar cases. Mere usage, of course, does not of itself confer power, nor can usage contravene express terms; but where authority is given, either expressly or by implication, to do an act of a certain sort, it is frequently necessary to determine what are the limits of the act so authorized. In such a case, a determination of what is usually, ordinarily or by the established custom deemed to be a part of such an act, is directly pertinent in deciding what was the scope of the authority conferred in the case at hand.[46] The doctrine is one of

[46] See Keith v. Atkinson, 48 Colo. 480, 139 Am. St. R. 284 (a traveler who goes to an hotel has the right to assume, until notified to the contrary, that the clerk and bell boys have the authority usually exercised by such employees at similar hotels, and may prove such usage in order to enforce liability for loss of baggage having given his check to a bell boy to be delivered to the clerk in order that the latter might cause the baggage to be delivered at the hotel); Lauchheimer v. Jacobs, 126 Ga. 261 (proof of custom was held admissible to show that a traveling salesman, at the close of a season, has implied authority to sell his samples); Gould v. Cates Chair Co., 147 Ala. 629 (authority to take orders, subject to confirmation, could not be enlarged by proof of a custom in Alabama, the principal residing in North Carolina; nor by

wide application. In determining the authority of a partner, for example, it is often necessary to determine the "scope" of the business carried on. By "scope," in that case and in this, is meant the range of such a business as ordinarily carried on at that time and place.

Moreover, not only the general usages prevailing in similar cases may be thus used, but also the established and customary method, if any, of dealing between the particular parties. Thus a recognized course of dealing may determine, as to other like cases between the same parties, how the authority in the given case is to be construed.[47]

It is, of course, true that, notwithstanding the existence of such a general or particular custom or course of dealing, the parties may, in the particular case, have attempted to exclude its operation; and such an exclusion will be effective as between the parties themselves and those having knowledge of the facts; but, as has been often pointed out, secret limitations upon established methods of procedure are not effective against those who deal in ignorance of them.

It will be obvious that the question here is not the same as that considered in the following section. Here the question is, what was the authority conferred; in the next section, how wide a range of means for executing that authority will be permissible.

§ 789. Authority carries with it every power necessary and proper to accomplish object.—As has already been pointed out, every delegation of authority, whether it be general or special, express or implied, unless the contrary be made known, carries with it, as an incident, the power to do all those acts, naturally and ordinarily done in such cases, and which are necessary and proper to be done in the case in hand in order to effectuate the purpose for which the authority in question was created. It embraces all the necessary and appropriate means to accomplish the desired end. This principle is founded on the manifest intention of the party creating such authority and is in furtherance of such intention.[48]

proof of a custom prevailing simply among agents. The custom must in some way have been brought home to the principal); Anglo-Californian Bank v. Cerf, 147 Cal. 393 ("Where an agent is expressly authorized to deliver deeds absolute on their face as security for his own indebtedness, as is admitted here, and no express limitation is placed upon him as to the particular indebtedness to be secured thereby, as the court was at liberty to conclude was the case here, any arrangement as to amount, terms, and character of his indebtedness to be secured which under the circumstances existing would not be unreasonable would appear to be within the authority conferred"). See also Hopkins v. Armour, 8 Ga. App. 442.

[47] See *ante*, § 716.

[48] LeRoy v. Beard, 8 How. (U. S.) 451, 12 L. Ed. 1151; National Bank

§ 790. Implied authority not to be extended beyond its legitimate scope.—But while, as has been seen, authority is often to be implied from the conduct of the parties, yet, as has often been pointed out, it is a necessary and logical limitation upon the construction of such an authority, that the power implied shall not be greater than that fairly and legitimately warranted by the facts. The reason of this rule is so apparent and so just that it needs no argument to support it.

If the authority arises by implication from acts done by the agent with the tacit consent or acquiescence of the principal, it is to be limited in its scope to acts of a like nature; if it arises from the general habits of dealing between the parties it must be confined in its operation to dealings of the same kind; if it arises from the previous employment of the agent in a particular business, it is, in like manner, to be limited to that particular business. In other words, an implied agency is not to be extended by construction beyond the obvious purpose for which it is apparently created.[49]

§ 791. Implied power limited to principal's business.—So, too, where authority is implied, as well as where it is express, it is to be construed as conferring authority to act only in the separate, individual business of the principal and for his benefit unless there be something to give it a wider scope, as stated in a previous section.[50]

v Old Town Bank, 50 C. C. A. 443, 112 Fed. 726; Roach v. Rector, 93 Ark. 521; St. Louis, etc., Ry. v. Jones, 96 Ark. 58; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Kearns v. Nickse, 80 Conn. 23, 10 L. R. A. (N. S.) 1118, 10 Ann. Cas. 420; Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124; McDonald v. Pearre Bros., 5 Ga. App. 130; Halladay v. Underwood, 90 Ill. App. 130; Shackman v. Little, 87 Ind. 181; Hardee v. Hall, 12 Bush (Ky.), 327; Joyce v. Duplessis, 15 La. Ann. 242, 77 Am. Dec. 185; Farrar v. Duncan, 29 La. Ann. 126; Star Line v. Van Vliet, 43 Mich. 364; Despatch Printing Co. v. Bank, 109 Minn. 440; Hackett v. Van Frank, 105 Mo. App. 384; Murphy v. Knights, 155 Mo. App. 649; Huntley v. Mathias, 90 N. C. 101, 47 Am. Rep. 516; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Benninghoff v. Agricultural Ins. Co., 93 N. Y. 495; Ricker National Bank v. Stone, 21 Okl. 833; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. Ct. 396; Macke v. Camps, 7 Philip. 553; Boyd v. Satterwhite, 10 S. C. 45; McAlpin v. Cassidy, 17 Tex. 449; Birge-Forbes Co. v. St. Louis, etc., Ry., 53 Tex. Civ. App. 55.

[49] McAlpin v. Cassidy, 17 Tex. 449; Graves v. Horton, 38 Minn. 66, see *ante*, § 273.

[50] *Ante*, § 783.

III.

WHERE AUTHORITY IS AMBIGUOUS.

§ 792. Duty of principal to make his instructions clear.—It is the duty of the principal, if he desires an authority to be executed in a particular manner, to make his terms so clear and unambiguous that they cannot reasonably be misconstrued. If he does this, it is the agent's duty to the principal to execute the authority strictly and faithfully; and third persons who know of the limitations, or who from the circumstances of the case ought to have known of them, can claim no rights against the principal based upon their violation.[51]

§ 793. When ambiguous, construction adopted in good faith, sufficient.—But if, on the other hand, the authority be couched in such uncertain terms as to be reasonably susceptible of two different meanings, and the agent in good faith and without negligence adopts one of them, the principal cannot be heard to assert, either as against the agent or against third persons who have, in like good faith and without negligence, relied upon the same construction, that he intended the authority to be executed in accordance with the other interpretation.[52] If in such a case, the agent exercises his best judgment and an honest discretion, he fulfills his duty, and though a loss ensues, it cannot be cast upon the agent.[53]

An instrument conferring authority is generally, it is said, to be construed by those having occasion to act in reference to it, "as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed it. He is not bound to take the opinion of a lawyer concerning the meaning of a word not technical and apparently employed in a popular sense." [54]

[51] See *ante*, §§ 751, 752.

[52] Ireland v. Livingston, L. R. 5 H. L. 395; Falsken v. Falls City Bank, 71 Neb. 29; Anderson v. First Nat. Bank, 4 N. D. 182; Oxford Lake Line v. First Nat. Bank, 40 Fla. 349; Berry v. Haldeman, 111 Mich. 667; Hopwood v. Corbin, 63 Iowa, 218.

[53] Bessent v. Harris, 63 N. C. 542; National Bank v. Merchants' Bank, 91 U. S. 92, 104, 23 L. Ed. 208; LeRoy v. Beard, 8 How. (U. S.) 451, 12 L. Ed. 1151; Very v. Levy, 13 How. (U. S.) 345, 14 L. Ed. 173; Marsh v. Whitemore, 21 Wall. (U. S.) 178; Loraine v. Cartwright, Fed. Cas. No. 8,500, 3 Wash. (U. S. C. C.) 151; DeTastett v. Crousillat, Fed. Cas. No. 3,828, 2 Wash. (U. S. C. C.) 132; Mechanics' Bank v. Merchants' Bank, 6 Metc. (Mass.) 13; Foster v. Rockwell, 104 Mass. 167; Long v. Pool, 68 N. C. 479; Shelton v. Merchants' Dispatch Transportation Co., 59 N. Y. 258.

[54] Curtis J., in Very v. Levy, *supra*, citing Withington v. Herring, 5 Bing. 442.

CHAPTER III

OF THE CONSTRUCTION OF AUTHORITIES OF CERTAIN KINDS

§ 794. Purpose of this chapter.
795. In general.

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796. What here included.
797. —— Authority to sell rather than merely to find a purchaser—Mere broker no authority to make a binding contract.
798. —— But authority to make a binding contract may be found to exist.
799. Agent usually a special agent —Authority strictly construed.
800. Mere preliminary correspondence or negotiations not enough to confer authority.
801. Conditional authority.
802, 803. Authority to sell land not ordinarily to be inferred from mere general authority to act.
804, 805. What may be sold.
806. When authority to be exercised.
807, 808. What execution authorized.
809. Authority to make representations as to value, quantity, location, boundaries or title.
810. Authority to make contract of sale justifies written contract, in usual form.
811. Authority to sell and dispose of land implies right to convey.
812. To insert usual covenants of warranty.
813. Authority to sell does not justify a mortgage.
814. Authority to receive payment.
815. Conveyance must be for consideration moving to principal.
816. Authority to give credit.
817. Authority to sell does not authorize exchange or barter.
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820. —— Or permitting waste or sale of timber separate from land.
821. —— Or changing boundaries of land.
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837. —— To renew or extend a lease.
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843. Authority to agree upon terms.
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845. Authority to receive the deed.
846. Authority to assume mortgages.
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895. No implied authority to exchange or barter.
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901. No implied authority to compromise, release principal's rights, or pay his debts.
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906. May not sell to or deal with himself.
907. Authority to receive notice.

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909. —— Authority from conduct.
910. —— Limitations.
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913. Agent with general authority may buy on credit.
914–917. May not buy on credit, when furnished with funds.
918. May buy on credit when not supplied with funds.
919. Agent with general authority to purchase has authority to agree upon price and terms.
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921. Must observe limits as to quality or species.
922. Must observe limits as to price.
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978. Negotiable paper delivered to agent in blank.

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988. —— Hiring help.
989. Other incidental contracts.
990, 991. Authority to waive liens, rights, conditions, notices, etc.
992. Contracts by architects, superintendents, etc.
993. Contracts by station and ticket agents.
994. Contracts for medical aid or nursing.
995. Implied authority to sell product of business.

996. Authority to collect or receive payment.
997. Authority to revive debt barred by limitation.
998–1000. Authority to make negotiable instruments.
1001, 1002. When may borrow money.
1003. May not make accommodation paper.
1004. May not pledge or mortgage the property of his principal.
1005. May not sell or lease principal's land.
1006. May not embark in new and different business.
1007. May not sell the business or property.
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1028. Authority to give necessary securities.
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1033. Authority to take usurious interest.
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1036. No authority to loan to himself.
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XII. OF AGENT AUTHORIZED TO BIND PRINCIPAL AS SURETY.

1038. When authority exists.
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1040. What here included.
1041, 1042. When authority exists.
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1053. What kind of an agent is he.
1054. Authority to appoint subagents.
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1063. Authority after issuance — Waiver of forfeitures.
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1074. Authority to adjust losses.
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1077. Territorial limitations.
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§ 794. Purpose of this chapter.—Having in the preceding chapters considered the question of what constitutes authority, as well as some of the rules which govern its construction and interpretation, it is now proposed to see how these principles are applied.

It is obviously impossible, however, within the limits of such a work as this, to treat at length of all the various matters which may involve this question. What will be attempted is to consider those classes of cases which most frequently arise, and to deal with the most important points which arise in them.

§ 795. In general.—In considering the questions discussed in this chapter, the rules already referred to must be kept in mind. Prominent among these, as has been seen, are, that express and formal grants of power are strictly construed;[1] that every grant of power is to be interpreted, in the absence of anything to show a contrary intent, as conferring authority to act only in the private, individual business of the principal, and for his benefit;[2] that grants of power, though couched in general language, are to be limited to the particular object contemplated by the power;[3] that every power carries with it, as an incident, where no limitations appear, the implied authority to do those things which are necessary and proper to be done in order to accomplish the object sought and which are usually done in the execution of a like authority;[4] and that a well-defined and publicly known usage may confer incidental powers unless the parties have excluded it.[5]

[1] See *ante*, § 784.
[2] See *ante*, § 783.
[3] See *ante*, § 780.
[4] See *ante*, § 789.
[5] See *ante*, § 281.

I.

OF AGENT AUTHORIZED TO SELL LAND.

§ 796. What here included.—It will be borne in mind that the question here to be considered is not in what form, or in what manner, authority to sell land may be conferred, *e. g.*, whether it must be by writing or may be by word or act, but whether an authority properly created and unquestionably existing for some purpose will include this one, whether authority unquestionably relating in some form to land confers authority to sell it, and whether an authority clearly authorizing a sale of land confers authority to do some other act relating to it.

So far as form is concerned, it will be recalled that parol authorization ordinarily suffices for a mere broker; usually, but not universally, written authority is requisite for a binding contract to sell; while authority under seal is usually requisite for the execution of instruments necessarily under seal, as usually in the case of deeds of conveyance of land.

§ 797. ——— Authority to sell rather than merely to find a purchaser—Mere broker no authority to make a binding contract.—It is to be noted also that the case here contemplated is that in which the agent is really authorized to *sell*, and not merely employed to find a purchaser to whom the principal may sell. The distinction is one of consequence, because one employed as a mere real esate broker to "sell" land, even though employed by writing, is usually held to have no power to make a binding contract (much less a deed of conveyance), but is confined to the finding of a person ready, willing and able to buy from the principal on the terms proposed by him.[6] The cases taking

[6] Carstens v. McReavy, 1 Wash. 359 (distinguished in Littlefield v. Dawson, 47 Wash. 644); McReavy v. Eshelman, 4 Wash. 757; Armstrong v. Oakley, 23 Wash. 122 (see also Scully v. Book, 3 Wash. 182); Donnan v. Adams, 30 Tex. Civ. App. 615; Dickinson v. Updike (N. J.), 49 Atl. 712; Stengel v Sergeant, 74 N. J. Eq. 20; Scull v. Brinton, 55 N. J. Eq. 489; Lindley v. Keim, 54 N. J. Eq. 418; Tyrrell v. O'Connor, 56 N. J. Eq. 448; Morris v. Ruddy, 20 N. J. Eq. 236; McCullough v. Hitchcock, 71 Conn. 401; Armstrong v. Lowe, 76 Cal. 616; Grant v. Ede, 85 Cal. 418, 20 Am. St. R. 237; Lambert v. Gerner, 142 Cal. 399; Ballou v. Bergvendsen, 9 N. D. 285; Brandrup v. Britten, 11 N. D. 376; Campbell v. Galloway, 148 Ind. 440; Furst v. Tweed, 93 Iowa, 300; Balkema v. Searle, 116 Iowa, 374; Halsey v. Monteiro, 92 Va. 581; Simmons v. Kramer, 88 Va. 411, 13 S. E. 902; Kramer v. Blair, 88 Va. 456; Chadburn v. Moore, 61 L. J. Ch. 674, 67 L. T. (N. S.) 257, 41 Wkly. Rep. 39; Glentworth v. Luther, 21 Barb. (N. Y.) 145; Gilmour v. Simon, 37 Can. S. C. 422, s. c. again, 15 Manitoba, 205; Boyle v. Grassick, 6 Terr. L. R. 232, 2 West L. R. 284. *Contra:* Compare cases cited in first note to following section.

this view proceed upon the theory that the character of the undertaking of the real estate broker is well known, and presumptively his employment, though by writing, is in his capacity as a negotiator merely, and not as an agent to close a contract in writing.[7]

§ 798. ——— But authority to make a binding contract may be found to exist.—But even if it be conceded that the mere employment of a real estate broker does not confer upon him the power to make a binding contract, it is still true that the language employed or the circumstances of the case may be such as to show that such a power was intended.[8] Of course a mere request to "list" property,[9] a mere request to endeavor to find a purchaser,[10] mere inquiries as to the possibility of a sale, the mere stating of terms upon which the owner

[7] Thus in McCullough v. Hitchcock, 71 Conn. 401; Halsey v. Monteiro, 92 Va. 581, and many other cases, in practically identical language, it is said: "A real estate broker or agent is one who negotiates the sales of real property. His business, generally speaking, is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind his principal by signing a contract of sale. A sale of real estate involves the adjustment of many matters besides fixing the price. The delivery of the possession has to be settled; generally the title has to be examined, and the conveyance with its covenants is to be agreed upon and executed by the owner. All of these things require conferences and time for completion. These are for the determination of the owner, and do not pertain to the duties and are not within the authority of a real estate agent. For these obvious reasons, and others which might be suggested, it is a wise provision of the law which withholds from such agent as we think it does, any implied authority to sign a contract of sale in behalf of his principal."

One of several tenants in common authorized to sell the whole property is not a broker within the meaning of this rule: Vermont Marble Co. v. Mead, — Vt. —, 80 Atl. 852.

[8] See Pringle v. Spaulding, 53 Barb. (N. Y.) 17; Jackson v. Badger, 35 Minn. 52; Stewart v. Wood, 63 Mo. 252; Smith v. Allen, 86 Mo. 178; Glass v. Rowe, 103 Mo. 513; Farrell v. Edwards, 8 S. D. 425; Colvin v. Blanchard, 101 Tex. 231; Donnell v. Currie, — Tex. Civ. App. —, 131 S. W. 88; Peabody v. Hoard, 46 Ill. 242; Haydock v. Stow, 40 N. Y. 363; Rosenbaum v. Belson, [1900] 2 Ch. 267.

[9] In Halsey v. Monteiro, 92 Va. 581, a letter from the owner telling the broker to list it for twelve months on certain terms, or that he would take so much cash, was held not to suggest an authorization to bind the owner by contract.

See also Ballou v. Bergvendsen, 9 N. Dak. 285; and Brandrup v. Britten, 11 N. Dak. 376 (where the language used was "I hereby grant to [the agent] the sale of the following described property," etc.).

[10] In McCullough v. Hitchcock, 71 Conn. 401, this language was held insufficient to authorize a sale. "I have a building lot I would like to sell. * * * I do not know the value of said lot, but could you not look at the lot and give me an idea of its value, and if possible find a purchaser for same."

would be willing to sell,[11] and the like, will not of themselves constitute an authority to sell. It is, however, entirely clear that the correspondence or negotiations between the parties may be such as to create the authority to make a binding contract to sell.[12] It is not necessary that

[11] In Watkins Land Mortgage Co. v. Campbell, 100 Tex. 542, real estate brokers submitted to their principal an offer and said: "Shall we close the deal?" The principal replied that if the brokers could get the cash payment increased "we would be willing to accept the offer. * * * Awaiting your further report we are, etc." Held, not to authorize the making of a binding contract. So in Simmons v. Kramer, 88 Va. 411, the broker wrote to his principal reporting an offer; the principal replied that he would not accept the offer, but stated the price and terms at which he would be willing to sell, concluding thus: "Will give you 2 per cent. commission, awaiting a reply." Held, not to be sufficient to justify the making of a contract.

See also Lambert v. Gerner, 142 Cal. 399; Armstrong v. Oakley, 23 Wash. 122 (where a letter of the owner was held to merely express the terms upon which the owner would be willing to enter into a contract with a purchaser); Kramer v. Blair, 88 Va. 456; Campbell v. Galloway, 148 Ind. 440.

An attorney wrote asking the defendant if he would accept $350. Defendant telegraphed that he would take $450, whereupon the attorney sold the property for $500 and converted it to his own use. In action for specific performance, *Held*, that the correspondence did not amount to an authorization to sell. Prentiss v. Nelson, 69 Minn. 496.

In answer to a letter inquiring at what price the defendant would sell, written by real estate brokers, the defendant replied, "$4200 on time * * * or $4100 cash is the lowest price I will take." Brokers sold on terms given; *Held*, that the sale was unwarranted, the correspondence having amounted only to an offer. Jahn v. Kelly, 58 Ill. App. 570.

In Donnan v. Adams, 30 Tex. Civ. App. 615, it was held that a memorandum, containing description and price, executed and signed by the owner and accompanied by oral instruction to sell, did not constitute an authority in the agent to make a contract binding the principal.

In Sullivan v. Leer, 2 Colo. App. 141, it was held that following correspondence under the circumstances did not constitute authority to sell. March 30, defendant wrote the agent "I will be in Denver last of April—wish you would have a purchaser, think I ought to get $17,000 for the house." April 20th, agent telegraphed: "Lot sold for $16,000 cash." Owner replied April 24th: "Won't sell for less than $17,000—be there May 1st." On May 3rd, the day of the defendant's arrival in Denver, the agent telegraphed: "Sold property, $17,000."

In Jones v. Howard, 234 Ill. 404, defendant wrote to real estate agents, "please assist me to sell my property described below until sale is made and properly closed. I hereby authorize you to sell same." *Held*, that an authority of this sort should be strictly construed, and that the letter in question did not confer authority to make a contract. Followed in Thorne v. Jung, 253 Ill. 584, where the principal, having been advised of a prospective buyer, wrote that he would sell on certain terms, that the papers should be made out and earnest money received by a title and trust company, "to whom I will give the necessary instructions," and that he gave this information, "to save time, should the deal be made."

any particular phraseology be used, or that the authorization be in any formal terms. The question is, does the language used sufficiently indicate that the party is authorized to close a binding contract of sale? This may be merely a question of the construction of the words used, or it may be an inference of fact as to intention to be decided like other similar questions. Naturally enough, as in other similar cases, different courts may draw different inferences from substantially similar facts, and many instances are to be found of apparently irreconcilable conclusions, although the courts purported to apply the same principles. It is not to be denied, however, that there are some cases in which the courts have proceeded upon wholly irreconcilable theories,

[12] In Jackson v. Badger, 35 Minn. 52, a letter reading, "You may sell my 40 acres, $2,000 hand money, and the balance in three years with interest," was held to authorize a binding contract, though not sufficient to authorize a conveyance.

In Stewart v. Wood, 63 Mo. 252, it was held that this language in a letter conferred power to make a binding contract: "Sell my farm for me at ten dollars per acre, or as much more as you can get."

In Smith v. Allen, 86 Mo. 178, the defendant, residing in Chicago, wrote to W, a real estate agent in Kansas City, in response to an inquiry about selling defendant's property there: "I am sick and not able to write; * * * I will leave the sale of the lots pretty much with you; if the party or anyone is willing to pay * * * I think I am willing to have you make out a deed and I will perfect it. * * * If you think I better try the spring market, hold till then." W showed this letter to the plaintiffs, executed a contract of sale and received earnest money. W then wrote defendant that he had sold on the terms submitted, "subject to your approval." In subsequent correspondence, it appeared that W, through misapprehension or equivocation, led his principal to believe he had not made a binding contract. *Held*, that the defendant's letter was a sufficient authorization to the agent to bind his principal, and that the letters thereafter did not explain the meaning of the authority but indicated merely the opinions of the writers, as to the consequences of their act.

In Glass v. Rowe, 103 Mo. 513, a letter in these words was held to confer a power to bind the principal by contract: "Will now sell $350 per foot. A regular commission of two and a half per cent. to you after sale is made and closed. Terms, * * * ."

In Farrell v. Edwards, 8 S. D. 425, sufficient authority was found in two letters, the substantial portions of which are as follows: "If you find a buyer, you can fix up the papers at any of the banks. I want 300 down, and my share of the crop; balance, 900, at 8 per cent." and "if you make the deal, you better write me before making out the papers to send to me to sign." The court also relied upon a ratification.

In Colvin v. Blanchard, 101 Tex. 231, the principal wrote to a firm of real estate dealers in whose hands the property had been placed for sale: "I will sell the lots for $19,000 and pay you a 5 per cent. com. plus $50, or $1,000 com. in all for making the sale. * * * Terms, $3,000 cash, bal. long time." *Held*, that the letter conferred a power to contract. There was evidence of subsequent assent on part of the

and, of course, have reached conflicting results.[13] Thus, in a few cases, express authority to sell, even though all the terms were specified, has been held to be a mere authority to "sell" as a broker, that is, to find a purchaser, but not to close a binding contract with him.[14]

seller, but as matter of ratification it was not noted by the court.

See also Donnell v. Currie, — Tex. Civ. App. —, 131 S. W. 88.

In Hawaiian Agricultural Co. v. Norris, 12 Haw. 229, the principal wrote to the agent, "I wish to sell," he refused to make contracts himself and referred all purchasers to the agent, and never objected when letters of the agent indicated that he was negotiating for a contract. It was held that authority to make a binding contract had been shown. The court reviewed many cases from the United States, on both sides, and concluded that "an authority to sell may very naturally in any particular case be intended to carry with it a power to contract and that such intention may be shown by slight circumstances."

In Winch v. Edmunds, 34 Colo. 359, W, living in Chicago had H in Colorado in general charge of his real estate there. On request, W sent H prices on certain parcels, one of which was sold by contract according to the price quoted. On similar prior occasions W had confirmed such sales. *Held*, that H had authority to make a binding contract of sale.

[13] Thus, for example, an undoubted majority of the courts, generally following the case of Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617, have put such a construction upon the employment of the ordinary real estate broker as to exclude his authority to make a binding contract unless there be something in the case to alter the ordinary presumption. (See also Armstrong v. Lowe, 76 Cal. 616; Grant v. Ede, 85 Cal. 418, 20 Am. St. R. 237; Lambert v. Gerner, 142 Cal. 399.)

McCullough v. Hitchcock, 71 Conn. 401; Buckingham v. Harris, 10 Colo. 455; Ryon v. McGee, 2 Mack. (D. C.) 17; Mannix v. Hildreth, 2 App. D. C. 259; Jones v. Holladay, 2 App. D. C. 279; Balkema v. Searle, 116 Iowa, 374; Campbell v. Galloway, 148 Ind. 440; Milne v. Kleb, 44 N. J. Eq. 378; Lindley v. Keim, 54 N. J. Eq. 418; Dickinson v. Updike (N. J.), 49 Atl. 712; Scull v. Brinton, 55 N. J. Eq. 489; Tyrrell v. O'Connor, 56 N. J. Eq. 448; Ballou v. Bergvendsen, 9 N. Dak. 285; Donnan v. Adams, 30 Tex. Civ. App. 615; Halsey v. Monteiro, 92 Va. 581; Carstens v. McReavy, 1 Wash. 359; Barnes v. German Sav. Soc., 21 Wash. 448; Armstrong v. Oakley, 23 Wash. 122.

[14] In Armstrong v. Lowe, 76 Cal. 616, the defendant employed real estate agents to sell property and gave them this memorandum: "You are hereby authorized to sell my property and to receive deposit on the same, situated * * * for the sum of two hundred dollars per acre, cash. I hereby agree to pay you the sum of five per cent. for your services in case you effect a sale or find a purchaser for the same, or will pay you two and one-half per cent. of above commission should I sell the same myself or through another agent." *Held*, that this writing did not authorize the making of a binding contract.

On the other hand, in Haydock v. Stow, 40 N. Y. 363, a writing in language almost identical was held to confer a power to make a contract. "I hereby authorize and empower Peck, Hellman and Parks, agents for me, to sell the following described property [described and terms]."

Where authority to make a binding contract can be conferred only by writing,[15] parol authority, which would suffice in many states, would not be adequate.[16]

§ 799. Agent usually a special agent — Authority strictly construed.—In all cases of this sort, in which written authority is requisite to justify a contract of sale, the person dealing with the agent, is, in contemplation of law, charged with knowledge of that fact and presumptively deals with the agent's credentials before him.[17] These agents, moreover, are usually special agents,[18] and their authority is to be deemed to be strictly limited to that which is either expressly given or necessarily implied.[19]

§ 800. Mere preliminary correspondence or negotiations not enough to confer authority.—It is obvious also that before the questions here suggested can be determined, the authority intended to be conferred must be completely agreed upon and vested. If, therefore, the dealings between the principal and the agent have not passed be-

See also Jackson v. Badger, 35 Minn. 52.

[15] As to which, see *ante*, § 225.

[16] *Deed executed in blank.*—In Blacknell v. Parish, 6 Jones Eq. (N. C.) 70, 78 Am. Dec. 239, where the principal executed a deed of the lands, leaving the name of the grantee and the amount of the price in blank, and delivered the deed to an agent with parol authority to find a purchaser, put his name and the consideration in the deed, and deliver it, it was held that while this could not be a good *deed*, because he did not have authority under seal to fill the blanks, it was good as a *contract to sell*, for the making of which the agent might be authorized by parol, since the statute did not require that such an authority should be conferred by writing.

But where the statute required that an agent to execute written instruments shall be authorized by writing, such a deed, so executed and delivered, was held not sufficient to justify a binding contract in writing. Ballou v. Carter, — S. Dak. —, 137 N. W. 603, relying upon Lund v. Thackeray, 18 S. Dak. 113, and Dal v. Fischer, 20 S. Dak. 426.

Power of attorney insufficient to support deed may sustain contract to sell.—It has been held in several cases that a power of attorney intended, but insufficient in form, to authorize the execution of a deed of conveyance, may sustain a written contract to sell where its form is adequate for that purpose. Joseph v. Fischer, 122 Ind. 399 (where deed was enforced as contract); Littlefield v. Dawson, 47 Wash. 644; Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92. See also Jones v. Marks, 47 Cal. 242.

[17] Schaeffer v. Mutual Ben. L. Ins. Co., 38 Mont. 459; Miller v. Wehrman, 81 Neb. 388; Coulter v. Portland Trust Co., 20 Or. 469; Rawson v. Curtiss, 19 Ill. 455.

[18] Swift v. Erwin, — Ark. —, 148 S. W. 267, and cases in following note.

[19] Pentold v. Warner, 96 Mich. 179, 35 Am. St. R. 591; Thomas v. Joslin, 30 Minn. 388; Schaeffer v. Mutual Ben. L. Ins. Co., *supra;* Moore v. Skyles, 33 Mont. 135, 114 Am. St. Rep. 801; 3 L. R. A. (N. S.) 136; Brown v. Grady, 16 Wyo. 151.

yond the stage of preliminary correspondence, if the terms upon which the authority is to be executed or the property sold are not yet fully determined, if further communications are to be had with the principal, or further assent given, before the authority is to be exercised,[20] and the like, there can ordinarily be no present authority to sell in such wise as to bind the principal.[21]

[20] As for example, where the principal's approval is to be given before the sale is made. Burlington, etc., R. Co. v. Sherwood, 62 Iowa, 309; Alcorn v. Buschke, 133 Cal. 655; Johnson v. American Freehold L. Mtg. Co., 111 Ga. 490.

In Furst v. Tweed, 93 Iowa, 300, the principal wrote saying that he asked a certain sum; that he would sell "on almost any terms to suit purchaser," and "if you succeed in selling, I am willing to allow you" a certain commission. *Held*, that the language used respecting the terms indicated that this matter was to be referred to him, and that the agent had no authority to close a binding contract.

In Balkema v. Searle, 116 Iowa, 374, there was correspondence stating terms, part cash, "balance given on time," but the time was not stated. The court said: "In the correspondence, some matters were left indefinite, to be settled by defendant, doubtless, when the purchaser appeared." *Held*, that agent had no authority to make a binding contract.

In Grant v. Ede, 85 Cal. 418, 20 Am. St. R. 237, where the owners wrote, "we will sell" at a certain price at any time before a given date, the court said that the agent was not thereby authorized to sell, and in any event material terms were not agreed upon, *e. g.*, the form of deed, the time of payment, and the time of delivery of possession.

[21] See, for example, Stewart v. Pickering, 73 Iowa, 652. In this case the defendants, land brokers in Iowa, wrote to the plaintiff's attorney in fact: "Do you have charge of the lands in this county belonging to the estate of S? If so, are they for sale? * * * If the title is all right, we can possibly find a customer for the list this year. Let us hear from you as to prices, etc." The reply thereto was as follows: "I herewith inclose you a price-list of our lands in your county. My Mother is the widow of S, and is the sole devisee by will which is recorded in your county. I am executor of my father, and attorney in fact of my mother. The titles are all strictly clear and good." Attached to this letter was the following: "Western land for sale, Winnebago county, Iowa." [Here followed a list of the land with the prices.] "Apply to D. S., Falls City, Pa., etc. Terms ¼ down, balance in 4 equal annual payments, with 5 per cent. interest," etc. *Held*, that this correspondence gave no authority to the defendants to bind the owner by a sale at the prices named, but was at most an authority to sell only subject to her approval or that of her attorney in fact.

See also Stillman v. Fitzgerald, 37 Minn. 186, where a firm of real estate brokers wrote to the defendant saying: "We have a customer [meaning the plaintiff] who would buy your lot if offered at a fair price," and asking him to state best price and the terms, for which he would sell, and pay their commission, which was stated. The defendant answered by letter stating price, and, in part only, the terms, for which he would sell, and that he would pay their commission. It was held that the brokers were not thereby constituted the defendant's

§ 801. Conditional authority.—The authority may, of course, be a qualified or conditional one. As long as the conditions or limitations are lawful, there is no reason why the principal may not limit or qualify the authority to any extent which suits his pleasure. Such limitations or conditions, unless waived, will be operative against the agent, and also against third persons who have, or are charged with, notice of them. The authority may thus be limited as to time, price, subject-matter, terms, and the like, and many illustrations of such limitations will be found in the following sections. It may also require the principal's approval before a particular execution shall be deemed authorized.[22]

§ 802. Authority to sell land not ordinarily to be inferred from mere general authority to act.—Authority to sell real estate must ordinarily be conferred in clear and direct language; for, although there are cases in which it may arise by implication,[23] it is not lightly to be inferred from express power to do other acts, or brought within the operation of mere general terms. A power of attorney, therefore, "to act in all my business, in all concerns, as if I were present, and to stand good in law, in all my land and other business," gives no authority to sell land;[24] nor does a power "to ask, demand, recover or receive the maker's lawful share of a decedent's estate, giving and granting to his said attorney his sole and full power and authority to take, pursue

agents, with a power to bind him by a contract of sale.

Where an agent, after having negotiated a sale of the property and given a receipt, communicated the general terms of the sale to the owner and the latter replied requesting full information about the price, about the terms of the sale, and about the date when the deed should be made out, as well as requesting that a blank deed or two be sent him with the purchaser's name, it was held that such letter was no evidence of any authority in the agent to sell the property. Smith v. Browne, 132 N. C. 365.

An owner wrote, in reply to a broker's request for a price, that he would take $1,000, and, if the broker could sell or rent it, the owner would do what was right by him. The agent made a sale. *Held*, that there had been no authorization. Riley v. Grant, 16 S. D. 553.

[22] See Alcorn v. Buschke, 133 Cal. 655.

[23] Comyns, Dig. VII, Polar, A 2, declares, "So, if a man expresses the power only by implication, it is well; as, provided that he shall not have power to alien, etc., otherwise than to make a jointure, and leases for 21 years; it is a good power to make a jointure and leases. I Leo. 148." See also Marr v. Given, 23 Me. 55, 39 Am. Dec. 600.

Compare Bosseau v. O'Brien, 4 Biss. (U. S.) 395.

The mere fact that the owner of land gives an option to buy, does not make the one to whom the option is given the owner's agent if the latter sells his option. Reeves v. McCracken, 103 Tex. 416.

[24] Ashley v. Bird, 1 Mo. 640, 14 Am. Dec. 313.

and follow such legal course for the recovery, receiving and obtaining the same as he himself might or could do were he personally present; and upon the receipt thereof, acquittances and other sufficient discharges for him and in his name to sign, seal and deliver;" [25] nor does a power "to make contracts, to settle outstanding debts and generally to do all things that concern my interest in any way real or personal, whatsoever, giving my said attorney full power to use my name to release others or bind myself, as he may deem proper and expedient;" [26] nor does a power "to attend to the business of the principal generally," or "to act for him with reference to all his business;" [27] nor does authority to locate and survey land; [28] nor does a power to sell "claims" and "effects." [29]

[25] Hay v. Mayer, 8 Watts (Penn.), 203, 34 Am. Dec. 453. A power of attorney "to ask, demand and receive of and from any person or persons all such real and personal estate as I may be entitled to by virtue of my being a son and heir at law of" a named person, does not authorize a sale and conveyance of the principal's real estate. Hotchkiss v. Middlekauf, 96 Va. 649, 43 L. R. A. 806. In Gee v. Bolton, 17 Wis. 604, a power "to bargain, purchase, sell, grant, release and convey, to accept and receive all sums of money, to collect and pay, to sue and be sued, to give notes and receipts and to accept the same, and in his name to make, seal, deliver and acknowledge," etc., nothing being said about land, was held not to give authority to sell and convey land. See also Bean v. Bennett, 35 Tex. Civ. App. 398.

[26] Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235. Same power also construed to the same effect in Hunter v. Sacramento Valley Beet Sugar Co., 11 Fed. 15, 7 Sawy. 498.

[27] Coquillard v. French, 19 Ind. 274. Nor does a power of attorney appointing one "general and special agent to do and transact all manner of business" necessarily confer power upon the agent to sell bonds belonging to his principal. Hodge v. Combs, 1 Black (U. S.), 192, 17 L. Ed. 157. Such a power, said the court, "may be construed to confer almost any or no power."

[28] Moore v. Lockett, 2 Bibb (Ky.), 67, 4 Am. Dec. 683.

In Mitchell v. McLaren (Tex. Civ. App.), 51 S. W. 269, it was held that a power of attorney "to locate any such certificate in my name or sell and assign the same," did not authorize the agent to locate land upon the certificate and then to sell the land.

[29] DeCordova v. Knowles, 37 Tex. 19. See also Berry v. Harnage, 39 Tex. 638, where a power of attorney in the following terms was held sufficient to authorize a sale of real estate: "to ask, demand, sue for, recover and receive all such sum and sums of money, debts, goods, wares, dues, accounts and other demands whatever, which are or may be due, owing, payable, and belonging to me, or detained from me by any manner of ways and means whatever, in whose hands soever the same may be found; giving and granting unto my said attorney, by these presents, my whole and full power, strength and authority, in and about the premises, to have, use, and take all lawful ways and means, in my name and for the purposes aforesaid, upon the receipt of any such debts, dues or issues of money, acquittances or other sufficient discharge, for me,

§ 803. ——— But where A wrote to C, "I wish you to manage (my property) as you would with your own. If a good opportunity offers to sell everything I have, I would be glad to sell. It may be parties will come into San Antonio, who will be glad to purchase my gas stock and real estate," it was held that C was thereby authorized to contract for the sale of the real estate, but not to convey it.[80] So authority to "use" land to enable the donee of the power to extricate himself from his financial embarrassments, was held to authorize a sale or a mortgage of the land.[81] A power "to do any lawful act for and in my name as if I were present," was held to authorize a sale and conveyance of land.[82]

§ 804. What may be sold.—In order that the agent may lawfully sell any particular parcel of land it is essential that that parcel be included within the language of the power either expressly or by clear implication. It is sometimes said that the land must be described in the power with the same certainty which would be required in the conveyance itself; and, though this may perhaps be too strict a rule, it certainly is requisite that the instruments conferring the authority shall show with reasonable certainty not only what lands are to be the subject-matter of the power but also what interests or estates therein are to be sold. A number of illustrations, more or less consistent, of the actual holdings of the courts are appended.

A power of attorney authorizing the agent "to bargain, sell, grant, release and convey, and upon such sales, convenient and proper deeds with such covenants as to my said attorney shall seem expedient, in due form of law, as deed or deeds, to make, seal, deliver and acknowledge," although it is silent as to what the agent is to sell and convey, clearly contemplates a sale of lands, and is held to be sufficiently broad to authorize the agent to sell and convey whatever estate the principal then had.[83]

and in my name, to make, seal, execute deeds of conveyance and deliver, and generally all and every act or acts, thing or things, device or devices, in the law whatsoever needful and necessary to be done in and about the premises, for me and in my name to do and execute and perform."

[80] Lyon v. Pollock, 99 U. S. 668, 25 L. Ed. 265.

[81] Baker v. Byerly, 40 Minn. 489.

[82] Veatch v. Gilmer (Tex. Civ. App.), 111 S. W. 746. The court said, "This is a universal power of attorney, but its operation will be by law restrained to the particular business in which it is presumed the intention was to delegate the authority."

[83] Marr v. Given, 23 Me. 55, 39 Am. Dec. 600. When a power of attorney executed by a husband and wife authorizes the agent to convey any

So a power of attorney in due form, authorizing the agent "to sell, bargain and convey three certain lots of land in the village of Pentwater belonging to me," but containing no other or further description, is sufficient where the principal had three such lots and only three in that village;[34] but an authority "to convey a piece of land in Colebrook belonging to the Bank," there being more than one such piece is too indefinite.[35]

An authority to sell all the lands which the principal may own, or all which he may own and lying within a certain territory, is good without a more specific description.[36] And an authority to sell any or all of the principal's "property," and to execute all necessary instruments authorizes the sale of his real estate.[37] Where the lands are sufficiently described, the fact that the principal apparently intended to add a more specific description but failed to do so, will not defeat the power.[38]

§ 805. ——— A power of attorney authorizing an agent to sell "the one-half" of a lot of land, without specifying which half, or

and all lands which may come into "his" possession by reason of certain homestead entries, "his" refers to the husband only, and land belonging to them jointly or to the wife alone cannot be included. Finnegan v. Brown, 90 Minn. 396.

[34] Vaughn v. Sheridan, 50 Mich. 155. See also Crimp v. Yokely, 20 Tex. Civ. App. 231.

[35] Lumbard v. Aldrich, 8 N. H. 31, 28 Am. Dec. 381.

[36] Munger v. Baldridge, 41 Kan. 236, 13 Am. St. Rep. 273; Roper v. McFadden, 48 Cal. 346; Kane v. Sholars, 41 Tex. Civ. App. 154.

A power to convey "all of our land in the State of North Carolina," held a sufficient description to admit evidence *aliunde* to identify. Janney v. Robbins, 141 N. C. 400. "Authority to sell any or all of plaintiff's land in the state, includes authority to sell any specific tract therein." Marshall v. Shibley, 11 Kan. 114.

Under a power to sell any of the principal's land "excepting the farm occupied by me * * * as a homestead in Green River Valley * * * to which land and farm this power of attorney does not extend," justifies the sale of a lot in that valley never occupied as a homestead. Cummings v. Dolan, 52 Wash. 496, 132 Am. St. R. 986.

[37] Gardiner v. Griffith (Tex. Civ. App.), 56 S. W. 558.

A power of attorney to sell and convey "any or all tracts, lots, pieces or parcels of land or real estate which have descended to, or have been acquired by, the said [plaintiff], in any of the States * * * of the United States of America, * * * excluding therefrom all lots in the city of Omaha, State of Nebraska," justifies a sale of land in Pennsylvania which the principal owns. Linton v. Moorhead, 209 Pa. 646.

A power to sell and convey all the land of the principal within a certain parish is a sufficient description. Rownd v. Davidson, 113 La. 1047.

[38] Bradley v. Whitesides, 55 Minn. 455.

whether in common or in severalty, empowers him to sell one-half in severalty and to exercise his own discretion as to which half.[39]

An agent authorized to sell and convey a piece of land except such parts as his principal had previously conveyed, may convey a piece previously sold by his principal but not conveyed;[40] and under a general authority to sell any of his principal's real estate he may sell that which the principal subsequently acquires;[41] especially where the power expressly refers to lands which the principal "does or may" own.[42] But where the power clearly contemplated the inauguration of a business and authorized the agent to "buy and sell" lands, it was held that the power to sell was to be limited to lands bought under it.[43] And, clearly, where the power is limited to land which the principal owns or is interested in at the time of the execution of the power, a conveyance of subsequently acquired land is not authorized.[44]

§ 806. When authority to be exercised.—Where a definite time is fixed by the clear language of the power, any sale after that time will be inoperative unless the principal waives the limitation or ratifies the sale.[45] An authority to sell lands at a given sum, if they can be sold "immediately," will not authorize a sale at that price a month afterwards, without any further authority;[46] nor can an agent empowered to sell real estate at a given price, without further instructions, sell it a considerable time later at the same price when the land

[39] Alemany v. Daly, 36 Cal. 90.

Although, where two parcels are described in the power, the sale of both, if any, may be required, the principal's parol consent to the sale of one before the other will justify such a sale. Campbell v. Beard, 57 W. Va. 501.

[40] Mitchell v. Maupin, 3 T. B. Mon. (Ky.) 185.

[41] Fay v. Winchester, 4 Metc. (Mass.) 513. See also Benschoter v. Lalk, 24 Neb. 251; Benschoter v. Atkins, 25 Neb. 645.

[42] Berkey v. Judd, 22 Minn. 287; Bigelow v. Livingston, 28 Minn. 57; Tuman v. Pillsbury, 60 Minn. 520 (where the authority was to enter upon, sell, and convey all land "which we now own, or which we may hereafter acquire or become seized of, or in which we may now or hereafter be in any way interested, under the act of congress" granting additional homesteads to soldiers and sailors); Snell v. Weyerhauser, 71 Minn. 57 (where a power to convey all land in which "we may now or hereafter be in any way interested" was held to authorize conveyance of land to which the husband subsequently acquired the title subject to the wife's right of dower).

[43] Greve v. Coffin, 14 Minn. 345, 100 Am. Dec. 229. See also Allis v. Goldsmith, 22 Minn. 123.

[44] Turner v. McDonald, 76 Cal. 177, 9 Am. St. R. 189 (even though the land was subsequently acquired by foreclosure of a mortgage which the principal then owned); Penfold v. Warner, 96 Mich. 179, 35 Am. St. R. 591.

[45] Henry v. Lane, 128 Fed. 243, 62 C. C. A. 625.

[46] Matthews v. Sowle, 12 Neb. 398.

has greatly increased in value.[47] An authority to an agent to sell real estate within "a short time" will authorize a sale made within two weeks, even though in the meantime the property has enhanced in value.[48]

§ 807. What execution authorized.—The principal has the right, in cases of this sort, to prescribe the terms upon which he will sell, and persons having or charged with notice of these terms can acquire no rights against the principal upon a contract which ignores or substantially deviates from them. Thus, an agent authorized to make the purchase price payable "in three years," has no implied authority to make it payable "on or before three years."[49]

So authority to sell real estate in "lots as surveyed by" a person named, does not empower the agent to sell the whole tract for a gross sum or at so much per acre;[50] a letter to an agent authorizing him to sell "for $5,000, one-half cash, is not satisfied by an agreement to sell for $5,000, $200 cash, $2,300 in three weeks and the balance on time;"[51] nor does authority to sell on time with interest on deferred payments justify a sale for cash;[52] an authority to sell lands if they could be sold

[47] (Nine months later). Waswey-ler v. Martin, 78 Wis. 59 (three years later), Proudfoot v. Wightman, 78 Ill. 553. Same, where six years had elapsed and the land had changed greatly in value and state of improvement: Hall v. Gambrill, 88 Fed. 709 (aff'd 92 Fed. 32). But compare Hartford v. McGillicuddy, 103 Me. 224, 16 L. R. A. (N. S.) 431, 12 Ann. Cas. 1083.

[48] Smith v. Fairchild, 7 Colo. 510.

[49] Jackson v. Badger, 35 Minn. 52; to the same effect, see, Dana v. Turlay, 38 Minn. 106; Jones v. Holladay, 2 App. D. C. 279; Coleman v. Garrigues, 18 Barb. (N. Y.) 60; Henry v. Lane, 128 Fed. 243, 62 C. C. A. 625, and Monson v. Kill, 144 Ill. 248.

[50] Rice v. Tavernier, 8 Minn. 248, 83 Am. Dec. 878.

[51] De Sollar v. Hanscome, 158 U. S. 216, 39 L. Ed. 956; to the same effect, see, Speer v. Craig, 16 Colo. 478; Field v. Small, 17 Colo. 386; Rundle v. Cutting, 18 Colo. 337; Monson v. Kill, 144 Ill. 248; Staten v. Hammer, 121 Iowa, 499.

In Hartenbower v. Uden, 242 Ill. 434, 28 L. R. A. (N. S.) 738, the court says: "If the written authority to the agent to sell fixes the amount of the cash payment, and the amount and date of the deferred payments, he has no authority to make a contract for a different cash payment, or for deferred payments of different dates or amounts." See also Oliver v. Sattler, 233 Ill. 536; Hoyt v. Shipherd, 70 Ill. 309.

In Breese v. Lindsay, 8 Vict. L. R. Eq. 232, it was held that an agent to sell land for cash could not sell on a month's credit. And in Gilmour v. Simon, 15 Manitoba, L. R. 205, it was held that an agent to sell land on terms requiring "$1,000 cash" cannot sell on terms that this sum shall be paid "on acceptance of title." But in Maffey v. Hobart, 14 Vict. L. R. 880, where the authority was to sell land "one fourth cash," a sale permitting the buyer to pay the one fourth in two installments a few days apart was held to be substantially authorized.

[52] Everman v. Herndon, 71 Miss. 823.

for a certain price does not justify a sale partly for cash and partly on time and binding the seller to furnish an abstract of title and pay taxes and interest on an existing mortgage up to a future date;[53] an authority to sell at auction does not justify a private sale;[54] authority to sell to one person does not justify a sale to an entirely different person;[55] an authority to sell for one price does not justify a sale for a less price;[56] and an authority to sell, the vendee to pay certain mortgages, does not justify a sale, the vendee to "assume" the mortgages, unless, perhaps, where they are not yet due.[57]

§ 808. ——— But where an agent is authorized to sell partly for cash and partly on time, the proportions not being fixed, a sale with more than one-third cash, one-half of the balance in three and the remainder in five years, with six per cent. interest, secured by a mortgage, is held to be within the terms of the authority;[58] where the authority is to sell, the payments to be made in three equal installments, a clause providing that if the installments are not paid at the time specified, the contract shall be forfeited at the option of the seller is within the authority;[59] where the agent is authorized to make "one-half payable on or before one year," a contract to sell for "one-half payable in one year," is within the terms of the authorization;[60] and where the authority is to sell for a certain sum, "about one-half cash," a sale for that sum in cash is held to be within the terms of the authority.[61]

[53] Staten v. Hammer, 121 Iowa, 499. To the same effect, see, Strong v. Ross, 33 Ind. App. 586. See also Brown v. Grady, 16 Wyo. 151; Morton v. Morris, 27 Tex. Civ. App. 262.

[54] Davis v. Gordon, 87 Va. 559.

[55] Breen v. Rives, 16 App. Div. (N. Y.) 632, to the same effect, see Graves v. Horton, 38 Minn. 66.

[56] Field v. Small, 17 Colo. 386, to the same effect, see, Philadelphia Mortgage and Trust Co. v. Hardesty, 68 Kan. 683; Holbrook v. McCarthy, 61 Cal. 216; Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343; Wasweyler v. Martin, 78 Wis. 59. But otherwise, where the agent is given discretion, as where he is told that as soon as he was satisfied that he was getting "the top notch in price" he should "close the deal." Vermont Marble Co. v. Mead, 85 Vt. 20.

[57] Schultz v. Griffin, 121 N. Y. 294, 18 Am. St. Rep. 825.

Authority to sell subject to a certain lease, will not justify a sale with warranty, as that the title is free from all incumbrances. Thomas v. Joslin, 30 Minn. 388.

Authority to sell with part of the price to remain on mortgage, will not justify giving the buyer the option to pay off the mortgage before the time fixed. Jordan v. Walker, 11 Victorian L. R. 346.

See also Donaldson v. Noble, 14 Vict. L. R. 1021.

[58] Smith v. Keeler, 151 Ill. 518.

[59] McLaughlin v. Wheeler, 1 S. D. 497.

[60] Deakin v. Underwood, 37 Minn. 98, 5 Am. St. Rep. 827.

[61] Witherell v. Murphy, 147 Mass. 417.

Under a power to convey when the sale has been made by certain other persons, a conveyance can only effectively be made when those persons have made the sale.[62]

§ 809. Authority to make representations as to value, quantity, location, boundaries or title.—An agent authorized merely to sell land has thereby, ordinarily, no implied power to bind his principal by representations concerning the value of the land;[63] the same thing is ordinarily true concerning representations as to the quality, or, perhaps, the quantity, of the land, though such representations, while not furnishing ground for action against the principal, might be sufficient to justify a rescission of the contract.[64] Representations as to location may be within the scope of such an agent's authority as being either necessary or usual,[65] and the same thing may be true respecting boundaries. In a case of the latter sort it was said: "In the sale or exchange of a tract of land, it is usual and necessary that the seller point out to the prospective buyer the boundaries of the tract—that he exhibit the thing he offers for sale to the view and inspection of the prospective buyer." [66]

Representations respecting title (other than the usual covenants of warranty, hereafter referred to), or waivers of the principal's claim of title are not usually within the power of an agent merely authorized to sell.[67]

[62] Deputron v. Young, 134 U. S. 241, 33 L. Ed. 923.

[63] See, Mayo v. Wahlgreen, 9 Colo. App. 506; Sanford v. Handy, 23 Wend. (N. Y.) 260; Lake v. Tyree, 90 Va. 719 (that lots were "good building lots and valuable"). Compare Mullens v. Miller, 22 Ch. Div. 194.

[64] Nat. Iron Armor Co. v. Bruner, 19 N. J. Eq. 331 (quantity and quality); Bennett v. Judson, 21 N. Y. 238 (location and quality); McKinnon v. Vollmar, 75 Wis. 82, 17 Am. St. R. 178, 6 L. R. A. 121 (amount of timber on it). In Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. R. 878, the court holds that an agent to sell an estate has implied authority to represent its acreage. An agent authorized to sell has no authority to make representations as to the nature or quality of a foundation wall. Samson v. Beale, 27 Wash. 557. No rescission if there was no agency. Reeves v. McCracken, 103 Tex. 416. Here A, contracted to sell to X; X by misrepresentations induced B to agree to buy from X. At X's request, to save one conveyance, A conveyed directly to B. *Held*, A not responsible for fraud of X inducing the sale to B.

[65] See, Sanford v. Handy, *supra;* McKinnon v. Vollmar, *supra;* Porter v. Beattie, 88 Wis. 22.

[66] Green v. Worman, 83 Mo. App. 568.

Where principal refers a prospective buyer to the agent to ascertain the boundaries, he is bound by the agent's representations. Beatty v. Ireland, 152 N. Y. App. Div. 588.

[67] Tondro v. Cushman, 5 Wis. 279; Iowa R. R. Land Co. v. Fehring, 126 Iowa, 1.

So an agent authorized to sell has no authority to promise that the

§ 810. Authority to make contract of sale justifies written contract, in usual form.—An authority to make a binding contract for the sale of land will, where there is nothing to indicate a contrary intention, carry with it by implication the authority to make a contract, in writing, where that is requisite or proper;[68] to make it in the usual form, and to include within it all usual and reasonable terms and provisions to accomplish the desired end. Thus the common provisions in well drawn contracts of this nature respecting remedies, time and place of performance, the effect of failure to perform, and the like, would doubtless be deemed authorized under this rule.[69]

§ 811. Authority to sell and dispose of land implies right to convey.—A mere authority to negotiate a sale of land, or even authority to make a binding contract for its sale, of itself, involves no authority to actually convey it.[70] But, on the other hand, unless there be something in the instrument, or in the circumstances surrounding its execution, by which its scope is limited, as to the mere finding of a purchaser or the negotiation of a contract of sale, a general power to sell and dispose of real estate, if executed with the necessary formalities, carries with it the power to execute all the instruments necessary and proper to complete the sale and carry it into effect in the ordinary way.[71] Said Chief Justice Shaw, "where the term 'sale' is used in its

buyer shall have a right of way over adjoining land, owned by his principal, or that such land will not be fenced. Noftsger v. Barkdoll, 148 Ind. 531.

But where the vendor referred the vendee to his local agent as one acquainted with the land, and equipped to explain its qualities, and the agent in so doing misrepresented, it was held a ground for rescission. A sale of coal lands. Mather v. Barnes, 146 Fed. 1000.

[68] Johnson v. Dodge, 17 Ill. 433; Blacknall v. Parish, 6 Jones Eq. (N. C.) 70, 78 Am. Dec. 239; Keim v. Lindley (N. J.), 30 Atl. 1063, s. c. 54 N. J. Eq. 418.

[69] See Kilpatrick v. Wiley, 197 Mo. 123; Gund Brew. Co. v. Tourtelotte, 108 Minn. 71, 29 L. R. A. (N. S.) 210. But in Funk v. Church, 132 Iowa, 1, an agent authorized to sell, made an agreement to reimburse the purchaser if he lost a half of the land, and it was held that authority to make such a contract was not to be implied; and in Gund Brew. Co. v. Tourtelotte, *supra*, it was held that an agent to sell had no implied authority to agree that the buyer might have the rents from the property during the pendency of the negotiations.

[70] See Delano v. Jacoby, 96 Cal. 275, 31 Am. St. R. 201; Dayton v. Nell, 43 Minn. 246.

[71] Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Hemstreet v. Burdick, 90 Ill. 444; People v. Boring, 8 Cal. 406, 68 Am. Dec. 331; Fogarty v. Sawyer, 17 Cal. 589; Marr v. Given, 23 Me. 55, 39 Am. Dec. 600; Alexander v. Walter, 8 Gill (Md.), 239, 50 Am. Dec. 688; Farnham v. Thompson, 34 Minn. 330, 57 Am. Rep. 59. Of these cases, 8 Cal. 406, and 8 Gill, 239 were official sales; 17 Cal. 589, was a sale under a power conferred by mort-

ordinary sense, and the general tenor and effect of the instrument is to confer on the attorney a power to dispose of real estate, the authority to execute the proper instruments required by law to carry such sale into effect is necessarily incident." [72]

It is, of course, true in many cases, that an oral or written authority may be sufficient to justify a written contract to sell, although it would not be sufficient in form, as for example because of the lack of a seal, to authorize the execution of a deed.

§ 812. To insert usual covenants of warranty.—Although the decisions are not entirely harmonious, the better rule seems to be that a general power to sell and convey land, without restrictions, as distinguished from a mere authority to release or quitclaim the principal's interest therein, carries with it authority to insert in the conveyance the ordinary covenants of general warranty, where such sales are usually made with such covenants,[73] but not to make any unusual or special warranty, as of the quantity or quality of the land sold.[74] *A fortiori* may the agent warrant where he is expressly authorized to sell on such terms as he shall deem most eligible.[75]

The fact that the agent inserts an unauthorized warranty will not ordinarily prevent the deed from having effect as a conveyance.[76]

§ 813. Authority to sell does not justify a mortgage.—A power to sell, however, conveys no implied authority to mortgage.[77] Said Judge

gage; the others were sales under formal powers of attorney, all apparently, under seal.

[72] In Valentine v. Piper, *supra*.

A person entrusted with a deed for the purpose of getting the grantor's signatures and then delivering it, is clothed with at least apparent authority "to close the deal" on their part. Bretz v. Connor, 140 Wis. 269.

Secret instructions as to the conditions upon which a deed is to be delivered do not bind purchaser who has no notice of them. Thornton v. Pinckard, 157 Ala. 206.

Authority given to A to convey land when sold by B, does not justify a conveyance of any land not so sold. Deputron v. Young, 134 U. S. 241, 33 L. Ed. 923.

[73] Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Peters v. Farnsworth, 15 Vt. 155, 40 Am. Dec. 671; Le Roy v. Beard, 8 How. (U. S.) 451, 12 L. Ed. 1151; Backman v. Charlestown, 42 N. H. 125; Farnham v. Thompson, 34 Minn. 330, 57 Am. Rep. 59; Dimmick v. Sprinkel, 59 Wash. 329; McLaughlin v. Wheeler, 1 S. D. 497; Schultz v. Griffin, 121 N. Y. 294, 18 Am. St. Rep. 825. Same rule applies to an authority to mortgage. Richmond v. Voorhees, 10 Wash. 316. See also Bronson v. Coffin, 118 Mass. 156; Cf. Yazel v. Palmer, 88 Ill. 597. *Contra:* Stengel v. Sergeant, 74 N. J. Eq. 20.

[74] National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331.

[75] Le Roy v. Beard, *supra*.

[76] Kane v. Sholars, 41 Tex. Civ. App. 154; Robinson v. Lowe, 50 W. Va. 75.

[77] Hawxhurst v. Rathgeb, 119 Cal. 531, 63 Am. St. R. 142; Jeffrey v. Hursh, 49 Mich. 31; Wood v. Good-

Cooley, "The principal determines for himself what authority he will confer upon his agent, and there can be no implication from his authorizing a sale of his lands that he intends that his agent may at discretion charge him with the responsibilities and duties of a mortgagor." [78]

§ 814. Authority to receive payment.—The receipt of so much of the purchase money as is to be paid down, is within the general scope of an authority to sell and convey,[79] or to make a binding contract to sell upon terms including a payment at the time of the execution of the contract, but is held not to be within the power of an agent authorized merely by parol to contract for the sale.[80] Mere authority to receive the immediate payment will not, however, warrant the receipt of subsequent payments.[81] But an agent authorized to contract for the

ridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; Ferry v. Laible, 31 N. J. Eq. 566; Kinney v. Mathews, 69 Mo. 520; Patapsco, etc., Co. v. Morrison, Fed. Cas. No. 10,792, 2 Woods (U. S. C. C.), 395; Devaynes v. Robinson, 24 Beav. 86; Morris v. Watson, 15 Minn. 212; Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 84 Am. St. R. 927; Campbell v. Foster Home Association, 163 Pa. 609, 43 Am. St. R. 818, 26 L. R. A. 117; Salem Nat. Bank v. White, 159 Ill. 136; Morris v. Ewing, 8 N. Dak. 99; First Nat. Bank v. Hicks, 24 Tex. Civ. App. 269.

[78] In Jeffrey v. Hursh, *supra*.

[79] Peck v. Harriott, 6 Serg. & R. (Penn.) 146, 9 Am. Dec. 415; Carson v. Smith, 5 Minn. 78, 77 Am. Dec. 539; Mann v. Robinson, 19 W. Va. 49, 42 Am. Rep. 771; Alexander v. Jones, 64 Iowa, 207; Yerby v. Grigsby, 9 Leigh (Va.), 387; Johnson v. McGruder, 15 Mo. 365; Goodale v. Wheeler, 11 N. H. 424.

[80] Smith v. Browne, 132 N. C. 365; Dyer v. Duffy, 39 W. Va. 148, 24 L. R. A. 339. See also Mann v. Robinson, *supra;* Stewart v. Wood, 63 Mo. 252.

One of three tenants in common was given parol authority to agree to sell their land. In the presence of the other two, the deeds were made out; and one of the parties delivered them to the purchaser in the presence of the one acting as agent, but in the absence of the other. The deed recited, in the usual manner, the receipt of the purchase price. The purchaser paid to the one acting as agent, the share of the absent one, although he had been expressly directed not to receive it. *Held* that the absent one could recover her share of the price of the purchaser, because an authority to an agent to make a contract of sale, does not necessarily give an authority to receive payment. Shaw v. Williams, 100 N. C. 272. *A fortiori* a broker who has mere authority to bring the parties together, has no authority to receive payment. Halsell v. Renfrow, 14 Okl. 674, aff'd 202 U. S. 287.

[81] Mann's Ex'rs v. Robinson, 19 W. Va. 49, 42 Am. Rep. 771. See Johnson v. Craig, 21 Ark. 533. No authority in the face of an express provision in the contract to the contrary. Metz v. Harbor, etc., Savings Ass'n, 117 N. Y. App. Div. 825. Of course, the agent's authority over the matter of the sale of his principal's land may be so general as to give him power to receive payments at any time, or to waive defaults in paying at the time fixed. McDonald v. Kingsbury, 16 Cal. App. 244.

sale, with the price to be paid in installments, and upon payment of the installments to execute the conveyance, is held to have implied power to receive the installments.[82]

When authorized to receive payment he must, like other agents similarly empowered, accept cash only or its equivalent, and he has no implied power to receive in payment notes, checks, or other similar tokens,[83] and *a fortiori* not notes given by himself for which the principal is not responsible.[84] Authority to receive such payments as are to be made as incidents of the sale, does not justify the receipt of payments before any sale is entered into, and, obviously, does not justify the receipt of payments upon a contract which the agent had no authority to make.[85]

§ 815. Conveyance must be for consideration moving to principal.—An agent authorized to sell and convey land will, unless the contrary appears, be deemed to be authorized to convey it only upon a sale, that is, upon a transfer for a consideration, and for a consideration which moves to the principal.[86] The land presumptively represents value and if the agent sells and conveys it, it must be expected that he is to obtain something like a substantial equivalent.[87]

§ 816. Authority to give credit.—The power to sell land does not of itself imply an authority to sell on credit. The presumption is that the sale is to be for cash.[88] But where the agent is authorized to sell "on such terms as to him shall seem meet," he may grant a reasonable

[82] Peck v. Harriott, *supra;* Carson v. Smith, *supra.*

[83] Ormsby v. Graham, 123 Iowa, 202; Wilkin v. Voss, 120 Iowa, 500; Runyon v. Snell, 116 Ind. 164, 9 Am. St. R. 893. But compare Galbraith v. Weber, 58 Wash. 132, 28 L. R. A. (N. S.) 341.

[84] Runyon v. Snell, *supra.*

[85] Schaeffer v. Mutual Ben. L. Ins. Co., 38 Mont. 459; Brown v. Grady, 16 Wyo. 151 (receipt of earnest money upon an unauthorized contract does not bind principal); Jackson v. Badger, 35 Minn. 52 (same).

[86] Alcorn v. Buschke, 133 Cal. 655; Hunter v. Eastham, 95 Tex. 648. In Neill v. Kleiber, 51 Tex. Civ. App. 552, a power to sell and "to do with the said land as if the same were his own property," was held to authorize a sale on credit for the agent's own benefit.

[87] Hunter v. Eastham, 95 Tex. 648; Lewis v. Lewis, 203 Pa. 194; Alcorn v. Buschke, 133 Cal. 655.

[88] Lumpkin v. Wilson, 5 Heisk. (Tenn.) 555; to the same effect, see Alcorn v. Gieseke, 158 Cal. 396; Lightfoot v. Horst, 103 Tex. 648; Bowles v. Rice, 107 Va. 51; McKay v. McKinnon, —— Tex. Civ. App. ——, 122 S. W. 440; Edwards v. Davidson (Tex. Civ. App.), 79 S. W. 48; Staten v. Hammer, 121 Iowa, 499; Dyer v. Duffy, 39 W. Va. 148; Winders v. Hill, 141 N. Car. 694; and, as a matter of course, where the power of attorney itself authorizes only a sale for cash, a sale on credit may be treated as void by the principal. Whitley v. James, 121 Ga. 521.

The power will be strictly con-

credit.[89] An authority to sell on credit, but not fixing the time to be given, implies a power to grant a reasonable time.[90]

§ 817. Authority to sell does not authorize exchange or barter.— Neither will a power to sell and convey land imply an authority to barter or exchange it for other property, or to take the pay in merchandise, services, and the like. It is presumed, in the absence of anything showing a contrary intent, that the land is to be sold only, and sold for cash.[91]

§ 818. ——— Or gift.—*A fortiori* has the agent no authority to give the land away, or to convey it without any consideration moving to the principal.[92]

strued. A power to sell for cash at any time within thirty days, will not justify giving a credit for not more than thirty days. Bowles v. Rice, *supra*.

[89] Carson v. Smith, 5 Minn. 78, 77 Am. Dec. 539.

In Morton v. Morris, 27 Tex. Civ. App. 262, the agent was given authority to sell on such terms as "to him shall seem meet." He sold the land and took as part of the consideration a non-negotiable note not due until one year after the removal of an attachment lien in which the purchaser was interested and of which the owner had no notice. The court said: "Were it not for the fact that it [the power], empowers the agent" to sell on such terms as to him shall seem meet, "there could be no implication that authority was to sell on credit, but the presumption would be that the sale should be for cash. As it is he was authorized to sell on reasonable credit. * * * Is twelve months after * * * the ending of a lawsuit a reasonable credit to be given by an agent for the payment of the purchase money due for the sale of his principal's property? As a matter of law, we think not."

[90] Brown v. Central Land Co., 42 Cal. 257.

[91] Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; Mann v. Robinson, 19 W. Va. 49, 42 Am. Rep. 771; Lumpkin v. Wilson, 5 Heisk. (Tenn.) 555; Rhine v. Blake, 59 Tex. 240; Morrill v. Cone, 22 How. (U. S.) 75, 16 L. Ed. 253; Hampton v. Moorhead, 62 Iowa, 91; Dupont v. Wertheman, 10 Cal. 354; Mott v. Smith, 16 Cal. 533; Paul v. Grimm, 165 Pa. 139, 44 Am. St. R. 648; s. c. 183 Pa. 326; Mora v. Murphy, 83 Cal. 12; Chapman v. Hughes, 134 Cal. 641; Edwards v. Davidson (Tex. Civ. App.), 79 S. W. 48; Kempner v. Rosenthal, 81 Tex. 12.

An agent, to whom a deed has been given with the name of the grantee in blank, and who is authorized to insert the name of a purchaser and deliver the deed to him, has therefrom no implied authority to deliver the deed upon an unauthorized exchange for other land, or to bind his principal by an agreement that the principal will assume and pay a mortgage upon such other land. Pease v. Fink, 3 Cal. App. 371.

[92] In Randall v. Duff, 79 Cal. 115, 3 L. R. A. 754, it was conceded that, where the authority was to sell, a conveyance by way of gift passed no title, but that a *bona fide* mortgagee of the donee had a valid lien upon the land to the extent of his money advanced; and in Van Zandt v. Furlong, 63 Hun, 630, it was held that, although an attorney with mere authority to sell could not make a valid transfer without valuable consideration, yet a subsequent purchaser from the transferee

§ 819. ——— Or giving option to buy.—An agent with authority to sell has, thereby, no implied authority to give an option to buy. Such an option would usually be a hindrance rather than a help. It would, during its term, prevent a sale to any other person, and, at the same time, a sale to the one holding the option would not be insured.[93]

§ 820. ——— Or permitting waste or sale, of timber separate from land.—An agent or attorney who has power only to bargain and sell land subject to confirmation, has no authority to license anyone to enter thereon and commit waste or cut timber, nor has he power to sell the timber apart from the land.[94]

§ 821. ——— Or changing boundaries of land.—Nor has an agent, authorized to sell or rent real estate, any implied authority to agree with an adjoining land owner upon a change of the boundaries of the principal's land.[95]

§ 822. ——— Or partition.—Authority to sell and convey land does not authorize a partition of the land, in which the principal has an interest as tenant in common.[96]

§ 823. ——— Or dedication to public use.—Mere authority to sell and convey land does not imply power to dedicate any part of it to the public use;[97] but a power "to sell, convey, plat and subdivide in such manner as to make the property marketable and to acknowledge and record such plat," implies a power to dedicate such portion as may be necessary to the public use.[98] So a power to lay out land in order to dispose of it, implies authority to dedicate the necessary highways,[99] and authority to purchase a town site and lay it out, implies power to dedicate proper and appropriate streets.[1]

§ 824. ——— Or conveyance to pay principal's debts, or assignment for creditors.—Authority to sell land does not authorize a conveyance of it in settlement of a pre-existing claim against the princi-

could not recover back his consideration by offering to prove, simply that the prior conveyance had been made by an agent with mere authority to sell and had, in fact, been made without consideration, where he himself had not been disturbed.

[93] Field v. Small, 17 Colo. 386; Tibbs v. Zirkle, 55 W. Va. 49, 104 Am. St. R. 977; Swift v. Erwin, —— Ark. ——, 148 S. W. 267; Wynkoop v. Shoemaker, 37 App. D. C. 258. See also Dyer v. Duffy, 39 W. Va. 148, 24 L. R. A. 339.

[94] Hubbard v. Elmer, 7 Wend. (N. Y.) 446, 22 Am. Dec. 590; St. Louis S. W. Ry. Co. v. Bramlette (Tex. Civ. App.), 35 S. W. 25.

[95] Fore v. Campbell, 82 Va. 808.

[96] Borel v. Rollins, 30 Cal. 408; Wirt v. McEnery, 21 Fed. 233.

[97] Wirt v. McEnery, 21 Fed. 233; Gosselin v. Chicago, 103 Ill. 623; Anderson v. Bigelow, 16 Wash. 198.

[98] Wirt v. McEnery, *supra.*

[99] State v. Atherton, 16 N. H. 203.

[1] Barteau v. West, 23 Wis. 416.

pal,[2] nor an assignment of it for the benefit of the principal's creditors.[3] But where the authority was to sell the land and pay the proceeds to the principal's creditor, it was held that a conveyance of the land directly to the creditor in satisfaction of the debt, was within the terms of the power.[4]

§ 825. ——— Or conveyance in payment of agent's debts.—An agent authorized to sell and convey real estate can do so only for and in behalf of his principal.[5] He may not convey it in trust for the payment of his own debts;[6] nor may he make the conveyance directly, for the payment of his own debt, or the joint debt of himself and one of his principals.[7]

§ 826. ——— Or conveyance in trust for support of principal's child, etc.—Where a wife was authorized to transact any business in connection with buying, selling, transferring or mortgaging real estate as agent of her husband, it was held that a conveyance in trust for the support of their infant daughter for a period of fifteen years was not within the authority given.[8] Neither may she convey it in satisfaction of advances made to her by their son.[9]

§ 827. ——— Or rescinding or altering contract.—An agent, authorized merely to make a contract for the sale of land, exhausts his

[2] Skirvin v. O'Brien, 43 Tex. Civ. App. 1; Frost v. Erath Cattle Co., 81 Tex. 505, 26 Am. St. R. 831.

[3] Gouldy v. Metcalf, 75 Tex. 455.

Neither does it authorize a conveyance in satisfaction of a debt which has been barred by limitations. Smith v. Powell, 5 Tex. Civ. App. 373. Nor does an authority to one of several heirs to sell real estate, authorize a conveyance of it in satisfaction of a judgment against such heir and his mother. Folts v. Ferguson (Tex. Civ. App.), 24 S. W. 657. But where the agent had a partnership interest in the land, and had the complete management and control of it, it was held that a conveyance by him in consideration of a cancellation of the partnership notes was authorized. Kempner v. Rosenthal, 81 Tex. 12. And where the authority was "to make a sale or other disposition of the" property, and "to execute all deeds," etc., it was held that a conveyance to an attorney for legal services in locating and establishing a town site on the land, was within the terms of the power. Jones v. Gibbs, 18 Tex. Civ. App. 626.

[4] Bertschy v. Bank of Sheboygan, 89 Wis. 473.

[5] Agent to sell and take part payment in notes, may accept only notes payable to his principal. Gourlay v. Carson, 16 Victorian L. R. 850.

[6] Frink v. Roe, 70 Cal. 296; Runyon v. Snell, 116 Ind. 164.

[7] Hunter v. Eastham, 95 Tex. 648. Same case again (Tex. Civ. App.), 81 S. W. 336.

[8] Coulter v. Portland Trust Co., 20 Or. 469. Same case, 23 Or. 131.

There is good discussion of the cases.

[9] Lewis v. Lewis, 208 Pa. 194. The wife here was authorized to collect certain debts, etc., for her support. She was also authorized to sell certain land. She made the conveyance in question in consideration of certain payments made by the son, out of his earnings, for her support.

power with the completion of that contract; and has thereafter no implied power to revoke or rescind it, or to release the purchaser from its obligations.[10] So an agent, who has made a contract to sell and received a part payment thereon, has no implied power to return the money because he is erroneously led to believe that the principal's title was imperfect.[11]

Such an agent will, moreover, have ordinarily no power to change or alter the completed contract or to substitute another in its place,[12] though his authority over the subject-matter may be sufficiently comprehensive to justify it.[13]

§ 828. ——— Or discharge of mortgage.—An agent authorized merely to sell land has therefrom no implied power to release or discharge mortgages belonging to his principal;[14] but an agent having general authority to deal in land, may bind his principal by the assumption of a mortgage as part of the purchase price.[15]

§ 829. ——— Or investment of proceeds of sale.—A power of attorney authorizing the agent to take possession of and sell all the property of his principal, and collect his debts, does not authorize the agent to re-invest the funds of his principal or to engage therewith in any schemes of speculation, however tempting.[16]

[10] Luke v. Grigg, 4 Dak. 287, 30 N. W. 170; West End Hotel & Land Co. v. Crawford, 120 N. C. 347.

[11] Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. R. 122.

[12] In Hill v. Bess (Tex. Civ. App.), 40 S. W. 202, it was held that authority to sell land and accept and collect notes in payment therefor does not authorize an agent, after the deed had been delivered and the original purchase money notes forwarded to the principal, to secure and collect duplicate notes in substitution for the originals upon the erroneous but honest supposition that the originals had been lost in the mail.

[13] Thus in Francis v. Litchfield, 82 Iowa, 726, it was held that where a general agent in the state had authority to sell the lands of a non-resident principal, collect the payments, and transact business generally in connection therewith, he had implied authority to make a contract with a purchaser whereby the principal was to take a second mortgage on the land instead of a first mortgage, in consideration that the purchaser would make a part payment to the principal out of the proceeds of the first mortgage, and give some additional security. There was also evidence of ratification.

So in Neppach v. Oregon & Cal. R. R. Co., 46 Or. 374, it was held that a general agent, intrusted with the entire management and control of the land business of a corporation, might bind his principal by extending the time for deferred payments and waiving a forfeiture for the delay.

[14] Barger v. Miller, Fed. Cas. No. 979, 4 Wash. (U. S. C. C.) 280.

[15] Schley v. Fryer, 100 N. Y. 71.

[16] Stoddart v. United States, 4 Ct. Cl. 511. See Porges v. U. S. Mortgage & Trust Co., 203 N. Y. 181, re-

II.

OF AGENT AUTHORIZED TO LEASE LAND.

§ 830. In general.—It has been seen in an earlier section how authority to lease land may be conferred.[17] If the lease is required to be under seal, authority under seal would at common law be requisite.[18] Authority to make leases for certain periods is, by statute, often required to be in writing.[19] In other cases, oral authority will suffice.[20]

Whatever the method employed, the authority must contemplate a leasing.[21] Authority to sell, therefore, would not suffice; authority to care for property, or to collect rents, or exhibit the property to prospective tenants, would not ordinarily suffice;[22] authority to "manage" property would be more comprehensive, and might under many circumstances justify the making of leases.[23]

versing 135 N. Y. App. Div. 484, and holding that where a power to sell was accompanied by express power to use proceeds in effecting a redemption of mortgaged land, the agent may not convert proceeds of a sale in the form of a check payable to his principal into cash and deposit the same in his individual banking account.

[17] See *ante*, § 229.

[18] See *ante*, § 212.

[19] See *ante*, § 229. Acceptance of rent does not ratify the making of a lease for more than the statutory period where the principal was ignorant that it was so made. Larkin v. Radosta, 119 App. Div. 515. Mere knowledge that the tenant is making improvements is not enough unless they are of the sort which a tenant for the shorter term would not be likely to make. Clement v. Amusement Co., 70 N. J. Eq. 677, 118 Am. St. R. 747. The written authority required may be made up of several writings. Paris v. Johnstone, 155 Ala. 403.

[20] See *ante*, § 229.

[21] See Bonnazza v. Schlitz Brewing Co., 155 Mich. 36, where the case failed because there was held to be no evidence upon this point. See also Howard v. Carpenter, 11 Md. 259.

[22] In Owens v. Swanton, 25 Wash. 112, a non-resident owner of lands left them in charge of his brother who being temporarily absent deputized another person to "collect rents, procure tenants and otherwise look after the property." *Held* that this deputy had no power to bind the owner by a lease for a definite term, in this case eighteen months.

The mere power to collect rent does not confer authority to lease (Dieckman v. Weirich, 24 Ky. L. Rep. 2340, 73 S. W. 1119); or to make a new lease or change an existing one (Indianapolis Mfg. Carpenters' Union v. Cleveland, etc., Ry. Co., 45 Ind. 281).

Authority to lease premises for a certain year is not inferable from facts that the alleged agent had sometimes collected rent drafts of the landlord on the lessee or given his own receipt for other rent due, or that he had previously leased the same premises. Weil v. Zodiag, 34 La. Ann. 982.

[23] In Duncan v. Hartman, 143 Pa. 595, 24 Am. St. R. 570 (149 Pa. 114), an agent was authorized to "act as

§ 831. What execution authorized.—In order to bind his principal, the agent to lease must, like other agents, confine his acts within the terms and conditions of his authority. Thus an agent authorized to lease an entire tract of land for a given period for a stated rent beginning at a certain time, may not bind his principal by a lease of a part of the land for a different rent and for a term beginning at a different time,[24] nor may an agent authorized to lease for a certain term, bind his principal by a lease for that term but which gives the lessee the option of a renewal for a longer period.[25] Neither does a power of attorney to a life tenant to make a lease for twenty-one years or one for one, two or three lives, authorize a lease for ninety-nine years determinable upon three lives.[26] But where the authority of a life tenant was to lease the property for such term or terms of years as she may deem proper, provided that no such term or terms should exceed the period of fifteen years, or should contain any clause of renewal, and that nothing in the power should be construed to authorize a lease for a longer period than fifteen years, it was held that the power of the tenant was not exhausted by one lease for fifteen years, but that she might, at the expiration of the first term, make a new lease for a term not to exceed fifteen years.[27]

An agent to take a lease may not bind his principal by covenants to repair the premises so as to make them suitable for his principal's purposes, or to rebuild them in case of fire;[28] but where the agent, who resided in another state, was authorized to take a lease of lands

our agent for our properties * * * and honestly and diligently manage said properties" for the term of one year. The properties embraced farms, mineral lands and wild lands. "It is conceded," said the court, "that it would not authorize the sale of the land, while on the other hand it is equally clear that it would authorize leases in the ordinary form for ordinary terms." It was, however, held not to authorize an exclusive grant to quarry, take and sell stone from the lands for a term of fifteen years.

The general agent of a corporation in charge of its lands, buildings, etc., cannot, in virtue of his authority to manage the affairs of the corporation, make a lease for the purpose of trying the title to land upon which he has entered for condition broken, under a vote of the corporation authorizing him to so enter but silent as to the lease. Gillis v. Bailey, 17 N. H. 18.

A lease made for three years by an agent of an owner abroad having authority from the owner "to take charge of the land while he was gone and make it pay the best way he could," is terminable by the owner upon his return. Antoni v. Belknap, 102 Mass. 193.

[24] Borderre v. Den, 106 Cal. 594.

[25] Schumacher v. Pabst Brewing Co., 78 Minn. 50.

[26] Roe d. Brune v. Prideaux, 10 East, 158.

[27] Taussig v. Reel, 134 Mo. 530.

[28] Halbut v. Forrest City, 34 Ark. 246.

in that state, it was held that he might, upon the lessor's refusal to accept the principal's credit, give his own note and, after it was paid, recover the amount from his principal.[29]

Acts of the agent, within the apparent scope of his authority, would, as in other cases, bind the principal, though they were in violation of his secret instructions.[30]

§ 832. Authority to execute a lease, in the usual form, with usual terms.—Authority to actually lease premises would carry with it, by implication, the power to execute and deliver the necessary or usual documents, to make them in the ordinary form, and to insert in them the usual and ordinary terms, covenants and conditions. Under a general power of this sort, the agent would be justified in making a necessary and usual covenant to repair the premises,[31] or to furnish heat.[32]

§ 833. Authority to make representations as to condition of premises, ownership, etc.—It has been seen in an earlier section that an agent authorized to sell land has, under many circumstances, power to bind his principal by representations concerning the location and boundaries of the land sold.[33] Hence, it is said, "if an agent authorized to sell has authority to point out the location of land he desires to sell, it is difficult to see why an agent to lease has not authority to describe the building and its surroundings which he desires to lease." It was therefore held that an agent, authorized to lease a building, who falsely represents that a partition wall in the building was fire proof makes his principal liable for damages.[34] It was conceded that

[29] Irions v. Cook, 83 N. C. 203.

Where an agent had authority to lease upon taking security for the payment of the rent, but there was no provision as to what security or in what form, and the agent made a lease to begin at a future date and arranged for security to be given before the term began, and the tenant offered to give the security so agreed upon, it was held that the principal was bound. Paris v. Johnson, 155 Ala. 403.

[30] As where an agent, who apparently had general authority, made a lease for a year though he had been instructed to rent by the month only. Babin v. Ensley, 14 N. Y. App. Div. 548. See also Johnson v. Ehrman Brewing Co., 66 N. Y. App. Div. 103.

[31] In White v. Clow, 135 Ill. App. 464, the court said: "Authority to rent the property included authority to make a lease with such conditions as are customary in leases and to bind [the principal] by such a contract."

But in McMichen v. Brown, 10 Ga. App. 506, it was held that an agent to rent had no implied authority to agree that the landlord would pay a certain sum for improvements made by the tenant.

[32] See National Loan Co. v. Bleasdale, 140 Iowa, 695.

[33] See *ante*, § 809.

[34] Matteson v. Rice, 116 Wis. 328. Agent to lease has apparent authority to describe the lands to be leased. Wilson v. Sale, 41 Pa. Super. 566.

In Daley v. Quick, 99 Cal. 179, it

the facts might not justify an inference of authority to warrant the fire proof quality of the wall, but it was said that "cases may and frequently do arise where the agent may have no authority to warrant, and yet, from the character of his agency, his principal may be held liable in tort for false representations made by him."

An agent to make leases would also undoubtedly have implied authority to make such representations concerning the general ownership of the premises, the right to lease them at that time, the determination of previous interests, and the like, as are naturally and usually involved in such transactions.[35] So, also, doubtless, to make representations and give information as to the facts concerning those matters which it is important for a prospective tenant to know, which are usually inquired about, and which are not open to the tenant's observation.[36]

§ 834. Authority to receive payment of rent.—An agent authorized to make a lease, would, like the agent authorized to sell, have implied authority to receive so much of the rent as was to be paid as a part of that transaction; but he would not thereby necessarily have authority to receive payment of subsequent installments. That would depend upon the general and continuing character of his authority.

Where he is authorized to receive payment of rent, he must as in other cases receive it in money only, and certainly has no authority to

was held that the principal was not liable for the representations of an agent (not authorized to lease the premises, but having merely authority to make repairs when requested by the tenants), that the premises did not need repairs, the tenants being in as good a position to discover the defects as the agent.

But in Martin v. Richards, 155 Mass. 381, it was held that where the agent who leased the premises referred to one H as the person authorized to make repairs, the knowledge of H of offensive odors which made the premises unfit for occupancy, was imputable to the principal, and the latter was liable to the tenant for injuries caused thereby.

In Williams v. Goldberg, 58 Misc. 211, the principal was held liable to tenant for injuries caused by the falling of plastering, after she had remained in possession relying upon the rental agent's false representations that the plastering had been examined and found safe.

[35] Mullens v. Miller, 22 Ch. Div. 194; Finch v. Causey, 107 Va. 124; Crump v. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116.

But not *after* the transaction is closed. Finch v. Causey, *supra;* Lake v. Tyree, 90 Va. 719.

No general authority to bind by representations as to the title so as to give a defence to an action for rent against a tenant who has not been disturbed by any outstanding claims. Tondro v. Cushman, 5 Wis. 279.

[36] See Matteson v. Rice, 116 Wis. 328; Cornfoot v. Fowke, 6 M. & W. 358.

allow it to be used to pay his own debts.[37] He must also obtain rent, and has no authority to permit tenants to remain without paying.[38]

§ 835. Authority to lease does not authorize lease to begin in future.—Authority to lease lands must ordinarily, when nothing is said as to the term, be deemed to contemplate only the making of a lease which shall begin immediately or substantially so; and therefore one made to begin at some future time would ordinarily be beyond the agent's authority.[39] It seems to be immaterial, in this respect, that the power under which the lease is made is one which is irrevocable during the life time of the agent.[40]

§ 836. Authority to change terms, substitute tenants, accept surrender of lease, or give notice to quit.—An agent having authority merely to make a lease would have, thereby, no implied power to subsequently change the terms of the lease so made; consent to a substitution of tenants; or accept a surrender of the lease.[41] But an agent having general power to manage premises, lease them when vacant, and collect accruing rents, would have implied power to consent to the surrender of a lease [42] or to the substitution of tenants,[43] or to extend the term of a lease,[44] or to reduce the rent, if done within reasonable limits,[45] or to waive payment entirely during a time when the premises are untenantable as the result of a fire, if, by so doing, he induces the tenants to remain after the repairs are made.[46] Such an agent would also have implied power to terminate a tenancy and give notice to quit.[47]

§ 837. ——— To renew or extend a lease.—Authority to make a particular lease, or to lease upon a particular occasion would not justify a subsequent renewal of the lease or an extension of the term.

[37] National Loan Co. v. Bleasdale, 140 Iowa, 695.

[38] Johnson v. Hulett, 56 Tex. Civ. App. 11.

[39] Taussig v. Reel, 134 Mo. 530.

[40] Roe d. Brune v. Prideaux, 10 East, 158.

[41] See Wallace v. Dinniny, 11 N. Y. Misc. 317 (aff'd 12 Misc. 635); Wilson v. Lester, 64 Barb. 431; Faville v. Lundvall, 106 Iowa, 135; Hamm Brewing Co. v. Wiggam, 27 S. D. 613.

[42] Lillian Realty Co. v. Erdurm, 120 N. Y. Supp. 749. But not where the lease expressly requires the consent of some other specified person. Berry v. Broadway Co., 148 N. Y. App. Div. 159.

[43] Amory v. Kanoffsky, 117 Mass. 351, 19 Am. Rep. 416. Or consent to a sub-letting. Underwood Typewriter Co. v. Century Realty Co., 165 Mo. App. 131.

[44] Pittsburg Mfg. Co. v. Fidelity Title & Trust Co., 207 Pa. 223. See also Noble v. Burney, 124 Ga. 960.

[45] Goldsmith v. Schroeder, 93 N. Y. App. Div. 206.

[46] Ireland v. Hyde, 34 Misc. (N. Y.) 546.

[47] Doe v. Mizem, 2 Moo. & Rob. 56; Benton v. Stokes, 109 Md. 117. See also McClung v. McPherson, 47 Or. 73.

But such an act would fall within the power of an agent having a general and continuing authority to let premises or make leases. He might renew or extend an old lease wherever he could have made a new lease to the same parties and upon the same terms.[48]

§ 838. Authority to bind principal to furnish irrigation, supplies, stock, etc.—An agent authorized to lease lands would thereby have, ordinarily, no authority to agree to such an unusual stipulation as that the principal shall, without charge, irrigate the lands,[49] or to bind his principal to furnish agricultural supplies to the tenant for putting in his crop.[50] Where the authority was general in its nature and authorized a lease on such terms as the agent should deem best, it was held that the agent might bind his principal separately to furnish stock: but he could not, by leasing his own lands with those of his principal, make her jointly liable with him for such stock.[51] An authority to lease does not include the power to bind the principal on a partnership agreement in respect to the use of the land;[52] nor does authority to lease land ordinarily justify an agreement to make improvements thereon.[53]

§ 839. Authority to waive liens.—An agent authorized merely to lease lands would clearly have no implied authority, ordinarily, to waive or release his principal's lien upon the crops or other property, whether the lien was contractual or statutory: but where the evidence showed that the agent had authority to lease, collect rents, direct repairs, authorize a tenant to sell crops to pay taxes and purchase fencing, etc., and otherwise indicated the general scope of his authority, it was held sufficient to justify the jury in finding a general agency which would include authority to release the principal's lien on a part of the crop which he permitted the tenant to sell.[54]

§ 840. Authority to mortgage, or to impair or defeat the principal's title.—An authority to lease lands, even though given in broad terms and including a power to sell, does not justify the making of a

[48] Pittsburg Mfg. Co. v. Fidelity Title & Trust Co., 207 Pa. 223; Steuerwald v. Jackson, 123 App. Div. 569.

[49] Durkee v. Carr, 38 Or. 189; Anderson v. Adams, 43 Or. 621.

[50] Loftin v. Crossland, 94 N. C. 76.

[51] La Point v. Scott, 36 Vt. 603.

Nor may an agent to lease construct ditches on the land of his principal, for the purpose of draining the agents own land adjoining, and thus render the principal liable for injuries caused by the negligent construction of the ditches. Harvey v. Mason City R. Co., 129 Iowa, 465, 113 Am. St. R. 483, 3 L. R. A. (N. S.) 973.

[52] Providence Machine Co. v. Browning, 72 S. C. 424.

[53] Peddicord v. Berk, 74 Kan. 236.

[54] Fishbaugh v. Spunaugle, 118 Iowa, 337.

mortgage upon the lands.[55] Neither does authority to lease lands and collect the rents justify licensing a telegraph company to erect poles in the highway in front of the lands.[56] Nor does authority to lease a particular piece of property confer authority to recognize an outstanding title asserted by a third person.[57] Nor does a formal power of attorney to lease lands and to compromise claims (but which expressly withholds the power to sell the same) authorize a conveyance of the land in settlement of the claims.[58]

III.

OF AGENT AUTHORIZED TO PURCHASE LAND.

§ 841. When authority exists.—The authority of an agent to purchase land is subject to many of the considerations applicable to the authority to purchase personal property, considered in the following subdivision. Like that authority, it may be conferred expressly or may arise from implication.[59] Land being much less frequently the subject of commercial transactions, and usually involving considerable amounts, authority for its purchase is more frequently specially conferred and less commonly results from implication.[60] It is not, however, impossible that the authority should arise by implication. Thus, the managing officer of a railway in process of construction would undoubtedly in many cases have implied authority to buy necessary land for right of way.[61] The managing agent of a principal generally engaged in buying and selling real estate, might often be found to have such authority;[62] and the managing agent of other enterprises might also have the authority when found to be essential to the accomplishment of the objects confided to his care.

§ 842. Authority to make a binding contract.—As in the case of the agent authorized to sell, it may be found that the authority to pur-

[55] First Nat. Bank v. Hicks, 24 Tex. Civ. App. 269.

[56] American Telegraph & Tel. Co. v. Jones, 78 Ill. App. 372.

[57] MacDonald v. O'Neil, 21 Pa. Super. Ct. 364; Cameron & Co. v. Blackwell, 53 Tex. Civ. App. 414.

[58] Wells v. Heddenburg, 11 Tex. Civ. App. 3.

[59] As has been seen in § 230, *ante*, authority to purchase land is not usually required to be conferred by writing. But see Davis v. Brigham, 56 Or. 41, Ann. Cas. 1912, B, 1340.

[60] Authority to purchase an execution which has been levied upon land does not justify a purchase of the land itself. Hood v. Hendrickson, 122 Ga. 795.

[61] See Johnson v. Railway Co., 116 N. Car. 926.

[62] See Schley v. Fryer, 100 N. Y. 71.

chase is, under the circumstances, merely a power of negotiation, authorizing the agent to find the seller but not authorizing him to make a binding contract. Where, however, it is evident that he was expected to consummate the negotiations, the agent could bind his principal by a definite contract of purchase.[63]

§ 843. Authority to agree upon terms.—Authority to purchase land will usually be a special one, confined to a particular piece of land to be purchased on specified terms. Where it is so, the rules governing special authority will apply to it. Where the agent has not been limited as to subject-matter or terms, he would have implied authority to select the land and agree upon the terms, within the range of what is usual and reasonable.[64] Where he is authorized to agree upon the terms, his authority will ordinarily be regarded as so far personal that he could not delegate it, or agree that the price should be fixed by arbitration.[65]

§ 844. Authority to bind principal for ordinary expenses in purchase.—An agent authorized to purchase would have, as incident to this authority, power to bind the principal for the ordinary and necessary expenses involved in the purchase, and not expected to be paid in the first instance by the agent himself; as, for example, for necessary recording fees, abstract charges, or the charges of an attorney reasonably employed to pass upon the title.[66]

[63] A mere authority to use one's name as the holder of the legal title, does not justify pledging his credit for the purchase price. Cowan v. Curran, 216 Ill. 598.

[64] See Brock v. Pearson, 87 Cal. 581; Johnson v. Railway Co., 116 N. Car. 926.

The mere fact that the principal thought the agent was buying the whole of a piece of land, where the agent had in fact bought but part of it, will not relieve the principal, there being no fraud, and the other party having no notice that the agent was not following his instructions. Corbit v. Kimball, 107 Cal. 665.

In Kickland v. Menasha Co., 68 Wis. 34, 60 Am. Rep. 831, the agent in buying the plaintiff's land promised as part of the price one-half of any excess in price at any later sale over the cash price paid. The deed, however, mentioned only the cash price and there was no proof of any notice to the company of the additional promise; but upon selling the land four years later the company was held bound to divide the profit with the plaintiff. This case is quoted and approved in Windsor v. St. Paul, etc., Ry. Co., 37 Wash. 156, 3 Ann. Cas. 62, where the right of way agent of the railway and an emissary employed by him agreed with the plaintiff that if he would sell his land for a certain price, the railway would provide fences and guards, and the company was held bound by these oral promises not mentioned in the deed.

[65] Talmadge v. Arrowhead Reservoir Co., 101 Cal. 367.

[66] In Egan v. DeJonge, 113 N. Y. Supp. 737, an agent employed to purchase land was held to have authority to engage attorneys as an im-

§ 845. Authority to receive the deed.—Where the agent is authorized to close the transaction, and especially where he is authorized to pay the purchase price upon the delivery of the deed, he would be authorized to receive the conveyance and to pay the price. The deed should, of course, be taken in the principal's name.

§ 846. Authority to assume mortgages.—An agent having general authority to purchase, who buys subject to an existing mortgage, may, it is held, bind his principal by accepting a deed which provides that the purchaser shall assume and pay the mortgage.[67]

§ 847. No authority to sell or mortgage land purchased.—Authority to purchase land would ordinarily be exhausted when the purchase was consummated, and the agent would have no implied authority to afterwards sell or mortgage the land bought.

IV.

OF AGENT AUTHORIZED TO SELL PERSONAL PROPERTY.

§ 848. When authority exists.—Authority to sell personal property need not be conferred in any particular manner. It may, of course, be expressly conferred, but it may also be implied from circumstances. Where the authority results from construction, or is deduced from circumstances, the circumstances must be such as fairly to warrant the inference of an authority to sell.[68] Such authority,

plied power incident to the general purpose of his employment.

[67] Schley v. Fryer, 100 N. Y. 71 (but see, Deering v. Starr, 118 N. Y. 665).

There is a dictum to the contrary in Metzger v. Huntington, 139 Ind. 501, though there was an adverse interest in that case which was held of itself to disqualify the agent.

[68] See Limestone Mine Co. v. Lehman (Ky.), 76 S. W. 328, 25 Ky. L. Rep. 703; Chiles v. Southern Ry. Co., 69 S. Car. 327; Mahrt v. Hyman, 17 Wash. 415; Dowagiac Mfg. Co. v. Watson, 90 Minn. 100; Rosendorf v. Poling, 48 W. Va. 621; Antrim Iron Co. v. Anderson, 140 Mich. 702, 112 Am. St. R. 434.

In Blaisdell v. Bohr, 77 Ga. 381, an agent who had bought and had possession of stock, and who had a power of attorney, "to attend to any and all descriptions of business in which I may be interested or concerned in a real or personal manner and to receive for me any sum or sums of money which may be due to me and to receipt therefore," was held authorized to sell it.

But in Camden Fire Ins. Ass'n v. Jones, 53 N. J. L. 189, an agent who had acted as general business agent for his principal and had collected dividends on the stock in question, and who had a power of attorney to collect all debts, compound same, and do whatever was necessary about the premises, "as well as to sign my name in all business transactions," was held not to be authorized to sell the principal's stock.

Authority from relationship.—As has already been seen in an earlier

however, cannot ordinarily be inferred from mere possession of the property [69] even though the alleged agent be a dealer in property of that kind,[70] but the principal must have done something more; he must have so acted as to clothe the agent with apparent authority to sell, or must have conferred upon him, or permitted him to assume, the apparent *indicia* of ownership.[71]

A distinction must be observed between an apparent ownership, and an apparent agency to sell.[72] Many things might be done by an apparent owner which would not be justified in an apparent agent—for example, the use of the property to pay the debts owed or secure the advances obtained by the apparent agent. It is agency and not apparent ownership which is to be considered here.

§ 849. ——— Limited or qualified authority.—The authority of the agent may be limited or qualified with respect of subject-matter, time, terms or other elements to any degree which may serve the principal's purposes, and such qualifications or limitations will be operative not only as between the principal and the agent, but as to third persons also provided they are not waived or are not secret limitations within the rules already discussed.[73] Thus where the agent, as in the familiar case of the traveling salesman, is authorized simply to solicit

chapter, authority to sell does not arise from mere relationship. The wife, has no inherent authority to sell her husband's chattels, or the child to sell his parent's chattels, and the like. So, in the case of uncle and nephew. Moffet v. Moffett, 90 Iowa, 442.

Suspicious circumstances. — The circumstances under which the alleged agent assumes to act may be sufficient to charge the buyer with notice of his lack of authority. See Clark v. Haupt, 109 Mich. 212.

[69] Anderson v. Patten, —— Iowa, ——, 137 N. W. 1050; Edwards v. Dooley, 120 N. Y. 540; Peerless Mfg. Co. v. Gates, 61 Minn. 124; Warder v. Rublee, 42 Minn. 23; Greene v. Dockendorf, 13 Minn. 70; Roberts v. Francis, 123 Wis. 78; Sloan v. Brown, 228 Pa. 495, 139 Am. St. R. 1019.

[70] Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332; Baehr v. Clark, 83 Iowa, 313, 13 L. R. A. 717; Gilman Linseed Oil Co. v. Norton, 89 Iowa, 434, 48 Am. St. R. 400, citing other cases.

[71] Smith v. Clews, 105 N. Y. 283, 59 Am. Rep. 502, distinguished in Saunders v. Payne, 12 N. Y. Supp. 735; Wilson v. Loeb, 69 Ill. App. 445; Farquharson v. King, [1901] 2 K. B. 697; Heath v. Stoddard, 91 Me. 499.

See the fuller discussion, *post*, Book IV, Chap. VII.

[72] See a good discussion of this distinction in Sloan v. Brown, 228 Pa. 495, 139 Am. St. R. 1019.

[73] Where a reorganization committee is entrusted with bonds with power of sale "'til Jan. 1, '06" a sale thereafter does not pass title. Smith & Co. v. Collins, 91 C. C. A. 182, 165 Fed. 148.

orders which are to be transmitted to and passed upon by the principal, he can not usually bind his principal by a present contract.[74]

So where the authority is to sell "upon terms to be agreed upon," or "subject to confirmation," and the like, the agent can not make a valid contract otherwise,[75] unless the qualification has been waived or concealed.[76]

§ 850. What may be sold—All—Part.—Where the authority specifies what it is that the agent is to sell, he cannot bind his principal thereunder by undertaking to sell something else.[77] Where he is authorized to sell a certain amount, he would have therefrom no

[74] See *post*, § 861; Elfring v. New Birdsall Co., 16 S. Dak. 252; Becker v. Clardy, 96 Miss. 301.

Where the agent's authority is limited to soliciting written proposals, the principal is not bound by a contemporaneous verbal agreement not in the writing and unknown to him. Inman v. Crawford, 116 Ga. 63.

[75] Johnson R. Signal Co. v. Union Switch & Signal Co., 51 Fed. 85; Chauche v. Pare, 75 Fed. 283, 21 C. C. A. 329; Bronson v. Implement Co., 135 Mo. App. 483 (representations by the agent that the printed terms of the order blank were mere formality do not alter the case); Alcorn v. Buschke, 133 Cal. 655.

[76] Where the local custom justifies an agent, empowered as the one in question, to make a present sale without confirmation, the principal will be bound although his instructions were not to sell until terms were confirmed. Cawthon v. Lusk, 97 Ala. 674.

[77] An agent for the sale of groceries has no implied authority to bind his principal by agreeing to sell nails in which as the buyer knows, the principal does not deal. Brown Grocery Co. v. Becket (Ky.), 22 L. Rep. 393, 57 S. W. 458.

An agent known to be acting for the packers of Alaska salmon has no implied authority to bind them to furnish salmon produced elsewhere. Reid v. Alaska Packing Co., 47 Or. 215.

Agent for the sale of beer in kegs, which kegs, as the buyer knew, were not ordinarily sold but were to be returned when empty to the principal, can not pass title to the kegs to such a buyer in violation of his actual authority. Schlitz Brew. Co. v. Grimmon, 28 Nev. 235.

A written authority to sell "new patterns of furniture" gives no authority to sell old patterns. McCord Furniture Co. v. Wollpert, 89 Cal. 271. An agent acting under a formal and recorded power of attorney which authorizes him to sell mortgages of which the principal is "now possessed" is limited to the sale of the mortgages which the principal had at time of giving the power. Union Trust Co. v. Means, 201 Pa. 374.

Where the principal by telegram authorizes his broker to sell goods of a certain grade and the broker makes a sale to a *bona fide* purchaser by exhibiting the telegram, the principal cannot escape by showing instructions to the agent to sell only goods of an inferior grade. Southern Cotton Oil Co. v. Shreveport Cotton Oil Co., 111 La. 387. Where a seller wrote to a broker in Memphis, offering to sell "fifteen cars good mixed corn, * * * weather wet, and will not guaranty grade," which letter is shown to the purchaser, a contract to sell corn of No. 2 grade, as known at Memphis, was unauthorized. Galbreath v. Condon, 48 Kan. 748.

implied authority to sell more.[78] Whether he may sell less or may sell a part only of that which he is authorized to sell will depend upon a variety of circumstances. The situation may be such as to clearly indicate that the authority is to be regarded as an entirety. Thus, for example, if he, the agent, be authorized to sell a team, it would usually be difficult to see that he was authorized to sell the horses separately, and especially to sell one horse without selling the other.[79] In one case it was said, "An agent authorized to sell a house might not be justified in selling half of it. But unless special directions to the contrary were given, an agent who had shares of stock to sell might sell in parcels, or might sell a part if he could not sell the whole; or he might sell a part to one person and the rest to another. Each sale would be valid, and within his authority." [80]

§ 851. ——— Commingling with other goods for sale.—Similar questions might arise respecting the commingling of the principal's goods with the goods of other principals or of the agent in making

[78] Authority to sell a yacht does not justify a sale of a launch, merely because it was sometimes used as a tender for the yacht. Forrest v. Vanderbilt, 46 C. C. A. 611, 107 Fed. 784, 52 L. R. A. 473.

An employment of a person as sole salesman of a coal mining company for one year, with power to sell "all coal mined," and which provides for fitting up an office for him at a certain place, contemplates the sale, on the market, of the coal as produced from time to time and does not justify a single sale of the entire output for ten months. Blackmer v. Summit Coal & Mining Co., 187 Ill. 32.

But where a salesman authorized to contract for the sale of cement to be manufactured by his principal and who had no actual limitation upon his authority as to the quantity he might sell to one customer, agreed to sell a large quantity, viz.: 35,000 barrels, but this amount was not beyond the limits of the principal's production, there was held to be nothing in the quantity so sold to show that it was beyond his authority, though he had never sold more than 7,500 barrels at one time before. Jenkins v. Alpena Cement Co., 77 C. C. A. 625, 147 Fed. 641.

An agent to sell stock on which a dividend has been declared but not paid has no implied authority to sell or throw in the dividend. Wheeler v. Northwestern Sleigh Co., 39 Fed. 347. But see Cronan v. Hornblower, 211 Mass. 538.

[79] In Henry v. Buckner, 13 Colo. 18, it was held that a written contract to sell for the owner a team of horses with a wagon and harness for a certain sum is an entire contract and does not authorize the sale of the wagon and harness without the team. The action was between the principal and agent only and did not involve the rights of third persons.

Compare Hatch v. Taylor, 10 N. H. 538, where various directions about trading or disposing of a team of horses, and about parting the span, were held to be apparently mere private instructions.

[80] Ulster County Sav. Inst. v. Fourth Nat. Bank, 54 Hun, 638, 8 N. Y. Supp. 162. Here 194 shares of stock were sent to a correspondent to be sold "at a price not less than $20 a share." The agent made a

the sale. Ordinarily it would be the duty of the agent not to commingle them, but to keep them separate and to sell them separately and to give to his principal the benefit of a several rather than a joint contract and obligation.[81] The general custom of the trade or the particular customs of a given market might, however, easily be such as not only to justify but perhaps to require that the goods should be so united with others as to make salable lots or groups.

§ 852. Authority when to be executed.—An authority to sell the property upon a particular day specified confers no power to sell it upon a subsequent or different day;[82] neither is there any presumption that an authority to sell goods in a single instance continues for several years afterward.[83]

§ 853. No authority to sell at auction—When.—An agent authorized to sell property is presumptively empowered to sell it only in the usual way, and therefore cannot, without special authority, sell it at auction; and a purchaser at such a sale, can ordinarily acquire no title.[84] So under a power of attorney authorizing a sale only at auction, a private sale is void and confers no title on the purchaser,[85] even though the full price fixed for the auction sale is realized.[86]

§ 854. Authority to fix price and terms of sale.—An agent clothed with general power to sell personal property without restrictions, has

sale of 144 shares, and the sale was sustained, one judge dissenting. The latter said: "I am unable to accept the theory that in the absence of an express direction not to sell a lesser number than 194 shares, the agent possessed an implied authority to sell as many shares, and in such parcels, as was deemed expedient, as the practical effect of such doctrine would seem to be to allow an agent to substitute for an express direction an implied authority. Suppose an agent should be directed to sell a farm, at not less than a fixed price per acre, would the agent be authorized to divide the farm and sell a portion thereof without the knowledge or consent of the owner? I think not."

[81] In Coe v. Nash, 28 Mich. 259, it was held in an action by the agent against his principal, that a commission merchant to whom hops had been consigned for sale had no right to sell them in a lot with others for a gross sum.

In Cameron v. Paxton, 15 Can. Sup. Ct. 622, it was held that an agent of two independent and unconnected principals has no authority to bind his principals or either of them by the sale of the goods in one lot, when the articles included in such sale are different in kind and are sold for a single lump price not susceptible of a ratable apportionment except by the mere arbitrary will of the agent.

[82] Bliss v. Clark, 16 Gray (Mass.), 60.

[83] Reed v. Baggott, 5 Ill. App. 257.

[84] Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

[85] The G. H. Montague, 4 Blatch. (U. S. C. C.) 464, Fed. Cas. No. 5,377.

[86] Daniel v. Adams, 1 Ambl. 495; Jaques v. Todd, 3 Wend. 83.

implied authority to select the purchaser,[87] to fix the price, and to agree upon such ordinary incidental matters as the time and place of delivery, and the other ordinary and usual terms of a sale.[88] The price so fixed, however, should not be less than the market price, if there be a market price, and in any event should not be less than a reasonable price.[89] And so as to the terms of the sale where the principal has not prescribed them: they should be the usual terms, if there be any particular usage, and, if not, they should not exceed the natural and ordinary terms, reasonably necessary and proper in selling similar goods under similar circumstances at the time and place in question.[90]

The principal may lawfully prescribe the price and terms upon which the sale is to be made, and these regulations will be binding upon the agent,[91] and, where they are charged with notice of them [92] upon third persons.[93] Private instructions as to price and terms cannot, how-

[87] Where the principal writes to his agent "Of course, I want a reliable purchaser, *one whom you think would make his payments promptly*," he clearly leaves this matter to the discretion of the agent. Peay v. Seigler, 48 S. Car. 496, 59 Am. St. R. 731 (a land case).

[88] Galbraith v. Weber, 58 Wash. 132, 28 L. R. A. (N. S.) 341; Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45; Putnam v. French, 53 Vt. 402, 38 Am. Rep. 682; Flanders v. Putney, 58 N. H. 358; French Piano & Organ Co. v. Cardwell, 114 Ga. 340; Stirn v. Hoffman House Co., 8 (N. Y.) Misc. 246; Smith Table Co. v. Madsen, 30 Utah, 297; Smith v. Droubay, 20 Utah, 443. As incident to the general authority to sell, the agent has "power to fix the terms of sale, including the time, place, and mode of delivery and the price of the goods, and the time and mode of payment, and to receive payment of the price, subject of course, to be controlled by proof of the mercantile usage in such trade or business." Daylight Burner Co. v. Odlin, *supra*.

In Smith v. Droubay, *supra*, a traveling salesman was held to have implied authority to agree that the goods for which he took the order would be delivered in a certain number of days, and that the principal was bound though he knew nothing about this undertaking,—certainly a doubtful proposition.

But a mere broker has no implied authority to fix terms of delivery. Molloy v. Cement Co., 116 N. Y. App. Div. 839.

[89] Bigelow v. Walker, 24 Vt. 149, 58 Am. Dec. 156.

[90] Putnam v. French, *supra*. Such an agent, it is there held, has apparent authority "to make terms of payment as to time and place, to the extent at least of what was customary and not extraordinary."

[91] See Wolfe v. Luyster, 1 Hall (N. Y.), 146; Steele v. Ellmaker, 11 Serg. & R. (Penn.) 86.

[92] As to this, see *ante*, § 743 *et seq.*

[93] A special agent cannot bind his principal by terms different from those prescribed. Sloan v. Brown, 228 Pa. 495, 139 Am. St. R. 1019; McManas v. Fortescue, [1907] 2 K. B. 1; Hardwick v. Kirwan, 91 Md. 285; Nester v. Craig, 69 Hun (N. Y.), 543; Lucas v. Rader, 29 Ind. App. 287.

Instructions to sell for "net cash" are not violated by permitting the buyer to postpone payment until the goods are delivered. Bristol v. Mente, 79 App. Div. 67, aff'd 178 N. Y. 599.

ever, affect those who, with no notice of them, have dealt with the agent in good faith, relying upon an apparent general authority.[94] But such third persons must have exercised reasonable prudence, and if the price or terms fixed by the agent were so unusual or so unreasonable as to fairly put a prudent man upon his guard, they will not be protected.[95]

[94] Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Clews v. Reilly, 53 Hun (N. Y.), 636; Hatch v. Taylor, 10 N. H. 538.

Where a letter authorizing the agent to sell and exhibited to the buyer, is silent as to the price, the agent has apparent authority to fix the price and the buyer is not bound by oral limitations given to the agent of which the buyer was ignorant. Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124.

In Ludlow-Saylor Wire Co. v. Fribley Hdw. Co., 67 Kan. 710, a traveling salesman sold wire ties in February for payment in May. He reported the price to his principal as being $1.10 per bale. In an action for the price, defendant was permitted to prove that the agent on the sale "had guaranteed the price" as on the date of payment, and that on that date the price was only ninety-five cents per bale. *Held*, proper, as the agent had merely violated secret instructions.

[95] See *ante*, § 751. Where the purchaser was informed, by the terms of the contract which he signed, that the agreement upon which he now relies was outside the agent's authority, he can not base a case upon any doctrine of "apparent" or implied authority. Metropolitan, etc., Co. v. Law, 61 N. Y. Misc. 105. (Here the buyer relied upon an alleged agreement that he might countermand the order; the contract expressly provided that it should not be countermanded; and that no agent had authority to agree to the contrary unless it was made a part of the written contract and was approved by the principal.) To same effect: Fulton v. Sword Medicine Co., 145 Ala. 331; Schlitz Brewing Co. v. Grimmon, 28 Nev. 235. But compare Author's, etc., Ass'n v. O'Gorman, 147 Fed. 616.

Where the agent offers to sell a $300 piano for $120, and to take the buyer's note running to the agent, there is enough to put the buyer on his guard. Baldwin v. Tucker, 112 Ky. 282, 23 Ky. L. Rep. 1538, 57 L. R. A. 451. So, where there was known to be a "list-price," an offer by the agent to allow a rebate which the agent was to pay in person because he did not wish it known that the house was discounting the list price, the buyer is put upon inquiry. Taylor Mfg. Co. v. Brown (Tex. Civ. App.), 14 S. W. 1071. The same conclusion was reached where the buyer knew that the seller-principal was under contract to maintain list prices but the agent offered to sell at a discount to be allowed by the agent when the bill was collected. Brown v. West, 69 Vt. 440.

But where there was no collusion between the buyer and the agent, and the price was not so low as to reasonably arouse suspicion, and the buyer had no notice of limitations except a clause in the contract requiring the agent to sell at "proper prices," it was held that the principal was bound. The court thought the expression "proper prices" was "too flexible and indefinite to bind or even put upon inquiry." U. S. School Furn. Co. v. Board of Education (Ky.), 38 S. W. 864, 18 Ky. L. Rep. 948.

§ 855. ——— Further as to price.—As is pointed out in an earlier chapter, the question whether the communications between the principal and the agent respecting price are to be regarded as mere private instructions, or as an effective limitation upon the agent's authority, is one not always easy of determination. Neither is it easy to determine whether fixing the price,—as distinguished from stating the price fixed by some one else,—appears to be within the agent's authority. Neither is it easy to decide what should be the consequences if the agent does not correctly state the price fixed by his principal. If I go to a railway ticket office, for example, and ask the price of a ticket to New York, I cannot, in the first place, reasonably suppose that the ticket agent is the one who decides that matter. I must assume that the price has been set for him by a higher authority, and that he is authorized to sell only at that price. If, now, by mistake, he names a lower price, which I pay and receive the ticket, but, before I have changed my position to my detriment, he discovers the mistake and demands its correction, have I a legal right to retain the ticket—have I a contract to carry me to New York at the price paid? If I go to a great department store and ask the clerk at a particular counter what is the price of a certain article, and he, by mistake, states the wrong price, but it is discovered when the sale is checked up and before I leave the counter, have I a contract for the purchase at that price? I have clearly no right to think that the clerk fixes the price. What is he put there for? What is the offer made to me by the proprietor? Two answers are possible: One, that the proprietor offers to sell only at the price which he has fixed,—which I may learn by asking the clerk,—and that the proprietor will be liable for any loss I have sustained by reason of misinformation given me by the clerk, but that no contract to sell at the mistaken price results. The other that the proprietor offers to sell the goods at the price which the clerk shall name,—the proprietor having instructed him what price to name,—and, therefore, that I make a contract by accepting the offer as made by the clerk, even though he violates his instructions, if I am ignorant of that fact, and am not put upon my guard by any suspicious circumstances. The logic of the first view seems to the present writer to be unanswerable: practical convenience may, perhaps, be better subserved by the second. Certainly, however, from the standpoint of equity or morals, the person who thus seeks to take advantage of a clear mistake, seems to be entitled to but very little consideration.

If the departure from the price fixed was the result, not of error

but of intent, on the part of the agent, the other party's situation does not seem to be improved.

It is doubtful whether it could be contended that the clerk or salesman in these cases has any authority to give information as to price except as part of a negotiation for a present sale,—he doubtless has no authority ordinarily to quote future prices, or to agree that prices for the future shall be what they now are.

Other more or less similar cases will at once present themselves. The traveling salesman who solicits orders for merchandise or machinery or implements may furnish an illustration. He is usually well known to be quoting the prices which have been named to him, and hence no one would ordinarily suppose that he is authorized to offer the goods for any other prices than those which have actually been prescribed for him.[96]

[96] An ordinary "commercial traveller," of the sort who usually sell at prescribed or list prices, has no apparent authority to bind his principal by agreeing to give rebates or reductions. Tollerton v. Gilruth, 21 S. D. 320; Taylor Mfg. Co. v. Brown, *supra*.

In Scudder-Gale Grocer Co. v. Russell, 65 Ill. App. 281, the court held the principal liable for nonperformance of a contract of sale made by a salesman who had mistakenly quoted the wrong price. The court said that the circumstances as well as former dealings justified the buyer in believing that the salesman had power to fix the price.

In Ohio, etc., Ry. Co. v. Savage, 38 Ill. App. 148, it appeared that a local freight agent had named to the plaintiff a rate for transporting grain less than the usual rate. The agent purported to do this on the authority of the division freight agent, one Hodgdon. Plaintiff loaded his grain in reliance upon the rate so named, but when he came to get his receipt, the agent informed him that some question had arisen about the rate, and that he could not allow it to him. Plaintiff thereupon sent his grain at the regular rate and brought this action to recover the difference. *Held*, that he could recover. The court said: "In the case of a railroad company the agent who is put up to represent the company in a particular capacity is, for that purpose, the company itself. In this instance the station agent held such a position that the plaintiff was justified in relying upon his representation in reference to the shipment of this grain, while the plaintiff knew that this agent had, necessarily, limited powers, yet he knew that he was the mouth-piece of the company, and more particularly of Hodgdon, at that place, in regard to matters of local business, and the company should not be permitted to say that the agent misunderstood or misinterpreted his instructions." It will be observed in this case, however, that the plaintiff had loaded his grain before he was advised of the mistake.

In Stirn v. Hoffman House Co., 8 N. Y. Misc. 246, a "general salesman" in a store was held to have apparent authority to agree to give a discount of ten per cent. from fixed prices upon a large bill of goods then bought. It does not clearly appear whether this was actually beyond the agent's prescribed authority or not.

In Smith Table Co. v. Madsen, 30 Utah, 297, a general salesman in a

§ 856. ——— Where the agent is given possession of the chattel and authorized to sell it, restrictions as to price may still be effective if the circumstances of the sale are such as, according to ordinary experience, would naturally suggest the probability of such restrictions. But where the agent is given possession and is sent out to sell to any buyer he can find, it is doubtless a natural and proper inference that he is authorized to sell for such price as he may be able to obtain, subject only to the limitation of what is unusual or extraordinary and therefore sufficient to excite suspicion.[97]

furniture salesroom was held to have apparent authority to give a "trade discount," rather than a mere "cash discount." There was evidence here that the agent had no such prescribed authority. The cases relied upon are Banks v. Everest, 35 Kan. 687 and Potter v. Springfield Milling Co., 75 Miss. 582, both cited in a following section, § 861. The first case is readily distinguishable; the second is more in point.

There is also some comment about price in Authors', etc., Association v. O'Gorman, 147 Fed. 616.

In Galbraith v. Weber, 58 Wash. 132, 28 L. R. A. (N. S.) 341 (in all respects a most extraordinary case) it appeared that Galbraith had sent out one B, as agent to sell an imported horse. Galbraith valued the horse at $3,000, but there was no evidence of any instructions to B not to sell for less. B took the horse to a town about 100 miles away, where for six or eight weeks he tried to sell the horse for $3,000, but without success. Defendants then offered $1,000 for him. B said he had no authority to sell for that sum, but would telegraph to Galbraith to see if he would accept it. B did not in fact send any telegram, but next day falsely reported to defendants that he had done so, and had received authority from Galbraith to accept the $1,000, and defendants bought at that price, giving B two promissory notes for $500 each, in payment. B did not send these notes to Galbraith, but discounted them at a bank and kept the money, at the same time forging and sending to Galbraith three notes for $900 each, which he reported that defendants had given in payment for the horse. Galbraith accepted these notes and held them until he learned of the forgery, thus, as the court held, indicating that he did not insist rigidly upon $3,000, but was willing to accept $2,700 in notes. Galbraith testified that the horse was worth $3,000, but there was also evidence of a less value. In view of these facts, the court said: "We do not think that these circumstances were so extraordinary as to enable us to say, as a matter of law, they showed want of authority on the part of B to agree upon a sale at $1,000." But if B truthfully told defendants that he was not authorized to sell for $1,000, his subsequent untrue statement that he had received that authority was not binding upon his principal. Clark v. Haupt, 109 Mich. 212.

[97] In McManus v. Fortescue, [1907] 2 K. B. 1, where an auctioneer had been given a reserve price and the sale was advertised as subject to a reserve price, the auctioneer at first struck off an article at less than the reserved price and then discovering or recollecting that the reserve was more then the bid refused to go on with the sale of the article, it was said by one of the judges (Moulton, L. J.): "The employment of an auctioneer is as an

§ 857. ——— On the other hand, the authority of the agent over the subject-matter may be so general, so long recognized or so customary that no one could well say that communications respecting price were intended to be other than mere advice or directory instructions.[98] Would the directions as to prices given by the board of directors of a great department store to the general manager, for example, stand upon the same footing as the general manager's directions given to the clerks respecting the prices at which they should sell the goods?

So if the agent is expected to bargain,—to use his judgment or skill in securing the best obtainable price,—but not to disclose the

agent for special purposes, and falls under the general law of agency by which the employer may restrict the authority given to the agent, subject to certain well-known exceptions not material to this case. The limitation of an auctioneer's authority, by his principal fixing a reserve price, is a perfectly valid and effectual limitation. It is in no wise inconsistent with his employment as an auctioneer, because an auctioneer is as frequently employed to sell subject to a reserve as without one, and indeed in certain markets it may be said to be the more usual practice. A principal, therefore, who gives authority to an auctioneer to sell subject to a reserve price gives no power to the auctioneer, either expressly or impliedly, to accept a less price." Rainbow v. Howkins, [1904] 2 K. B. 322, was doubted.

In Whitehead v. Tuckett, 15 East, 400, a manuscript case is referred decided in 1792 or 1793, to the following effect: "A servant was sent with a horse to a fair with an express order from the master not to sell it under a certain sum; the servant, notwithstanding, sold it for a less sum; upon which the master immediately gave notice and brought trover against the purchaser; and it was *held* that he might recover, because the servant was not his general agent."

But, on the other hand, it is said by Pollock, C. B., *arguendo*, in Smith v. McGuire, 3 H. & N. 554, "If a man sends his servant to market to sell goods, or a horse, for a certain price, and the servant sells them for less, the master is bound by it. There, even the violation of a particular authority does not render the sale null and void." Same effect: United States v. Torres, 11 Philipp. 606.

In Galbraith v. Weber, 58 Wash. 132, 28 L. R. A. (N. S.) 341, it is said: "Where the agent has exclusive possession of the property of his principal with authority and for the express purpose of selling it to any purchaser he may find, we think a purchaser from such agent would clearly have the right to rely upon the agent having power to agree upon the purchase price; but in that case the principal had not fixed the price, though he *valued* the article at a certain sum. See also, Cooper v. Coad, 91 Neb. 340.

[98] See the leading case of Whitehead v. Tuckett, 15 East, 400, where prices named by the principals in a series of letters written to their agents to sell (held to be general agents), were held to be mere suggestions or advices and not limitations upon authority. The court distinguished the case from a MS. case referred to in argument and given in the preceding note.

limits prescribed by his principal, the limitations so fixed must usually be regarded as mere instructions.

With respect of price, therefore, the situation seems to be this: If the principal has not fixed the price, the agent may do so, within ordinary and reasonable limits, because it must be fixed in order to effect the sale. If the principal has prescribed the price, his limitations are binding upon the agent, and upon third persons also, unless the principal's provisions as to price are to be regarded as mere private instructions to the agent or unless the principal has in some way held the agent out as one having authority to fix the price. Merely intrusting an agent with the possession of the property he is to sell, is not necessarily such a holding out, though it will be where such an agent so intrusted has ordinarily the authority to sell upon such terms as he can secure.

§ 858. ——— Terms or conditions attached.—With respect of the terms or conditions which may be attached to contracts of sale, it has been held that it is within the apparent scope of an agency for the sale of goods, to stipulate that if the property is not satisfactory to the purchaser, or if the machinery sold does not do good work, and the like, it may be returned.[99] A stipulation that if it be found not marketable within a reasonable prescribed time, it may be returned, has also been upheld; at least, the principal cannot enforce the residue of the contract, and repudiate this portion of it.[1] An agent selling a furnace to be shipped in detached parts has implied authority to agree that they shall be put together and placed in the building where they are to be used.[2] So a traveling salesman has been held to have implied authority to undertake to transmit instructions to his principal to cause the goods shipped to be insured, where it is the custom of the principal to effect such insurance on the request of purchasers.[3]

§ 859. ——— But, on the other hand, it has been held that a traveling salesman has no implied authority to make such an unusual

[99] Oster v. Mickley, 35 Minn. 245 (agricultural implement, see also *post*, § 885; Zaleski v. Clark, 44 Conn. 218, 26 Am. Rep. 446 (a bust to be made by a sculptor); French Piano Co. v. Cardwell, 114 Ga. 340 (a piano); Eastern Mfg. Co. v. Brenk, 32 Tex. Civ. App. 97 (jewelry).

[1] Babcock v. Deford, 14 Kan. 408. But see cases cited in following section.

[2] Boynton Furnace Co. v. Clark, 42 Minn. 335. In Lamon v. Speer Hardware Co. (C. C. A.), 198 Fed. 453, it is held to be within the implied authority of an agent to sell a cotton ginning plant to agree to erect it and put it in running order. But this, of course, cannot be a universal rule.

[3] McDonald v. Pearre, 5 Ga. App. 130. Where an agent was sent out to sell a horse and was given a writ-

contract as that all of the goods unsold by the purchaser may, after the season is ended, be returned by him on or before the day of settlement;[4] or that the principal would receive and allow for imperfect goods previously purchased by the buyer from other parties;[5] or which he might subsequently purchase from the same principal;[6] or that he need pay for the goods only as he resells them, and that the agent will find buyers for him,[7] or that for every sample article which the buyer gives away, he will sell a certain number of accessories within a given time,[8] or that the principal will pay for fitting up a place in which to sell the goods.[9]

Oral conditions attempted to be attached to written contracts, will be excluded by the rules relating to that subject.[10]

§ 86b. ——— Failure to impose conditions prescribed by principal.—A sales agent who fails or neglects to impose conditions upon the sale which have been prescribed to him by his principal, makes himself liable to his principal, but whether his failure or neglect will

ten statement by his principal that the latter would be bound by any contract the agent made, he was held bound by an agreement that if the horse did not earn his cost the principal would make allowance for the deficiency. Worsley v. Ayres, 144 Iowa, 676.

[4] Friedman v. Kelly, 126 Mo. App. 279, or that the buyer may countermand the order at his pleasure. Metropolitan, etc., Co. v. Lau, 61 N. Y. Misc. 105. Compare Babcock v. Deford, *supra*.

In Clayton v. Western Nat. Wall Paper Co., — Tex. Civ. App. —, 146 S. W. 695, an agreement by a sales agent that, if the buyer would buy more goods, the seller would take back certain undesirable and inferior goods previously purchased from him, was held to be within his implied authority.

In Kinser v. Calumet Fire Clay Co., 165 Ill. 505, a salesman who desired to furnish goods to one bidding for public work, agreed that if the latter would lower his bid and thus secure the contract, the agent's principal would guaranty him against loss on the contract. *Held*, unauthorized.

[5] Phoenix Pottery Co. v. Perkins, 79 N. J. L. 78.

[6] Ide v. Brody, 156 Ill. App. 479. Same effect, where bargain was to allow on price of goods now sold, the price of goods previously purchased and paid for. Lindow v. Cohn, 5 Cal. App. 388. The court treated such an arrangement as a barter or exchange—in any event, not a sale for cash. But see Clayton v. Western Nat. Wall Paper Co., *supra*.

[7] Ball v. Freund, 117 N. Y. Supp. 193.

[8] Sale of "talking machines," purchased to be given away as advertisements, with guaranty that for every machine given away the buyer would sell, on the average, twenty-five "records," within four months. Johns v. Jaycox, 67 Wash. 403, 39 L. R. A. (N. S.) 1151.

[9] Salesman of brewery undertook to pay for fitting up a saloon in which to sell the beer. Schoenhofen Brew. Co. v. Wengler, 57 Ill. App. 184.

[10] Written orders secured by agent and sent to principal who accepts them are not affected by parol agreements with the agent of which

affect the title of the purchaser will depend upon a variety of circumstances. A purchaser with notice of the conditions could acquire no title in violation of them; but a purchaser who buys in ignorance of the conditions and upon terms which are usually within the power of such an agent to make, would be protected.[11] Thus one who buys a book of an agent in the ordinary way, receives it and pays for it, is held not charged with conditions restricting its resale which are printed on the inside of the cover and which he neither saw nor had called to his attention until after the purchase was completed, even though it was the duty of the agent to make the sale only upon that condition.[12]

§ 861. Authority to make binding contract.—As in the case of real estate, a so-called authority to sell may confer power to actually make the sale, or it may be confined to the mere preliminary negotiation—the finding of a purchaser with whom the principal may deal in person, or the solicitation of orders which the principal may accept or reject at his pleasure.

Authority merely to solicit orders and transmit them to the principal, as is usually the case with the so-called "drummer" or traveling solicitor, clearly confers no power to accept the orders so taken or to make a binding contract of sale.[13] Such a power may, however, be

principal is ignorant. McCaskey Register Co. v. Curfman, 45 Ind. App. 297; Holt Mfg. Co. v. Odenrider, 61 Wash. 555; Bybee v. Embree-McLean Carriage Co., — Tex. Civ. App. —, 135 S. W. 203.

Buyer has no right to rely on conditions which, as he sees, are repugnant to the contract or order which he signs. Metropolitan, etc., Co. v. Lau, *supra*.

[11] Authors', etc., Ass'n v. O'Gorman, 147 Fed. 616.

[12] Authors' etc., Ass'n v. O'Gorman, *supra*.

The court also says that a rule which would require the purchaser upon learning of it either to observe the restriction or return the book is "impractical and unsound." A principal however who insists upon retaining an article bought upon unauthorized conditions, or who seeks to enforce a contract with unauthorized terms, after he learns of the facts, is usually held to ratify the act. He must either repudiate the transaction or stand by its terms.

[13] Bensberg v. Harris, 46 Mo. App. 404; Bauman v. McManus, 75 Kan. 106, 10 L. R. A. (N. S.) 1138; Mathews Apparatus Co. v. Renz (Ky.), 22 Ky. Law Rep. 1528, 61 S. W. 9; Brown Grocery Co. v. Becket (Ky.), 22 Ky. L. Rep. 393, 57 S. W. 458; Ryan v. American Steel & Wire Co., 148 Ky. 481, 146 S. W. 1099; Elfring v. New Birdsall Co., 16 S. Dak. 252; Becker v. Clardy, 96 Miss. 301, Ann. Cas. 1912 B. 355.

See also Abrahams v. Weiller, 87 Ill. 179.

Notice of the lack of authority may be communicated by the terms of the order. Deane v. Everett, 90 Iowa, 242. Salesman may insert stipulation requiring acceptance by principal, even though he had authority to make a binding contract. Gilman v. Stock, 95 Me. 359.

A "drummer" or soliciting agent is not a peddler or merchant. City v. Collins, 34 Kan. 434; State v.

conferred expressly,[14] or it may arise by implication from a course of dealing,[15] or from the general custom of the trade.[16]

An agent having an apparently general power to sell may bind his principal by accepting the order, and the contract will not be affected by the principal's reservation of a right to reject all orders taken by him, where such reservation was not known to the other party and was not suggested by the circumstances.[17]

Miller, 93 N. C. 511, 53 Am. Rep. 469; Com. v. Farnum, 114 Mass. 267.

[14] In Pittsburg Sheet Mfg. Co. v. West Penn. Sheet Steel Co., 197 Pa. 491, a written contract of employment between a steel company and a salesman which had express stipulations respecting performance, commissions, prices, and the like, but contained no provision that orders should be subject to ratification or approval of the company, was held to give the salesman authority to bind his employer by an absolute contract of sale. Compare McKeige v. Carrol, 120 N. Y. App. Div. 521; Falihee v. Simmons, 121 N. Y. App. Div. 839.

[15] Brennan v. Dansby, 43 Tex. Civ. App. 7.

See Spooner v. Browning, [1898] 1 Q. B. 528, 67 L. Jour. Q. B. 339, where it was held that the fact that a principal allows an agent to obtain orders for him which the principal may fill or not as he sees fit—this being well known to the party who gives the order—and the fact that he has on two occasions filled such orders, does not afford any evidence from which the inference of fact can reasonably be drawn that the principal holds the agent out either as having authority to bind him by contracts or as representing that the principal will fill orders brought him by the agent so as to make the principal liable for an order subsequently given to the agent but not submitted to the principal and apparently accepted by documents forged by the agent.

In Hopkins v. Armour, 8 Ga. App. 442, a sale was upheld because it appeared that in previous dealings the orders as given by the buyer to the salesman had been filled, and because of a custom alleged to prevail among such salesman to make binding contracts, although there appeared no facts bringing home to the principal any knowledge either of the prior dealings or of the custom.

But compare with Gould v. Cates Chair Co., 147 Ala. 629, where it is said that a principal in North Carolina is not bound by customs prevailing in Alabama, especially where the customs urged prevailed among salesmen only.

[16] Such a custom shown. Mabray v. Kelley-Goodfellow Shoe Co., 73 Mo. App. 1; Friedman v. Kelly, 126 Mo. App. 279; Austrian v. Springer, 94 Mich. 343, 34 Am. St. Rep. 350; Cawthon v. Lusk, 97 Ala. 674.

[17] Banks v. Everest, 35 Kan. 687 (where there was a long course of dealing with the agent of a law book publisher thought to justify the conclusion that he was authorized to make binding contracts); Potter v. Springfield Milling Co., 75 Miss. 532 (a case doubtful upon its facts).

See also Nebraska Bridge Supply Co. v. Conway, 127 Iowa, 237.

A salesman who is supplied by his principal with blank forms of bills of sale including the principal's name as seller, may make a binding contract. Watterson v. Beaudry, 35 Que. Super. 450.

In Dreyfus v. Goss, 67 Kan. 57, a traveling salesman sold goods by sample, sending the order to his principal. The goods were shipped but on arrival were found not to be like the sample. When the agent came again, he admitted that the

§ 862. ——— To execute and deliver necessary documents or memoranda.—As incident to the power to make a binding contract of sale or to sell, the agent would have implied power to make, execute and deliver any necessary and usual bill of sale, or any necessary and usual note or memorandum in writing, which may be required to give his act effect, or to satisfy the statute of frauds, and the like.[18] These he may, of course, couch in the usual and appropriate language.

§ 863. Authority of selling agent to receive payment—In general. Whether an agent authorized to sell personal property has implied authority to receive payment, is a question upon which there has been much difference of opinion. It will be obvious that its solution must depend largely upon the nature of the particular transaction and the usages if any in relation thereto.

If a merchant places behind his counters a clerk to sell goods, it could not be doubted that, in the absence of a known custom to pay a cashier or other person, the clerk would have implied power to receive, *at the time of the sale,* payment for the goods sold by him.[19] Whether he would have authority at some subsequent time to receive payment for the goods sold, after the account had gone upon the books, and the matter had passed into other hands, is evidently not so clear. If payment were made to him at his usual place in the store, the case would present a different aspect than if it had been made to him at his own home or upon the street. So, too, if he were one of many salesmen in a large establishment in the metropolis, a different case would be presented than if he were the only clerk in a country store combining in himself salesman, bookkeeper and collector.[20]

goods were not equal to the sample, and made a new contract that the buyer should keep them at a less price and on a longer credit. *Held,* that this contract was a present binding sale, and within the authority of the agent. *Sed quaere.*

[18] Potter v. Springfield Milling Co., 75 Miss. 532.

[19] See Hirshfield v. Waldron, 54 Mich. 649, where Champlin, J., says: "The usual employment of a clerk in a retail store is to sell goods to customers or purchasers, and it is implied from such employment that he has authority to receive pay for them on such sale. But there is no implication from such employment that he has authority, after the goods are delivered and taken from the store, to present bills and collect money due to his employers, because it is not in the scope of the usual employment of such clerks."

[20] See Davis v. Waterman, 10 Vt. 526, 33 Am. Dec. 216, where it is held that a clerk in a country store with whom are left the goods and demands of his employer, has charge of both, and in the absence of his principal, has power to receive pay on the demands and to institute suits for their security when an emergency arises.

Again if he were sent about the country with authority to sell goods entrusted to his possession for that purpose, authority to receive payment therefor would be implied, as it would not be presumed that the principal intended that they should be parted with without payment.[21] But if his authority was simply to solicit orders for goods, a sample of which he had in his possession, it being left for the principal to deliver the goods in pursuance of the orders taken, the question whether the agent might subsequently collect payment merely as an incident of the authority to take orders, would present other considerations.[22]

§ 864. Authority to receive payment not implied from possession of bill.—The mere fact that one claims to be authorized to receive payment is no evidence of his authority, nor can such authority be implied from the mere possession by the assumed agent of the bill or account, though made out upon the principal's bill-head and in his own handwriting.[23]

But where the principal sends to a traveling agent, a bill for goods sold by him, and also, a bill for goods sold to the same purchaser by the principal himself, and the purchaser, in reliance upon these facts, pays the agent, a jury may properly find that the agent had apparent authority to receive the payment.[24]

§ 865. Agent authorized to deliver possession may receive payment.—Where the principal entrusts the agent with the possession of the goods to be sold and authorizes him to sell and deliver them, authority to receive payment of so much of the purchase price as is to be paid at the time of such delivery, will be implied, and a payment made to the agent at the time of the sale and delivery, or as part of the same transaction, will be binding upon the principal;[25] of course,

[21] See following section.

[22] See *post*, § 864.

[23] Hirshfield v. Waldron, 54 Mich. 649; Dutcher v. Beckwith, 45 Ill. 460, 92 Am. Dec. 232. See also Kornemann v. Monaghan, 24 Mich. 36; Grover & Baker Sew. Machine Co. v. Polhemus, 34 Mich. 247; Reynolds v. Continental Ins. Co., 36 Mich. 131; McDonough v. Heyman, 38 Mich. 334.

[24] Luckie v. Johnston, 89 Ga. 321.

[25] Bailey v. Pardridge, 134 Ill. 188; Adams v. Fraser, 82 Fed. 211, 27 C. C. A. 108; Sumner v. Saunders, 51 Mo. 89; Brooks v. Jameson, 55 Mo. 505; Rice v. Groffman, 56 Mo. 434; Birch Tree Bank v. Brown, 152 Mo. App. 589; Capel v. Thornton, 3 Car. & P. 352.

Some of the broader *dicta* in the Missouri cases cited above, that the power to receive payment is an incident to the power to sell in any case, are properly withdrawn in Butler v. Dorman, 68 Mo. 298, 30 Am. Rep. 795.

Receiving payment upon sale on trial.—Under a contract, held by the court to create a general agency, it was held that the agent of a piano company, intrusted with possession, could select the purchaser and agree upon terms of sale, which

in the absence of any knowledge on the part of the purchaser that the agent was not authorized to receive payment. It is to be presumed in such a case that payment and delivery are to be substantially concurrent acts, and the agent who is authorized to deliver must be presumed to be authorized to complete the sale by receiving payment, either simultaneously or so soon thereafter as to be really a part of the same transaction.

Where, however, the price is to be paid in installments, the agent, though having thus implied authority to receive the installment to be paid at the time of delivery, would ordinarily thereby exhaust his authority, and would have no implied authority to subsequently receive the remaining installments.[26] Such authority might, of course, be inferred from a more general authority over the subject-matter, or from a course of conduct or a holding out reasonably indicating such a wider power.[27]

§ 866. Payment to general sales-agent.—Carrying the doctrine of the preceding section a step further, it is clear that where the principal establishes a general sales agency, of which he puts the agent in charge, authorizing him to sell the goods, fix the terms and conditions of sale and to receive the proceeds of sales, payments made to such agent for goods purchased of him are apparently within the scope of his authority, and will bind the principal in the absence of any limitation upon his authority known to the person who makes the pay-

might be either for cash or on credit, and deliver the property in completion of the sale or on trial looking to a completion in the future, and receive money in advance to be applied on the purchase price if the sale was completed. French Piano Co. v. Cardwell, 114 Ga. 340.

Receiving payment before delivery.—In Shull v. New Birdsall Co., 15 S. D. 9, it was held that a special agent to sell machinery had no implied authority to receive payment before delivery. To same effect see, Case Thresh. Mach. Co. v. Eichinger, 15 S. D. 530.

[26] See Seiple v. Irwin, 30 Pa. St. 513; Clark v. Smith, 88 Ill. 298; Law v. Stokes, 32 N. J. L. 249, 90 Am. Dec. 655; Butler v. Dorman, 68 Mo. 298, 30 Am. Rep. 795; Adams v. Fraser, 82 Fed. 211, 27 C. C. A. 108; and cases cited in § 869, *post*.

American Sales Book Co. v. Cowdrey, 100 Ark. 325, 38 L. R. A. (N. S.) 700, is *contra*. There the agent sold apparatus upon terms of part cash and balance in six installments; at the time of the sale he agreed to come back at a later date and instruct the buyer in the use of the apparatus. On that later date, he collected the balance of the price, giving a discount for cash. *Held*, that the payment was good. One judge dissented, and the case is certainly questionable. There was also a notice on the statement sent by the seller "Pay no money to agents."

[27] See Howe Machine Co. v. Ballweg, 89 Ill. 318; Brooks v. Jameson, 55 Mo. 505; Sumner v. Saunders, 51 Mo. 89; Lamb v. Hirschberg, 1 N. Y. Misc. 108; Baldwin v. Tucker, 25 Ky. L. Rep. 822, 75 S. W. 196.

ment.[28] In pursuance of this view, it has been held that where such an agent has taken a note for the price, as he was authorized to do, and has sent it to his principal, payments afterwards made to the agent will be effective against the principal where the buyer was ignorant of any limitation on the agent's authority.[29]

Such an agent has, however, as will be seen hereafter,[30] no authority to take notes payable to himself,[31] or to accept in payment property transferred to himself or the discharge of debts or notes due from himself.[32]

§ 867. Payment to agent as ostensible owner.—And so where an agent authorized to sell and entrusted with possession of the property to be delivered upon the sale, is expressly or by implication authorized or permitted to sell in his own name as though he were the owner, and makes a sale in his own name to one who does not know and has no good reason to believe that he is not the owner, a payment made to the agent or a set off acquired against him before the principal is disclosed will be effective against the principal.[33] An agent so situated is ostensibly the owner of the goods and the principal who has per-

[28] Kasson v. Noltner, 43 Wis. 646; Estey v. Snyder, 76 Wis. 624; Sumner v. Saunders, 51 Mo. 89; Brooks v. Jameson, 55 Mo. 505; Howe Machine Co. v. Ballweg, 89 Ill. 318; Sawin v. Union Bldg. Ass'n, 95 Iowa, 477.

[29] Kasson v. Noltner, *supra;* Sumner v. Saunders, *supra;* Brooks v. Jameson, *supra.* So in case of a chattel mortgage. Estey v. Snyder, *supra.*

[30] See *post*, § 949 *et seq.*

[31] Baldwin v. Tucker, 112 Ky. 282, 23 Ky. L. Rep. 1538, 57 L. R. A. 451 (same case, aff'd 75 S. W. 196, 25 Ky. L. Rep. 222).

[32] Walton Guano Co. v. McCall, 111 Ga. 114; Hoffman v. Ins. Co., 92 U. S. 161, 23 L. Ed. 539; Stewart v. Woodward, 50 Vt. 78, 28 Am. Rep. 488; Wheeler & Wilson Mfg. Co. v. Givan, 65 Mo. 89; Bertholf v. Quinlan, 68 Ill. 297; Aultman v. Lee, 43 Iowa, 404.

[33] Rabone v. Williams, 7 T. R. 360, n; George v. Clagett, 7 T. R. 359; Fish v. Kempton, 7 C. B. 687; Cooke v. Eshelby, 12 App. Cas. 271; Montagu v. Forwood, [1893] 2 Q. B. 350; Semenza v. Brinsley, 18 C. B. (N. S.) 467; Borries v. Imperial Ottoman Bank, L. R. 9 C. P. 38; *Ex parte* Dixon, 4 Ch. D. 133; Capel v. Thornton, 3 Car. & P. 352; Hogan v. Shorb, 24 Wend. (N. Y.) 458; Judson v. Stilwell, 26 How. Pr. (N. Y.) 513; Pratt v. Collins, 20 Hun (N. Y.), 126; Maxfield v. Carpenter, 84 Hun, 450; Baxter v. Sherman, 73 Minn. 434, 72 Am. St. Rep. 631; Rice v. Groffman, 56 Mo. 434; Hutchinson Mfg. Co. v. Henry, 44 Mo. App. 263; Tripp, etc., Shoe Co. v. Martin, 45 Kan. 765; Eclipse Wind Mill Co. v. Thorson, 46 Iowa, 181; Bennett v. Williamson, 9 Ohio Cir. Ct. Rep. 107, 6 Ohio C. D. 59; DuBois v. Perkins, 21 Or. 189; Peel v. Shepherd, 58 Ga. 365; Lumley v. Corbett, 18 Cal. 494; Ohio Pottery Co. v. Talbert, 87 S. Car. 194; Hook v. Crowe, 100 Me. 399.

See also Pickering v. Busk, 15 East, 38; Greely v. Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; Goodnow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22.

mitted him to assume that appearance is estopped to assert his ownership as against one who has relied upon the contrary appearance.[34] The case of the factor[35] or commission merchant[36] who usually sells in his own name is the typical one, and is sharply in contrast with that of the broker[37] who usually has not possession and sells in the name of his principal.

The situation presupposes not only an agent in possession authorized to sell (whose duty it is ordinarily to sell only as agent and in the name of his principal), but also a real or apparent authority to sell in the agent's own name.[38] The failure to observe this last requirement has

So where the agent is permitted to carry on the business as though it was his own, his acts in taking and disposing of notes cannot be disturbed by the unknown principal. Gardner v. Wiley, 46 Or. 96.

[34] In Semenza v. Brinsley, 18 C. B. (N. S.) 467, 477, it is said by Willes, J., to be one of the essentials to the set-off that the agent "sold them as his own goods in his own name as principal *with the authority of the plaintiff*." [Italics in these quotations are mine, F. R. M.]

In Montagu v. Forwood, [1893] 2 Q. B. 350, *supra*, it is said by Bowen, L. J.: "The case is, in my judgment, governed by the principle of the decision in George v. Clagett, by the rules of common sense and justice, and I think also by the law of estoppel. The principle is not confined to the sale of goods. If A employs B as his agent to make any contract for him, or to receive money for him, and B makes a contract with C, or employs C as his agent, *if B is a person who would be reasonably supposed to be acting as a principal*, and is not known or suspected by C to be acting as an agent for any one, A cannot make a demand against C without the latter being entitled to stand in the same position as if B had in fact been a principal. If A has allowed his agent B to appear in the character of a principal, he must take the consequences."

In Cooke v. Eshelby, 12 App. Cas. 271, it is said by Lord Halsbury: "The ground upon which all these cases have been decided is that the agent *has been permitted by the principal* to hold himself out as the principal, and that the person dealing with the agent has believed that the agent was the principal and has acted on that belief." By Lord Watson: "It must also be shown that the agent was enabled to appear as the real contracting party *by the conduct or by the authority express or implied of the principal*. The rule thus explained is intelligible and just; and I agree with Bowen, L. J., that it rests upon the doctrine of estoppel."

In Brown v. Morris, 83 N. Car. 251, it is said: "The proposition that because the defendant thought, *without being misled by any one*, that the goods belonged to the agent, the principal and owner could not recover, is without support in reason or authority." See also Baxter v. Sherman, 73 Minn. 434, 72 Am. St. Rep. 631.

[35] See Rabone v. Williams; George v. Clagett.

[36] As in Hogan v. Shorb; Tripp, etc., Shoe Co. v. Martin.

[37] See Maxfield v. Carpenter, *supra;* Bassett v. Lederer, 3 Th. & C. (N. Y.) 671.

[38] See second note to this section *supra*.

ment, and payment made to such an agent will not be payment to the principal, unless the agent be in fact authorized or the principal has held him out as so authorized.[49b] If however, payment in whole or in part is to be made at the time the order or subscription is taken, authority to receive such payment will be implied, as has been already seen,[49c] and so, of course, if such has been the course of dealing between the particular parties, or if the principal has held the traveling salesman out as authorized to receive it, a payment made to him subsequent to the sale will be payment to the principal.[49d] Subsequent dealings or the terms of the employment may also give the authority.[49e]

[49b] Simon v. Johnson, 101 Ala. 368, 105 Ala. 344, 53 Am. St. R. 125; Meyer v. Stone, 46 Ark. 210, 55 Am. Rep. 577; Sioux City Nursery Co. v. Magnes, 5 Colo. App. 172; Lakeside Press, etc., Co. v. Campbell, 39 Fla. 523; Clark v. Smith, 88 Ill. 298; Greenhood v. Keator, 9 Ill. App. 183; Williams v. Anderson, 107 Ill. App. 32; Kane v. Barstow, 42 Kan. 465, 16 Am. St. R. 490; Dreyfuss v. Goss, 67 Kan. 57; Clark v. Murphy, 164 Mass. 490; Kornemann v. Monaghan, 24 Mich. 36; Brown v. Lally, 79 Minn. 38; Sumrall v. Kitselman, — Miss. —, 58 So. 594; Butler v. Dorman, 68 Mo. 298, 30 Am. Rep. 795; Chambers v. Short, 79 Mo. 204; Law v. Stokes, 32 N. J. L. 249, 90 Am. Dec. 655; Hahnenfeld v. Wolff, 15 N. Y. Misc. 133; Zilberman v. Friedman, 54 Misc. 256; Scarritt Furn. Co. v. Hudspeth, 19 Okl. 429, 14 Ann. Cas. 857; Seiple v. Irwin, 30 Pa. 513; Fabian Mfg. Co. v. Newman (Tenn. Ch. App.), 62 S. W. 218; Crawford v. Whittaker, 42 W. Va. 430; McKindley v. Dunham, 55 Wis. 515, 42 Am. Rep. 740. The fact that the agent falsely represents himself to be a member of the selling firm is immaterial. Crawford v. Whittaker, *supra*.

[49c] See *ante*, § 864.

[49d] See Luckie v. Johnston, 89 Ga. 321 (principal sent the bills for the goods to the agent, and buyer paid in reliance thereon); Hutchison Mfg. Co. v. Henry, 44 Mo. App. 263 (principal clothed agent with apparent authority by entrusting him with possession of the goods); Warren v. Halley, 107 Mich. 120 (buyer asked where he should pay; principal replied that he preferred to have payments at the office, but would send a man; later selling agent came with a receipt on one of principal's printed blanks, though made out by the agent, and buyer paid to him).

A *general* agent for the sale of property *held* to have implied authority to receive payment either before or after delivery. Sawin v. Union Bldg. Ass'n, 95 Iowa, 477.

See also Lorton v. Russell, 27 Neb. 372.

[49e] Where a salesman who had taken an order from a purchaser who did not pay, was offered the account by his principal at a discount, and was authorized to sell the account to any one at a discount, instead of selling it wrote directly to the debtor that he might have the same discount if he would pay the debt to the agent, and the debtor did so pay it, but the agent did not pay the principal, it was *held* that these offers of the principal were sufficient to authorize the agent to collect the amount as he did, and that the principal could not recover the amount from the debtor. Superior Mfg. Co. v. Russell, 127 Ga. 151.

So where the contract between the principal and the agent makes

A merely local custom, however, to make such payments can not be operative in the absence of some evidence that the principal knew of and assented to it.[49f]

§ 871. ——— When payment to agent part of terms of sale.—But it has been held that an agent authorized to take the order has the implied authority to make terms of payment as to time and place, to the extent at least of what was customary and not extraordinary; and that where it is made one of the terms of sale that payment may be made to the agent at the purchaser's place of business, to save the expense and trouble of remittance, payment to the agent was payment to the principal.[49g]

So where a traveling salesman agreed, though without authority, to receive certain goods in part payment for those sold by him, the purchaser being ignorant of his want of authority, it was held that the agreement was binding upon the principal who had shipped the goods to the purchaser, and sued for the price.[49h]

These cases, however, are to be sustained upon the ground of ratification rather than that of implied authority. The defendant had agreed to pay the price only upon the understanding that it could be paid in a certain manner. If the agreement in that respect was unauthorized, the principal might refuse to deliver, or might recover his goods, but he could not sue on the contract and enforce it, so far as it was favorable to himself, and repudiate it as to the residue.

§ 872. ——— Notice of want of authority.—But whatever inference of authority might otherwise be drawn, its effect may be neutralized by an adequate notice to the purchaser that the agent has no authority to receive payment. Express notice of such a limitation actually delivered to the purchaser would of course be sufficient;[49i]

him liable for the price of the goods sold by him, it is said that he has thereby implied authority to collect the price [*sed quaere* as a universal rule] though another term in the contract providing that the principal should have the right to make collections if he desired was held conclusive of the agent's power in the absence of an election by the principal to collect. Diebold Safe & Lock Co. v. Dunnegan, 135 Mo. App. 135.

[49f] Simon v. Johnson, 101 Ala. 368.

[49g] Putnam v. French, 53 Vt. 402, 38 Am. Rep. 682; Trainor v. Morison, 78 Me. 160, 57 Am. Rep. 790; Scott v. Hopkins, 41 Hun, 637.

[49h] Billings v. Mason, 80 Me. 496 (distinguishing Clough v. Whitcomb, 105 Mass. 482, and Finch v. Mansfield, 97 Mass. 89, and likening the case to Wilson v. Stratton, 47 Me. 120).

So also Hook v. Crowe, 100 Me. 399; Shoninger v. Peabody, 57 Conn. 42, 14 Am. St. Rep. 88.

[49i] See Metz v. Savings Association, 117 App. Div. 825 (a land case) where it was a term in the contract that the agents had not power to receive payment.

but it need not always be express: it is enough if the facts brought to the buyer's attention reasonably apprise him of the limitation.[49]

It is frequently attempted to give notice to the purchaser that the agent is not authorized to receive payment, by printing or writing upon the bill or invoice, a warning to that effect. Whether such a warning can be held to be constructive notice seems to depend largely upon the degree of prominence given it. Thus, it is said by a Wisconsin judge, "On the face of the bill sent to the defendant, and directly under his address, there appears in large, legible print in red ink, as if stamped upon it, the words 'Agents not authorized to collect.' * * * If these words so legible and prominent on the face of the bill, would not be notice, it would seem to be impossible to give a purchaser such a notice. By all authorities he must be presumed to have observed these words, and to have had such notice when they were so prominent on the face of the bill of goods in his possession, and in which he alone was interested as purchaser. It might as well be said that the contents of any written or printed notice of any kind, or for any purpose, were not presumed to have been brought home to, and to be known by, a party on his receipt of the notice." [50]

In a Vermont case above referred to it is said: "It is further insisted by the plaintiffs' counsel that the defendants were charged with notice that they must pay the plaintiffs and not Allen (the agent) by reason of the words 'payable at office' written on their bill rendered, when the last invoice was sent. The defendants did not see those

[49] Williams v. Anderson, 107 Ill. App. 32.

In Lamb v. Hirschberg, 1 App. Div. (N. Y.) 519, it is said: "If there is notice direct or implied to pay to a principal, and, therefore, not to the agent, payment to the latter will not bind the principal." In this case one Beaumont as agent for Bradley sold goods to defendant. At the time of sending the invoice Bradley wrote to defendant. "Kindly favor me with your remittance on receipt of the goods, and oblige," and later, "will you kindly send check for above amount by return, or in case you have remitted part, kindly send balance to cover." *Held*, subsequent payment to Beaumont not binding. In Stanwood v. Trefethen, 84 Me. 295, plaintiff, the owner of a cargo of fish, wrote to defendant, who purchased such fish: "Should the schooner, Midnight, * * * sell fresh fish in Portland, will you please see that the check is made payable to my order as the captain is a stranger to me? By so doing you will confer a favor." *Held*, notice was sufficient. In Lakeside Press & Photo-Engraving Co. v. Campbell, 39 Fla. 523, after a sale and the receipt of the goods plaintiff sent the following notice to defendants: "Agents are not authorized to make collections." *Held*, sufficient notice.

[50] Orton, J., in McKindly v. Dunham, 55 Wis. 515, 42 Am. Rep. 740. To same effect is Law v. Stokes, 32 N. J. L. 249, 90 Am. Dec. 655, though there was also a letter of warning in this case.

words. Therefore they had no notice in fact. Should they be held chargeable with notice? The plaintiffs sent that bill without any letter, when the goods were sent, which was three months before the time of payment agreed upon. The defendants examined it as to items charged and amount of same, and filed it away,—never noticing those words; and when Allen came around at about the time he was to come for the pay by the terms of the sale, they paid him the balance due,—supposing all the while that he was, as he claimed to be, a member of the firm. In view of the obscure manner in which those words were written on the bill-head; and of the circumstances under which, and the purposes for which in other respects that bill was sent, and of the terms of the contract as to whom and when and where payment was to be made, we do not think the defendants were guilty of such negligence, in not seeing those words, as to be chargeable with notice which they did not in fact have. It was a matter which the plaintiffs might easily have made plain. They saw fit to undertake to give the notice in an obscure way which was likely to be ineffectual. It turned out so and they should bear the consequences." [51]

So goods ordered of an agent were delivered as agreed, accompanied by a bill with the words, "All bills must be paid by check to our order or in current funds at our office," printed in red at the top. About two weeks afterward, the agent called for and received payment, giving to the purchasers a receipted bill bearing the same notice in red letters that appeared upon the bill sent with the goods. The agent embezzled the money. The court said: "The plaintiff seeks to charge the defendants with knowledge that payment was required to be made according to the terms of the notice in red letters upon the bill sent with the goods. The defendants did not see the notice, nor taking into consideration the care ordinarily exercised by prudent men, are they at fault for not observing it. It is not so prominent upon the bill as to become a distinctive feature of it, one that would be likely to attract attention in the hurry of business and that ought to have been seen by the defendants. It would have been an easy matter for the plaintiff to have inclosed the bill in a letter of advice, calling the attention of the defendants to the fact that he was unwilling to intrust collections to his agent." [52]

[51] Veazey, J., in Putnam v. French, 53 Vt. 402, 38 Am. Rep. 682. To same effect: Luckie v. Johnston, 89 Ga. 321.

[52] Trainor v. Morison, 78 Me. 160, 57 Am. Rep. 790; see also Kinsman v. Kershaw, 119 Mass. 140; Law v. Stokes, 32 N. J. L. 249, 90 Am. Dec. 655.

A notice mailed but not received would be of no effect. Scott v. Hopkins, 41 Hun, 637.

§ 873. ——— What may be received in payment when receipt is authorized.—The question of what a selling agent, who is authorized to receive payment, may accept as payment, is included within the discussion in a later subdivision dealing with agents generally who are authorized to collect or receive payment;[53] and it will not be separately considered here.

§ 874. ——— Purchaser cannot set off debt due from agent.—For reasons similar to those preventing payment to an agent authorized merely to sell, the purchaser cannot set off against the principal a debt due him from the agent,[54] except where the agent is permitted to appear as ostensible owner as has been seen in a preceding section.[55]

§ 875. Implied authority of traveling salesmen to hire horses.—It has been held that an agent authorized to travel from place to place to sell his principal's goods, has implied authority to hire horses and carriages, when necessary for use in the course of his employment, to transport himself and his samples;[56] and for that purpose may use his principal's funds in his hands, or pledge his principal's credit. And even though the agent may have been supplied by the principal with money for that purpose, and forbidden to pledge the credit of the principal therefor, the principal, it is said, will be liable to one who in good faith has supplied the agent with horses, without knowledge of those instructions.[57]

[53] See *post*, §§ 946 *et seq.*

[54] Bernshouse v. Abbott, 16 Vroom (N. J.), 531, 46 Am. Rep. 789; Talboys v. Boston, 46 Minn. 144; Zelenka v. Port Huron Mach. Co., 144 Iowa, 592; Grubel v. Busche, 75 Kan. 820.

[55] See *ante*, § 867.

[56] Bentley v. Doggett, 51 Wis. 224, 37 Am. Rep. 827.

See also Huntley v. Mathias, 90 N. Car. 101, 47 Am. Rep. 516, where the principal was held liable because his agent, who had hired a horse to transport his samples, had overdriven the same. Same effect: Rexroth v. Holloway, 45 Ind. App. 36.

But in Alabama it is held that "authority to sell and canvass for the sale of sewing-machines, does not, *per se*, confer the power to purchase or hire a horse or mule to aid the agent's locomotion and thus fasten a liability on the principal." Howe Machine Co. v. Ashley, 60 Ala. 496. See also Nicholson v. Pease, 61 Vt. 534.

[57] Bentley v. Doggett, *supra*.

"The defendants not having furnished their agent the necessary teams and carriages for transportation, he clearly had the right to hire the same and pay their hire out of the funds in his hands belonging to them. This is admitted by all parties. The real question is, can the agent, having the money of his principals in his possession for the purpose of paying such hire, by neglecting to pay for it, charge them with the payment to the party furnishing the same, such party being ignorant at the time of furnishing the same that the agent was furnished by his principals with money and forbidden to pledge their credit for the same?

"There can be no question that, from the nature of the business re-

The reasoning of the court, more fully set forth in the margin, was that the agent had apparent authority to hire the horses, and that he might hire them upon the basis that payment should be made after the service had been performed. He thus created a valid debt against his principal, and, if he then failed to pay it with the money supplied him for that purpose, the principal must suffer, as he would in any other case in which an agent commissioned to pay a debt had failed to do so. Evidence that it was the custom in Chicago, where the principal did business, to furnish traveling salesmen with funds for their expenses was held to be immaterial, unless it was so universal that the other party in Wisconsin could fairly be charged with notice of it.

§ 876. ——— There being no express authority to hire the horses and carriage in this case, upon the principal's credit, the conclusion reached by the court can be sustained only on the ground that the authority to do so was (a) incidental, (b) usual, or (c) warranted by the principal's previous conduct, as, for example, a course of dealing or a "holding out." The last two may, however, be eliminated from this case. There was no proof of such conduct, course of dealing or "holding out:" and there was no proof that it was usual to do so. The only proof of usage was that it was customary in Chicago to supply such agents with funds. Was the authority, then, "incidental," within the meaning of the rule that every authority carries with it, unless the contrary be made known, implied authority to do those things which are reasonably necessary and proper to carry into effect the main authority conferred?[58] The question may be stated in two ways: (1) Is

quired to be done by their agent, the defendants held out to those who might have occasion to deal with him that he had the right to contract for teams and carriages necessary and convenient for doing such business, in the name of his principals, if he saw fit, in the way such service is usually contracted for; and we may, perhaps, take judicial notice that such service is usually contracted for, payment to be made after the service is performed. It would seem to follow that as the agent had the power to bind his principals by a contract for such service, to be paid for in the usual way, if he neglects or refuses to pay for the same after the service is performed, the principals must pay. The fault of the agent in not paying out the money of his principal, in his hands cannot deprive the party furnishing the service of the right to enforce the contract against them, he being ignorant of the restricted authority of the agent. If the party furnishing the service knew that the agent had been furnished by his principal with the money to pay for the service, and had been forbidden to pledge the credit of his principals for such service, he would be in a different position. Under such circumstances, if he furnished the service to the agent, he would be held to have furnished it upon the sole credit of the agent, and he would be compelled to look to the agent alone for his pay."

[58] See *ante*, § 715.

authority to pledge the principal's credit, in hiring horses to transport the agent and his samples, to points not reached by railroad, reasonably necessary and proper as an incident to the authority of an agent authorized to go about the country to sell goods for his principal? (2) Is such an authority an incident if the agent is not supplied with funds? If the former can be said, then it would be immaterial, so far as the third person ignorant of the fact was concerned, that the principal had, in the given case, supplied the agent with funds and forbidden him to obtain credit. That would be in the nature of a secret limitation upon apparent authority. If the latter is to be said, the principal would not be bound, unless the case were thought to fall within the rule, not recognized by all courts, that the agent's act was a representation as to a condition peculiarly within his own knowledge upon which the party dealing with him may rely.[59] The Wisconsin court took the first view.

§ 877. ——— But another view is tenable: It was not contemplated that the agent should procure horses or other supplies *on credit* at all, or, at least, not on his principal's credit. The agent was expected to pay cash (and was supplied with cash for that purpose) or, if a brief credit was given, as (according to the suggestion of the court), until the service was performed, or until he calls for his bill at the hotel, and the like, it should be on the agent's own credit. His principal authorizes him to pay out the principal's money for this purpose (and agrees to allow it on an accounting), or agrees to reimburse or indemnify the agent for any proper expense for which the agent pledges his own credit, but does not authorize the pledging of the principal's credit.[60] Such a view accords best with the actual situation. It seems unnatural to suppose that the principal has authorized his credit to be pledged at any one of the (usually remote) hotels and livery stables which his agent may visit; or that the local hotel keeper or livery stable keeper ever, in fact, trusted to the credit of a principal, of whom he never heard and whom he might have to go into another state to find. It seems much more natural to suppose that the

[59] See *ante*, § 759.

[60] A principal who supplies his traveling salesman with money for his expenses while on the road, and allowed him to draw for more whenever he needed it, is not liable to a hotel keeper for the agent's board where he has settled with the agent and allowed him for this expense before he knew that the agent had not paid it. Nicholson v. Pease, 61 Vt. 534.

But it is held that he will be liable if, after being notified that the agent has not paid, he then pays or allows it to the agent. Grand Ave. Hotel Co. v. Friedman, 83 Mo. App. 491.

agent's credit, if any one's, is looked to, and that the agent looks to his principal for reimbursement.

It would scarcely be thought that the agent was authorized to pledge his principal's credit for railroad tickets, since they are practically never sold except for cash; yet it would be just as easy to regard such a purchase as an incidental act as the hiring of horses. Once adopted, the rule may easily be pushed to extreme lengths, and be urged to justify pledging the principal's credit for the personal supplies of the agent, upon the ground that, without them, the agent could not actually be in condition to execute his authority.

§ 878. ——— Authority to procure personal supplies.—But, as is pointed out in the preceding section, even though it be conceded that the agent may exercise incidental authority, the authority so included must be directly incident to the main power and not merely collateral to it; and personal supplies for the agent could rarely be deemed to be legitimate.[61] As said in one case,[62] "Supplies afforded for the personal use of the agent are not among the objects presumed to be included in the agency, but, if related to it at all, are merely collateral to it. It follows that authority to procure such supplies, on the credit of the principal, is not to be presumed, nor will the law presume a contract in such a case from the mere fact of furnishing such supplies." Hence it was held that from the mere fact that an agent employed to sell goods, has intrusted to his possession a horse and wagon of the principal as well as the goods for sale, the law will not imply a contract on the part of the principal to pay for the board of the agent or the keeping of the horse.[63] Nor is the principal responsible for a hotel bill, covering a period of several months and contracted by his traveling agent, without notice to or authority from the principal, it being the custom to pay cash.[64]

[61] Sampson v. Singer Mfg. Co., 5 S. Car. 465; Covington v. Newberger, 99 N. C. 523; Nicholson v. Pease, 61 Vt. 534; Grand Ave Hotel Co. v. Friedman, 83 Mo. App. 491.

[62] Sampson v. Singer Mfg. Co., *supra*.

[63] Sampson v. Singer Mfg. Co., 5 S. C. 465; Grover & Baker S. Mach. Co. v. Polhemus, 34 Mich. 247.

Where an agent is furnished a horse by his principal, which the agent is to feed and take care of, the fact that the principal derives a profit from such use of the horse does not make him liable for the board and keeping of the horse procured by the agent without authority. Grover & Baker S. Mach. Co. v. Polhemus, *supra*.

[64] Covington v. Newberger, 99 N. C. 523. In Gilmour v. Snow, 27 Rep. Jud. Quebec, 39, a commercial traveler is held to have no right to pledge his samples to an innkeeper as security for the expense of medical attention furnished by the innkeeper and money supplied by him

§ 879. ——— No implied authority to sell his samples.—A traveling salesman has no implied authority to sell the samples furnished him by his principal for use in soliciting orders. His sale of them, therefore, and receipt of payment therefor, will be no bar to the recovery of their value by his principal from the purchaser.[65] Neither may he pledge them to secure payment for personal supplies furnished to himself.[66] There may, however, be such proof of custom as to sustain the sale.[67]

§ 880. Implied authority to warrant quality.—The question of the implied power of an agent, authorized to sell, to warrant the quality of the goods sold, is a very important one, and one that has often arisen, but upon which the authorities are not harmonious. It has been attempted in many cases to settle the question by reference to the arbitrary distinction made between general and special agencies;[68] but while these rules may suffice to determine many of the questions arising between the principal and his agent, they are not satisfactory in considering the liability of the principal to third persons. This question must be determined by the same principles which govern the liability of the principal for the acts of the agent in other cases.

As has been already seen, the authority of the agent in a given case may include not only the powers expressly conferred upon him, but also (*a*) such powers as are reasonably necessary and proper to carry into effect the main power conferred; (*b*) such powers as are usually exercised in similar cases; and (*c*) such powers as, on the doctrine of estoppel, may fairly be deemed to be open in the particular case. An authority to warrant quality as a part of a power to sell might conceivably arise under any of these rules.

§ 881. ——— Authority to warrant as a necessary incident.—Many *dicta* are to be found in the books to the effect that authority to warrant quality is an incident to authority to sell. Such a proposition is, of course, unsound. Sales may be, and constantly are, made in many fields without either an express or an implied warranty, as the well settled maxim of our law, *caveat emptor*, sufficiently attests.

to the traveler to continue his journey; and the employer is, therefore, held to have the right to reclaim such merchandise from the innkeeper.

[65] Kohn v. Washer, 64 Tex. 131, 53 Am. Rep. 745; Hibbard, Spencer, Bartlett & Co. v. Stein, 45 Ore. 507. See also, Savage v. Pelton, 1 Colo. App. 148.

[66] Gilmour v. Snow, 27 Rap. Jud. Que. 39.

[67] Lauchheimer v. Jacobs, 126 Ga. 261, example, to sell at the end of the season.

[68] As in Gaar v. Rose, 3 Ind. App. 269.

At the same time, it is believed to be true that there may be cases, though they must be rare, in which the making of a warranty of quality is so practically essential to the making of the sale as, without proof of usage, to justify the inference of the power as a necessary incident of authority to sell. A number of cases have been put upon this ground.[69] Thus, an agent for a distant principal, endeavoring to introduce a new article in a certain community, and who could not sell it unless it was warranted, has been held to have authority to warrant as a necessary incident to the authority to sell.[70]

§ 882. ——— Authority to warrant because warranty usual.— Authority to warrant quality may be, and in a constantly increasing mass of cases is, deduced from the fact that the same or similar articles are usually sold with such a warranty. In this respect it may be said to be the rule that authority conferred upon an agent, whether general or special, to sell personal property carries with it, in the absence of countervailing circumstances known to the person with whom he deals, implied authority to make, in the name of the principal, such a warranty of the quality and condition of the property sold as is usually and ordinarily made in like sales of similar property at that time and place.[71] Stated negatively he will have no such authority if it be

[69] See Hille v. Adair, 22 Ky. L. Rep. 742, 58 S. W. 697; Woodford v. McClenahan, 9 Ill. 85; Ahern v. Goodspeed, 72 N. Y. 108; Conkling v. Standard Oil Co., 138 Iowa, 596.

[70] Hille v. Adair, *supra*.

[71] Gaines v. McKinley, 1 Ala. 446; Skinner v. Gunn, 9 Port. (Ala.) 305; Bradford v. Bush, 10 Ala. 386; Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Cocke v. Campbell, 13 Ala. 286; Croom v. Shaw, 1 Fla. 211; Huguley v. Morris, 65 Ga. 666; Woodford v. McClenahan, 4 Gilm. (Ill.) 85; Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561; Applegate v. Moffitt, 60 Ind. 104; Talmage v. Bierhause, 103 Ind. 270; Murray v. Brooks, 41 Iowa, 45; Mallory v. Elwood, 120 Iowa, 632; First N. Bank v. Robinson, 105 Iowa, 463; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Randall v. Kehlor, 60 Me. 37, 11 Am. Rep. 169; Upton v. Suffolk Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; Palmer v. Hatch, 46 Mo. 585; Hayner v. Churchill, 29 Mo App. 676; Morris v. Bowen, 52 N. H. 416; Cooley v. Perrine, 41 N. J. L. 322, 32 Am. Rep. 210 (aff'd, 42 N. J. L. 623); Decker v. Fredericks, 47 N. J. L. 469; Ahern v. Goodspeed, 72 N. Y. 108; Tice v. Gallup, 2 Hun (N. Y.), 446; Smith v. Tracy, 36 N. Y. 79; Nelson v. Cowing, 6 Hill (N. Y.), 336; Scott v. McGrath, 7 Barb. (N. Y.) 53; Milburn v. Belloni, 34 *Id.* 607; Sanford v. Handy, 23 Wend. (N. Y.) 260; Cafre v. Lockwood, 22 App. Div. (N. Y.) 11; Reynolds v. Mayor, 39 App. Div. (N. Y.) 218; Bierman v. City Mills Co., 10 Misc. Rep. (N. Y.) 140; Ellner v. Priestly, 39 Misc. Rep. (N. Y.) 535; Manley v. Ackler, 76 Hun (N. Y.), 546; Hunter v. Jameson, 6 Ired. (N. C.) L. 252; Davis v. Burnett, 4 Jones (N. C.), L. 71, 67 Am. Dec. 263; Williamson v. Canaday, 3 Ired. (N. C.) L. 349; Ezell v. Franklin, 2 Sneed (Tenn.), 236; McAlpin v. Cassidy, 17 Tex. 449; Deming v. Chase, 48 Vt. 382; Fay v. Richmond, 43 Vt. 25; Reese v. Bates, 94 Va.

not usual,[72] and, of course, as will be seen,[73] he will have no authority to give an unusual warranty.

The question of what is usual in such a case is ordinarily a question of fact to be determined by the jury,[74] but in certain cases the court will take judicial notice of it.[75] The usage must be so well settled, notorious and continuous, as to raise the legal presumption that it was known to buyer and seller, and that the sale was made in reference to it.[76] If it is purely local, the principal may rebut the presumption of knowledge by showing that, in fact, he did not know of it, in which case he will not be bound.[77] Proof of the usage is admissible in behalf of either party.[78]

§ 883. ——— Authority to give warranties which the law would imply.—It has, moreover, been declared in several cases that, if the sale is one in which, had it been made by the principal in person, the law would imply a warranty, *e. g.*, a warranty of fitness for the contemplated use, an express warranty to the same effect, given by the agent, must be deemed to be within the scope of his implied authority.[79]

§ 884. Authority to warrant in accordance with descriptions furnished by principal.—Where the principal furnishes the agent with written or printed circulars, or other descriptive matter relating to the goods to be sold, for the purpose of having these delivered or ex-

321; Pickert v. Marston, 68 Wis. 465, 60 Am. Rep. 876; Boothby v. Scales, 27 Wis. 626; Larson v. Aultman & Taylor Co., 86 Wis. 281, 39 Am. St. R. 893; Westurn v. Page, 94 Wis. 251; Waupaca Electric Light Co. v. Milwaukee Electric Ry. Co., 112 Wis. 469; Schuchardt v. Allens, 1 Wall. (U. S.) 359, 17 L. Ed. 642; Taggart v. Stanbery, 2 McLean (U. S. C. C.), 543; Graves v. Legg, 2 Hurl. & N. 210; Dingle v. Hare, 7 C. B. (N. S.) 145; Alexander v. Gibson, 2 Camp. 555.

After the sale is completed, the agent would have no implied authority to add a warranty. Fletcher v. Nelson, 6 N. D. 94.

[72] See Piller v. Piser, 67 Misc. 445 (a salesman in a furniture store, selling articles open to view, has no implied authority to warrant a uniformity of color in a bed room suite); Dunham v. Salmon, 130 Wis. 164 (a warranty that a stallion was a good foal getter and would breed more than sixty per cent. of the mares served, *held*, beyond implied power of agent in absence of a custom to so warrant).

[73] See *post*, § 889.

[74] Herring v. Skaggs, *supra*; Pickert v. Marston, *supra*; Westurn v. Page, *supra*; Reese v. Bates, *supra*; Hayner v. Churchill, *supra*. See also, Reynolds v. Mayor, *supra*.

[75] Ahern v. Goodspeed, *supra*; Talmage v. Bierhause, *supra*. See also Reese v. Bates, *supra*.

[76] Herring v. Skaggs, *supra*.

[77] Pickert v. Marston, *supra*; see *ante*, § 281.

[78] Pickert v. Marston, *supra*.

[79] In Laumur v. Dolph, 145 Mo. App. 78 (sale of an automobile) the court said: "The defendants impliedly warranted that the chattel was fit for the purpose intended, and no special authority in the agent, who made the sale, to give such warranty need be shown."

hibited to prospective buyers, or otherwise used as a means of inducing sales, the agent would doubtless have implied authority to warrant the goods in accordance with any statements of fact contained in such circulars, provided such statements, if made under the same circumstances by the principal in person, would constitute warranties.[80]

§ 885. Illustrations of rules—Commercial paper—Agricultural implements—Sample, etc.—Thus in a New York case, the court said it was within their judicial observation from many cases before them, that a warranty of commercial character was the usual accompaniment of a sale, upon the New York stock exchange, of promissory notes having the guise of commercial paper, and it was held that an agent authorized to sell such paper had implied authority to make such a warranty.[81]

So the court will take judicial notice that it is usual and customary in ordering goods of a dealer, through his agent, to require a warranty of quality, where the goods are not present and subject to the inspection of the purchaser, and authority to make such a warranty will be implied.[82]

Again, sales of implements, machinery and similar articles by the manufacturers are so generally accompanied by a warranty of good workmanship, sound materials, and general fitness for the purpose for which they are intended, that an agent commissioned to sell them, will it is held, be presumed to have authority to make such a warranty.[83]

So such an agent has been held to have implied authority to sell upon trial and to give the purchaser the privilege of returning the machine if not satisfactory;[84] and may sell upon condition that the sale shall not be consummated if the machine does not do good work;[85] and, having sold upon condition that, if the machine does not prove satisfactory to the purchaser, he shall return it, the agent may waive such return.[86]

[80] Smillie v. Hobbs, 64 N. H. 75; Levis v. Pope Motor Car Co., 202 N. Y. 402.

[81] Ahern v. Goodspeed, 72 N. Y. 108, 114.

[82] Talmage v. Bierhause, 103 Ind. 270.

[83] (Farm implements) Murray v. Brooks, 41 Iowa, 45; McCormick v. Kelly, 28 Minn. 135; Flatt v. Osborne & Co., 33 Minn. 98; Aultman v. Falkum, 51 Minn. 562; Gaar v. Patterson, 65 Minn. 449; Case Threshing Mach. Co. v. McKinnon, 82 Minn. 75; Parsons Band Cutter, etc., Co. v. Haub, 83 Minn. 180; Canham v. Plano Mfg. Co., 3 N. D. 229; Smith v. Williams, 29 Ind. App. 336. (Furnaces) Boynton Furnace Co. v. Clark, 42 Minn. 335. (Flour) Loomis v. Vawter, 8 Kan. App. 437.

[84] Deering v. Thom, 29 Minn. 120. See also, Olson v. Aultman Co., 81 Minn. 11; Reeves v. Cress, 80 Minn. 466.

[85] Oster v. Mickley, 35 Minn. 245.

[86] Pitsinowsky v. Beardsley, 37 Iowa, 9; Warder v. Robertson, 75 Iowa, 585.

An agent authorized to sell goods by sample would doubtless have implied authority to make the warranty usual in such cases, that the goods sold are equal to the sample.[87]

§ 886. ——— Horses.—Whether an agent employed to sell a horse has implied authority to warrant his soundness, has been much discussed and the authorities are not harmonious. Thus it has been held that an agent of a horse dealer has such implied authority, and that it cannot be affected by private instructions from the principal not to warrant;[88] but that the agent of a private individual or a special agent has no such implied authority, even in the absence of any restrictions.[89] On the other hand, it has been decided that unless expressly forbidden, the agent would have such an implied authority;[90] and in still other cases, the authority has been declared in general terms.[91]

But no satisfactory reason is perceived why the question of the warranty of a horse should stand upon any different basis than the warranty of any other chattel, namely, that an agent authorized to sell may give a warranty of quality if, and only if, such a warranty is usually given on similar sales at that time and place.[92] It would doubtless be

[87] Andrews v. Kneeland, 6 Cow. (N. Y.) 354; Dayton v. Hooglund, 39 Ohio St. 671; Schuchardt v. Allens, 1 Wall. (U. S.) 359, 17 L. Ed 642; Murray v. Smith, 4 Daly (N. Y.), 277; Dreyfus v. Goss, 67 Kan. 57.

See also Ellinger v. Rawlings, 12 Ind. App. 336.

[88] Howard v. Sheward, L. R. 2 C. P. 148.

[89] Brady v. Todd, 9 C. B. (N. S.) 592; Cooley v. Perrine, 41 N. J. L. 322, 32 Am. Rep. 210, aff'd 42 N. J. L. 623. The decision in this case was based solely on the distinction between a general and a special agency.

See also Court v. Snyder, 2 Ind. App. 440, 50 Am. St. R. 247; Brier v. Mankey, 47 Ind. App. 7.

[90] Deming v. Chase, 48 Vt. 382; Tice v. Gallup, 2 Hun (N. Y.), 446.

[91] See Nelson v. Cowing, 6 Hill (N. Y.), 336; Scott v. McGrath, 7 Barb. (N. Y.) 53; Ezell v. Franklin, 2 Sneed (Tenn.), 236; Skinner v. Gunn, 9 Port. (Ala.) 305; Lane v. Dudley, 2 Murph. (N. C.) 119, 5 Am. Dec. 523; Gaines v. McKinley, 1 Ala. 446; Helyear v. Hawke, 5 Esp. 72; Alexander v. Gibson, 2 Camp. 555; Bradford v. Bush, 10 Ala. 386; Savage v. Eakins, 31 Ill. App. 267; Cochran v. Chitwood, 59 Ill. 53; Ellison v. Simmons, 6 Pen. (Del.) 200.

Most of these cases rely for authority on § 102 of Story's Agency which however has been questioned or qualified by most of the subsequent editors. See 7th Ed. by Redfield & Herrick, and the 9th by Mr. C. P. Greenough.

In Belmont's Ex'r v. Talbot, 21 Ky. Law Rep. 453, 51 S. W. 538, it was held that the superintendent of a stock farm would have authority to warrant soundness. "It was at least within the apparent scope of his authority. He was not a special agent, but a general agent having charge of his principal's business in this state."

See also, First Nat. Bank v. Robinson, 105 Iowa, 463.

[92] See Samuel v. Bartee, 53 Mo. App. 587; Westburn v. Page, 94 Wis. 251.

much easier to establish a custom to warrant in sales by horse dealers than in sales by other persons.

§ 887. ——— Limitations upon custom.—Where a general custom to warrant is recognized or proof of such a custom is made, evidence is not admissible to prove that it was not the custom of this particular principal to warrant, unless it be shown that the purchaser had notice of that fact,[93] or that the agent was expressly forbidden to warrant, unless notice of such prohibition be brought home to the purchaser.[94]

§ 888. ——— Evidence that the authority of the agent to warrant was limited to the giving of a particular written or printed warranty only, furnished him by his principal, is not admissible, unless it be also shown that the purchaser had knowledge of the limitation;[95] but where the purchaser has knowledge that such a warranty was furnished, he cannot accept an oral warranty from the agent, different in its terms, and require the principal to comply with such oral warranty.[96]

Evidence that it was the seller's custom to give a printed warranty only would not be admissible to rebut the general inference,[97] nor would evidence of any local custom not prevailing at the place of sale;[98] but a local custom there prevailing upon which the parties relied, or a general custom in contemplation of which they presumptively dealt, would be admissible.

§ 889. Limits of this rule—No extraordinary warranty.—But this

[93] Murray v. Brooks, 41 Iowa, 45.

[94] Boothby v. Scales, 27 Wis. 626; Reynolds v. Mayor, 39 N. Y. App. Div. 218.

See also Reese v. Bates, 94 Va. 321; Hayner v. Churchill, 29 Mo. App. 676.

[95] Murray v. Brooks, 41 Iowa, 45; First Nat. Bank v. Robinson, 105 Iowa, 463; Parsons, etc., Co. v. Haub, 83 Minn. 180.

[96] Wood Mow. & Reap. Machine Co. v. Crow, 70 Iowa, 340; limiting Eadie v. Ashbaugh, 44 Iowa, 519, and Farrar v. Peterson, 52 Iowa, 420. Where the purchaser is furnished with a printed warranty which expressly provides that the agent has no authority to change or vary its terms, such provision is a sufficient notice to the purchaser of the limitations upon the agent's authority. Furneaux v. Easterly, 36 Kan. 539.

Notice from blank not used or from previous order not accepted.—But where the purchaser had first given an order upon a printed form which contained a statement that agents were authorized to make contracts only on such a form, and that order was rejected, whereupon the purchaser made an oral contract with the agent, it was held that the purchaser was not bound, as to this last contract, by the notice contained in the previous one which had not been consummated. Olson v. Aultman, 81 Minn. 11, citing Gaar v. Patterson, 65 Minn. 449. See also Challenge Co. v. Kerr, 93 Mich. 328. But see *contra* Deane v. Everett, 90 Iowa, 242.

[97] Flatt v. Osborne, 33 Minn. 98.

[98] Flatt v. Osborne, *supra*.

rule authorizing the usual warranties is not to be extended beyond the limits prescribed by it. It cannot, therefore, apply to sales of property not usually sold with such a warranty, nor to sales made under such circumstances that such a warranty is not usually given, nor can it give countenance to any unusual or extraordinary warranty.

Thus, though an agent authorized to sell liquors may warrant their quality and condition, he has no implied power to warrant that they will not be seized for violation of the revenue laws;[99] an agent employed to sell flour, cannot without express authority, warrant that it will keep sweet during a sea voyage from Massachusetts to California;[1] nor has a traveling salesman authorized to sell fish any implied authority to warrant that it would keep sound for any particular time.[2]

And though an agent employed to sell negotiable notes would have implied authority, when necessary, to indorse them, he would have no implied authority to make an additional guarantee of payment.[3]

Nor has an agent authorized to sell safes implied authority to warrant that they are burglar proof.[4]

The implied authority must, moreover, be confined to warranties given respecting the goods the agent sells, and it will not extend to goods subsequently sold by the principal in person.[5]

§ 890. Authority to make representations concerning goods.—Even though not taking the form of an express warranty, authority to make representations concerning the goods would in many cases be implied. Thus, if the principal should send an agent out to introduce and sell a new article, as, for example, a new machine, a new article of food, a new medicine, and the like, authority to answer questions, or to make statements, concerning such matters as would naturally and ordinarily arise under such circumstances, would properly be implied. Questions respecting the purpose of the article, the manner in

[99] Palmer v. Hatch, 46 Mo. 585.

[1] Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

[2] Troy Grocery Co. v. Potter, 139 Ala. 359. An agent for the sale of Alaskan salmon has no implied authority to warrant that it is as good as that caught anywhere. Reid v. Alaska Packing Co., 47 Oreg. 215.

[3] Graul v. Strutzel, 53 Iowa, 712, 36 Am. Rep. 250. Authority to sell a claim in judgment does not justify a warranty of the validity of the claim. Lipscomb v. Kitrell, 11 Humph. (Tenn.) 256.

[4] Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4, s. c. 73 Ala. 446.

[5] Wait v. Borne, 123 N. Y. 592. So though an agent who sells a "stacker" may warrant the "stacker," he has no implied authority to warrant that an engine already owned by the buyer (though previously bought of the principal) has power enough to run the "stacker." Second Nat. Bank v. Adams (Ky.), 93 S. W. 671. See also Case Mill Mfg. Co. v. Vickers, 147 Ky. 396.

which it might be safely handled, the conditions and circumstances under which it could be properly used, and the like, would fall within this principle,[6] and would, if false, afford whatever remedy would ordinarily be available for misrepresentations.

Even though the agent may not be deemed to be *authorized* to make representations, but he nevertheless does do so as part of the sale, the principal may be affected by them, either in an action for damages or for rescission, as will be seen in a later chapter; but that is not the question here under consideration.

§ 891. Authority to warrant title.—An agent authorized to sell goods, as the goods of his principal, would doubtless be deemed to have implied authority to warrant his principal's title. Warranties of this sort are usual, and would be implied if the principal himself were to offer for sale goods in his own possession.[7]

The same principles would also doubtless apply to warranties against incumbrances upon the title of the goods sold.[8]

§ 892. Authority to advertise the property.—It is clearly not within the implied authority of the ordinary agent employed to sell property to bind the principal to third persons by contracts to pay for advertising the property to be sold.[9] Presumptively, in the ordinary

[6] In Haynor Mfg. Co. v. Davis, 147 N. C. 267, 17 L. R. A. (N. S.) 193, a salesman represented a certain "tonic" as being non-alcoholic, and guaranteed that a buyer, in a prohibition territory, would be indemnified for liquor licenses required. *Held*, that the manufacturer, knowing the character of the tonic, was bound by his agent's representations although no express authorization to make such statements was proven. In Darks v. Scudders-Gale Grocer Co., 146 Mo. App. 246, a salesman sold ginger extract, now alleged to contain wood alcohol, representing it to be a proper medicine and the buyer died of the effects. Said the court: "The defendant permitted the agent to go into the field and solicit orders. In soliciting business for the defendant, questions would naturally come up concerning the quality and usefulness of the articles the agent was attempting to sell, and therefore statements made by the agent concerning the quality of the articles and the purpose for which they were intended must be within his apparent authority." See also Doylestown Agr. Co. v. Brackett, — Me. —, 84 Atl. 146.

[7] See 2 Mechem on Sales, § 1300 *et seq.*

[8] See Colvin v. Peck, 62 Conn. 155. A general agent of defendant authorized a special agent to sell a cargo of imported coal, instructing him to make the best terms he could, and informing him that the duty had been paid. The latter agent sold with an express warranty that the coal was free from incumbrance, whereas in fact it was still subject to duty. *Held*, that the circumstances and the fact that the law would raise an implied warranty of title justified this warranty. North American Com'l Co. v. North American Transp. Co., 52 Wash. 502.

[9] See Tarpy v. Bernheimer, 16 N. Y. Supp. 870 (beer salesman no im-

case, that is a matter which the principal will arrange for himself. The authority of a general manager might be wider, as will be seen in a following section;[10] and an agent authorized to sell goods of a sort usually sold only by some form of public advertising, or to sell goods in a manner usually involving such advertising, and the like, might well be found to have implied authority to pursue that method.[11] It would doubtless be easier in many cases to find an implied undertaking to reimburse the agent for expenses which he might incur in advertising, than to find implied authority to pledge the principal's credit directly.

§ 893. No implied authority to give credit.—In the absence of anything to indicate the contrary, it will be presumed that the sale is to be for cash in hand. An agent authorized merely to sell a chattel has, therefore, no implied authority to give credit, unless there is a valid usage to that effect at that time and place.[12]

A general authority to prescribe terms, or an established course of dealing, may, of course, justify a different conclusion.

§ 894. No authority to appropriate to his own use.—An agent entrusted with goods to sell for his principal, has no implied authority to sell or deliver them in payment of his own debt, or to pledge them as security for his own debt, and persons dealing with such an agent are bound to take notice of this limitation of his authority.[13] Such

plied authority); Brooklyn Daily Eagle v. Dellman, 30 N. Y. Misc. 747 (soliciting salesman no implied authority to agree with a buyer that his principal would advertise the wares in plaintiff's newspaper); United States Bedding Co. v. Andre, —— Ark. ——, 150 S. W. 413 (traveling salesman no implied authority to charge his principal for advertising goods upon bill boards for a period of six months at an expense of $44). See also National Cash Reg. Co. v. Ison, 94 Ga. 463.

[10] See *post*, § 989.

[11] In Ayer v. Bell Mfg. Co., 147 Mass. 46, defendant was seeking to introduce a new soap; it was already advertising it widely; and gifts were offered to consumers who used the largest quantity up to a certain date. Plaintiff, a wholesale grocer, wrote to defendant, asking what terms and inducements were offered to jobbers. In response defendant sent an agent who, in order to get plaintiff's order, agreed that the advertisement should be continued until a certain date. *Held*, that the jury might properly find that this was within his authority.

[12] Payne v. Potter, 9 Iowa, 549; May v. Mitchell, 5 Humph. (Tenn.) 365; Burks v. Hubbard, 69 Ala. 379; School District v. Aetna Ins. Co., 62 Me. 330; State v. Delafield, 8 Paige (N. Y.), 527, aff'd 26 Wend. 192; Norton v. Nevills, 174 Mass. 243; Kops v. Smith, 137 Mich. 28; State v. Chilton, 49 W. Va. 453. See also Tyler v. O'Reilly, 59 Hun, 618; Bowles v. Rice, 107 Va. 51. That a factor may sell on credit, see *post*, Chapter on Factors.

[13] Wheeler & Wilson Mfg. Co. v. Givan, 65 Mo. 89; Holton v. Smith, 7 N. H. 446; Gould v. Blodgett, 61

authority may however be expressly conferred, or it may be inferred from the fact that the agent was, with the principal's knowledge and consent, using the principal's property and credit, generally, in the agent's behalf.[14]

In other cases, however, a creditor who receives the goods under such an arrangement with the agent, though acting in good faith and in ignorance that the goods do not belong to the agent, acquires no title as against the principal.[15]

§ 895. No implied authority to exchange or barter.—Mere authority to sell gives an agent no authority to exchange the chattels for other property, or to take anything else than money in payment for them,[16] though such an authority may, of course, be conferred expressly or be fairly inferred from the language of the power.[17] Such an agent cannot therefore, take payment in notes, checks or other paper.[18] And having received payment in money, he has no author-

N. H. 115; Whitney v. State Bank, 7 Wis. 620; Burks v. Hubbard, 69 Ala. 379; Stewart v. Woodward, 50 Vt. 78, 28 Am. Rep. 488; Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332; Williams v. Johnston, 92 N. C. 532, 53 Am. Rep. 428; Parsons v. Webb, 8 Greenl. (Me.) 38, 22 Am. Dec. 220; Hook v. Crowe, 100 Me. 399; Greenwood v. Burns, 50 Mo. 52; Butts v. Newton, 29 Wis. 632; Rodick v. Coburn, 68 Me. 170; McCormick v. Keith, 8 Neb. 143; Hart v. Hudson, 6 Duer (N. Y.), 294; Hurley v. Watson, 68 Mich. 531, s. c. 92 Mich. 121; Wilson v. Wilson-Rogers, 181 Pa. 80; Hodgson v. Raphael, 105 Ga. 480; Talboys v. Boston, 46 Minn. 144; Low v. Moore, 31 Tex. Civ. App. 460; Grooms v. Neff Harness Co., 79 Ark. 401; Smith v. James, 53 Ark. 135; Miller v. Springfield Wagon Co., 6 Ind. Ter. 115; Sykes v. Giles, 5 M. & W. 645; Scott v. Irving, 1 B. & Ad. 605; Catterall v. Hindle, L. R. 1 C. P. 187.

[14] Stewart v. Cowles, 67 Minn. 184.

[15] Grooms v. Neff Harness Co., *supra;* Smith v. James, *supra;* Warner v. Martin, 11 How. (U. S.) 209, 13 L. Ed. 667; Belton Compress Co. v. Belton Brick Mfg. Co., 64 Tex. 337; De Bouchout v. Goldsmid, 5 Ves. Jun. 211, and cases above cited. An agent has no authority to agree to pay his private debt from the proceeds of the sale of his principal's goods. Rice v. Lyndborough Glass Co., 60 N. H. 195.

[16] Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; Wheeler & Wilson Mfg. Co. v. Givan, 65 Mo. 89; Taylor v. Starkey, 59 N. H. 142; Brown v. Smith, 67 N. C. 245; Victor Sewing Mach. Co. v. Heller, 44 Wis. 265; Kent v. Borstein, 12 Allen (Mass.), 342; City of Cleveland v. State Bank, 16 Ohio St. 236, 88 Am. Dec. 445; Block v. Dundon, 83 App. Div. 539; Beck v. Donohue, 27 Misc. 230; Jones v. Richards, 50 Misc. 645; Hayes v. Colby, 65 N. H. 192. See also Russell v. Cox, 18 Ky. Law Rep. 1087; Kearns v. Nickse, 80 Conn. 23, 10 L. R. A. (N. S.) 1118, 10 Ann. Cas. 420; Starr Piano Co. v. Morrison (Mich.), 124 N. W. 562; Guerreiro v. Peile, 3 B. & Ald. 616.

[17] Gaus v. Hathaway, 66 Ill. App. 149.

[18] Buckwalter v. Craig, 55 Mo. 71. A direction to sell for cash does not permit the agent to take a check payable the day after the sale, even though that be the customary way

ity to exchange the money with a third person for other money, and if he does so and receives a counterfeit bill, his principal may recover the money given for it;[19] or, having authority to receive notes, he has no authority to accept goods in payment of the notes.[20]

§ 896. No authority to buy goods.—An agent authorized to sell has thereby no implied authority to buy goods;[21] especially, as has been seen,[22] to buy the goods he is authorized to sell.[23] Authority to buy, however, may as in other cases arise from the conduct or acquiescence of the principal.[24]

§ 897. No authority to pledge goods.—An authority to sell goods clearly contemplates an actual transfer of the general ownership; and, as has been seen,[25] a transfer of such ownership for cash only. Mere authority to sell, therefore, does not justify a pledge,[26] even on the principal's account,[27] and *a fortiori* not on the agent's account.[28] Except as modified by the Factors Acts, this rule is not affected by the fact that the other parties did not know that the agent was merely such, and supposed him to be the owner of the goods.[29]

§ 898. No authority to mortgage.—For reasons similar to those that rebut the implication of an authority to pledge, an authority to

at the place of sale of making what are there called cash sales. Hall v. Storrs, 7 Wis. 253. An agent who takes check payable ten days after date is liable if bank fails before payment. Harlan v. Ely, 68 Cal. 522.

[19] Kent v. Borstein, *supra*.

[20] J. A. Fay, etc., Co. v. Causey, 131 N. C. 350; Woodruff v. Am. Road Mach. Co., 23 Ky. Law Rep. 1551. See also Russell v. Cox, *supra*.

[21] Gates Iron Works v. Denver Engineering Works Company, 17 Colo. App. 15; Keyes v. Union Pac. Tea Co., 81 Vt. 420.

A fortiori, no authority to buy goods for third persons on his principal's credit. Cowan v. Sargent Mfg. Co., 141 Mich. 87.

[22] See *ante*, § 179.

[23] See cases cited *ante*, § 179; McIntosh-Huntington Co. v. Rice, 13 Colo. App. 393.

This question is more fully discussed in Book IV, Chap. II.

[24] Witcher v. Gibson, 15 Colo. App. 163.

[25] See *ante*, § 893.

[26] Heilbronn v. McAleenan, 16 N. Y. St. Rep. 957, 1 N. Y. Supp. 875; Anderson v. McAleenan, 15 Daly, 444. See also, Hawxhurst v. Rathgeb, 119 Cal. 531, 63 Am. St. R. 142.

[27] Shaw v. Saranac Horsenail Co., 144 N. Y. 220. See also, Bonita v. Mosquera, 2 Bosw. (N. Y.) 401.

[28] Wycoff v. Davis, 127 Iowa, 399; Read v. Cumberland Tel. Co., 93 Tenn. 482; Wheeler & Wilson v. Givan, 65 Mo. 89; Henry v. Marvin, 3 E. D. Smith (N. Y.), 71; Merchants' Bank v. Livingstone, 74 N. Y. 223; Taliaferro v. Baltimore First Nat. Bank, 71 Md. 200; Ullman v. Myrick, 93 Ala. 532; Thurber v. Cecil Nat. Bank, 52 Fed. 513; Hawxhurst v. Rathgeb, *supra*; Haynes v. Foster, 2 Cr. & M. 237. See also, Ryan v. Stowell, 31 Neb. 121; Morsh v. Lessig, 100 Pac. 431.

[29] See *post*, Book IV, Chap. VII; Bott v. McCoy, 20 Ala. 578, 56 Am. Dec. 223; Voss & Co. v. Robertson, Brown & Co. 46 Ala. 483; Costikyan v. Sloan, 33 App. D. C. 420.

sell goods raises no implication of an authority to mortgage them.[30] Clearly is this so where the agent undertakes to mortgage them as his own, or to secure his own debt.[31]

§ 899. No authority to promise commissions for sub-sales.—An agent authorized to sell his principal's goods, and not being of the rank of a manager, general sales agent, and the like, has ordinarily no implied authority to bind his principal by a promise to pay commissions to third persons for sales made by them for the principal;[32] nor having property to be sold for cash, like railroad tickets, has he implied power to deliver it to a third person to sell, to be paid for when sold, and to bind the principal by promising such third person a commission upon sales made by him.[33]

§ 900. Authority to guarantee exclusive markets, particular prices, etc.—An agent authorized to take orders for his principal's goods of a certain sort, *i. e.*, eye-glasses, may, it has been held, bind his principal by an agreement that the latter will give the buyer the exclusive right to handle his goods in that place, and will not, during that period sell similar goods to any other dealer in the same town;[34] but it has also been held that he cannot agree that his principal will not afterward sell to others similar goods for a less price.[35]

If the first case is sound, its doctrine must certainly be confined to goods and places as to which a single representative might be deemed usual and sufficient.

So it has been held that an agent, authorized to sell threshing machinery, has no implied authority to bind his principal to procure threshing contracts from other persons;[36] and that an agent authorized to sell cigarettes and tobacco has no implied authority to agree, as an inducement to the purchase, that the buyer will not suffer from

[30] Edgerly v. Cover, 106 Iowa, 670; Kiefer v. Klinsick, 144 Ind. 46.

[31] Switzer v. Wilvers, 24 Kan. 384, 36 Am. Rep. 259; Barry v. Adams, 3 Allen (Mass.), 493; Ryan v. Stowell, 31 Neb. 121; Reed v. Kinsey, 98 Ill. App. 364.

[32] Atlee v. Fink, 75 Mo. 100, 42 Am. Rep. 385; National Cash Register Co. v. Ison, 94 Ga. 463. See also, Shoninger v. Peabody, 59 Conn. 588; National Cash Register Co. v. Hagan, 37 Tex. Civ. App. 281.

In Cooper v. Coad, 91 Neb. 840, an agent sent into a locality, in which he was a stranger, to sell valuable horses, was held to have authority to make arrangement for the assistance of a local dealer.

[33] Frank v. Ingalls, 41 Ohio St. 560.

[34] Keith v. Hirschberg Optical Co., 48 Ark. 138. To same effect (the goods being crockery, etc., manufactured by the seller) is Watkins v. Morley, 2 Will. (Tex. Civ. App.) 634.

[35] Anderson v. Bruner, 112 Mass. 14.

[36] Forbis v. Reeves, 109 Ill. App. 98.

the loss of rebates which would have been allowed to him by another dealer for selling the latter's goods.[37]

§ 901. No implied authority to compromise, release principal's rights, or pay his debts.—Neither has such an agent any implied authority to release a debt due to his principal;[38] nor has a mere clerk employed in his principal's store, or a mere traveling salesman authorized to solicit orders, any implied authority to compound or compromise debts due to his employer;[39] or to sell goods at wholesale prices for a debt due from his principal;[40] or to deliver goods in payment of, or as security for, a note signed by his employer.[41] So an agent, authorized to sell machinery—for example, a harvesting machine, has implied authority to release one of his principal's customers from liability for the price of goods purchased and to accept in his place the customer's successor in the business;[42] nor, where goods have been sold upon conditions retaining title as security, would he have any implied authority to consent to acts which would waive or defeat that security.[43]

§ 902. Authority to rescind the sale.—Authority to make or negotiate a sale is ordinarily exhausted when the sale contemplated is made.[44] After the contract of sale made or negotiated by the agent has become complete therefore, the agent has ordinarily no implied authority to rescind or discharge it, or to receive back the goods, or to otherwise alter or amend the terms of the sale.[45]

[37] Braun v. Hess, 187 Ill. 283, 79 Am. St. Rep. 221.

[38] Smith v. Perry, 29 N. J. L. 74.

[39] Powell's Adm'r v. Henry, 27 Ala. 612.

Traveling salesman or "drummer" has no implied authority to compromise debts due for goods previously sold by him, or to agree that later goods may be applied to satisfy alleged defects existing in goods previously sold. Lindow v. Cohn, 5 Cal. App. 388; Scaritt v. Hudspeth, 19 Okla. 429, 14 Ann. Cas. 857.

[40] Lee v. Tinges, 7 Md. 215; Hampton v. Matthews, 14 Pa. 105.

[41] Nash v. Drew, 5 Cush. (Mass.) 422.

[42] Ludwig v. Gorsuch, 154 Pa. 413.

[43] McEntire, etc., Co. v. Buggy Co., 172 Ala. 637.

[44] Stilwell v. Mut. L. Ins. Co., 72 N. Y. 385; Luke v. Griggs, 4 Dak. 287; Ahern v. Baker, 34 Minn. 98; Fullerton v. McLaughlin, 70 Hun (N. Y.), 568; Robinson v. Nipp, 20 Ind. App. 156.

[45] Adams v. Fraser, 27 C. C. A. 108, 82 Fed. 21; Diversy v. Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Brigham v. Hibbard, 28 Or. 386; Fletcher v. Nelson, 6 N. D. 94; Andrews v. Himrod, 37 Ill. App. 124; Fullerton v. McLaughlin, 70 Hun (N. Y.), 568; American Sales Book Co. v. Whitaker, 100 Ark. 360, 37 L. R. A. (N. S.) 91; Mange-Wiener Co. v. Patton Drug Co., 27 Pa. Super. 315; Sumwalt Ice Co. v. Knickerbocker Ice Co., 112 Md. 437.

Where an agent who has taken an order wrongfully alters it before transmission to his principal, the alteration is to be treated as the act of a stranger and will not in-

As has been seen, however, an agent having general authority to sell may, in many cases, make the right to return the property if the buyer is not satisfied, an express condition of the sale;[46] and an agent, having a general and continuing authority to sell, would also doubtless, in many cases, be deemed to have implied authority to release a dissatisfied purchaser, even though no such condition had been expressly incorporated in the contract.[47]

§ 903. Authority to waive performance of terms of contract.—As has been seen in an earlier section,[48] it has been held that an agent authorized to sell machinery—for example, a harvesting machine, has implied authority to give a prospective purchaser an opportunity to try the machine, and to agree that if the machine is not satisfactory it may be returned.[49] The printed forms of contract, with which such agents are supplied by their principals, now quite commonly provide for return in case the machine shall be found defective, and also usually provide that, before the machine is returned, a notice of the defect shall be given to the seller or the agent, and an opportunity afforded to remedy it. Under such contracts, it has been held that the agent, having actual notice of the defect, may waive the formal return of the property to himself;[50] and, where the contract provides for no-

validate the contract. Equitable Mfg. Co. v. Allen, 76 Vt. 22, 104 Am. St. R. 915.

Obviously a mere agent to deliver goods sold by the principal has thereby no authority to alter the terms of the sale. Schenck v. Griffith, 74 Ark. 557.

[46] See *ante*, § 858. Where the buyer, in pursuance of the contract, may return the article, a return or tender to the agent who made the sale and who is still acting as such will ordinarily be held sufficient. Parsons Band-Cutter & Self-Feeder Co. v. Mallinger, 122 Iowa, 703; Clydesdale Horse Co. v. Bennett, 52 Mo. App. 333; Adrian v. Lane, 13 S. C. 183.

[47] See *ante*, §§ 715, 858.

See also Palmer v. Roath, 86 Mich. 602; Herpolsheimer v. Acme Harvester Co., 83 Neb. 53.

In Peterson v. Walter A. Wood, etc., Co., 97 Iowa, 148, 59 Am. St. R. 399, it is said: "Did the agent have authority to agree with plaintiff for a return of the notes? It appears he had authority to sell, to set up, and to see that the machine worked properly. There is no question as to his authority to have received the machine back when he discovered that it did not work properly, unless he could remedy the defect, which he did not do. It seems to us, under such circumstances, his right to restore that which plaintiff had given for the machine is not to be doubted. Everything that the agent did, touching the setting up and operating the machine, and the promise to return the notes, was in the line of an attempt to complete the sale, and within his authority. Springfield Engine Co. v. Kennedy, 7 Ind. App. 502."

[48] *Ante*, § 858.

[49] Deering v. Thom, 29 Minn. 120. See also, Olson v. Aultman, 81 Minn. 11; Marion Mfg. Co. v. Harding, 155 Ind. 648.

[50] Pitsinowsky v. Beardsley, 37 Iowa, 9; Warder v. Robertson, 75

tice in writing, the agent who has actual notice may waive the requirement of a written notice so far as he is concerned,[51] though he cannot necessarily waive notice to his principal where that also is required.[52]

Having thus the authority to waive, its exercise by the agent may be express, or it may be inferred from the fact that he has proceeded to do or act without requiring the performance in question.

§ 904. ——— Alteration of contract.—Such a sales-agent, while he could not of course surrender any of the substantial rights of his principal, would doubtless in many cases be held to have implied au-

Iowa, 585; McCormick Harvesting Mach. Co. v. Brower, 88 Iowa, 607; Osborne & Co. v. Backer, 81 Iowa, 375; Blaess v. Nichols & Shepard Co., 115 Iowa, 373; Massilon Engine Co. v. Shirmer, 122 Iowa, 699; Kenney v. Anderson (Ky.), 81 S. W. 663, 26 Ky. L. Rep. 367; McCormick Harvesting Mach. Co. v. Hiatt, 4 Neb. Unof. 587; Bannon v. C. Aultmann & Co., 80 Wis. 307, 26 Am. St. R. 37; Canham v. Piano Mfg. Co., 3 N. D. 229; Snody v. Shier, 88 Mich. 304.

In all of the cases previously cited the authority has been spoken of as a general authority to sell. In Bragg v. Bamberger, 23 Ind. 198, upon apparently the same general facts a contrary conclusion is reached; but it is said that the authority is special and exhausted when the sale is made.

See also Ellinger v. Rawlings, 12 Ind. App. 336.

[51] Peterson v. Reaping Mach. Co., 97 Iowa, 148, 59 Am. St. R. 390; First Nat. Bank v. Dutcher, 128 Iowa, 413, 1 L. R. A. (N. S.) 142; Gaar, Scott & Co. v. Rose, 3 Ind. App. 269; Springfield Engine & Thresher Co. v. Kennedy, 7 Ind. App. 502; Heilman Machine Works v. Dollarhide, 32 Mo. App. 178.

[52] See Nichols v. Knowles, 31 Minn. 489, where it is held that a notice of a defect given to the seller's mechanical expert, who happened to be in the neighborhood and his promise to come and "fix" the machine (which he never did) could not be regarded as a waiver of the requirement of written notice to the principal. The court said that there was no evidence whatever of this man's authority to receive such a notice in behalf of his principal or to waive it, and no evidence that the principal ever knew of or accepted or acted upon the notice, or ratified his promise or action in the matter.

Failure to send a *registered* letter as required by the contract has been held not fatal where the letter was actually received, especially where the proper person responded to it and came or did what was required. See First Nat. Bank v. Dutcher, 128 Iowa, 413, 1 L. R. A. (N. S.) 142 [citing Advance Thresher Co. v. Curd (Ky.), 85 S. W. 690; Kenny v. Anderson (Ky.), 81 S. W. 663; Frick v. Morgan (Ky.), 69 S. W. 1073 (Ky. cases not officially reported); Badgett v. Frick, 28 S. Car. 176; Aultman, etc., Machine Co. v. Ridenour, 96 Iowa, 638].

The Iowa cases state that "it is a well settled rule that an agent having power and authority to sell a machine under a contract which contains conditions for the benefit of the seller has authority to bind his principal by a waiver of such conditions." Reeves v. Younglove, 148 Iowa, 699; First Nat. Bank v. Dutcher, *supra* [citing Pitsinowsky v. Beardsley, 37 Iowa, 9; Warder v. Robertson, 75 Iowa, 585; McCormick v. Brower, 88 Iowa, 607; Osborne v. Backer, 81 Iowa, 375; Peterson v. Machine Co., 97 Iowa, 148, 59 Am. St. R. 399]. But that is certainly a most questionable proposition, however well settled it may be in Iowa.

thority, while the matter was still in his hands, to waive or alter other terms of the contract than the ones relating to notice, depending upon their nature and the extent of his authority. Thus, in order to prevent a failure of the sale, or to induce further trials, it might be held that he could extend the time for making tests, or promise further assistance or supplies.[53] So a general sales-agent, having authority to make sales and collections, would doubtless have authority to make reasonable adjustments and modifications in order to effect a settlement.[54] And a general sales and contracting agent, having charge of his principal's business within a given territory, with no apparent limitations upon his authority in that regard, has been held to have implied authority to consent to a change in a contract negotiated by him, though such change involved an alteration in the printed form supplied by his principal.[55]

§ 905. ——— **Notice of limitations** upon the agent's authority to waive or alter the contract may be given by the terms of the contract itself and such limitations upon the authority of particular agents at least will be effective,[56] though some courts have refused to enforce

[53] See Blaess v. Nichols & Shepard Co., 115 Iowa, 373; Peter v. Plano Mfg. Co., 21 S. D. 198.

Where a harvester is sold on terms that if the machine upon a week's trial does not work well, the buyer shall give notice and the seller will send a man to put it in order; but fixes no time within which this shall be done, the buyer and the seller's agent sent to put it in order may agree upon a time, notwithstanding a provision in the contract that "no agent has power to make any additions, or to vary the terms and conditions hereof." Holt Mfg. Co. v. Dunnigan, 22 Wash. 134.

But a mere mechanical expert sent to repair a machine sold by other agents has no implied authority to alter or consent to the alteration of the terms of the contract. Houghton Implement Co. v. Vavrowski, 19 N. D. 594.

[54] Stevenson Co. v. Fox, 19 Misc. 177.

Same of an adjustment made by a "state agent" (Randall v. Fay Co., 158 Mich. 630); and of a district agent to agree that certain goods sold in excess of buyer's needs might be returned (Herpolsheimer v. Acme Harvester Co., 83 Neb. 53).

In Ellinger v. Rawlings, 12 Ind. App. 336, an ordinary traveling salesman who had taken orders for goods which were shipped but proved to be unsatisfactory to the buyer, was held to have apparent power on a later visit to the same customer (at which he took a new order) to give directions as to the time and manner of returning the unsatisfactory goods.

[55] Van Santvoord v. Smith, 79 Minn. 316 (citing Tice v. Russell, 43 Minn. 66; Badger Lumber Co. v. Ballentine, 54 Mo. App. 172; Burley v. Hitt, 54 Mo. App. 272; Palmer v. Roath, 86 Mich. 602; Indianapolis Rolling Mill v. R. Co., 120 U. S. 256, 30 L. Ed. 639).

So of statements made by a general agent that forfeitures under the contract would not be insisted upon and that delayed payments would be accepted. McDonald v. Kingsbury, 16 Cal. App. 244.

[56] (No agent or expert can change, etc.) Fahey v. Esterley Mach. Co.,

V.

OF AGENT AUTHORIZED TO PURCHASE PERSONAL PROPERTY.

§ 908. When authority exists.—As in the case of an agency to sell, authority to purchase personal property need not be conferred in any particular manner. Where it is expressly conferred there is, of course, ordinarily very little room for doubt. The question here is rather, *first* whether any, and if so, what power to buy personal property is properly to be deduced from the words and conduct of the parties, or from a conceded power to do some other act; and, *secondly*, if it be found that authority to purchase has been conferred, how that authority is to be construed, and what implied or incidental powers are to be regarded as attaching to it.

Upon the *first* point, then, an agent may be deemed authorized to buy not only where he has been expressly authorized to do so, but also where as a matter of fact authority to buy may be implied, or where, though no such implication of fact can be made, the principal has so conducted himself as to reasonably warrant the inference of such an authority. Stated more specifically, if the principal has authorized an agent to do an act for the doing of which the purchase of personal property is practically essential, or has put him in a situation in which a power to buy it is usually exercised, or has in any manner held him out as possessing such a power, the principal will be bound by purchases made within the apparent scope of the authority from sellers in ignorance of any limitations upon it.[65] Thus the manager of a store, the superintendent of a railway or a mine, or the foreman of a farm

[65] Hayward Lumber Co. v. Cox (Tex. Civ. App.), 104 S. W. 403; Hall v. Ayer & Lord Tie Co. (Ky.), 102 S. W. 867.

In Furnace Run Sawmill Co. v. Heller, 81 Ohio St. 201, creditors who, by arrangement with their debtor, had united in appointing a trustee to manage the debtor's business with a view to paying the creditors, under a contract that the trustee should "complete all outstanding contracts and pay all necessary running expenses of said business," were held to be liable for supplies bought by him. The court held that there was express authority.

B, a salesman and buyer of raw furs, on several occasions had bought furs from the plaintiff on terms of present delivery; once before, to the knowledge of the plaintiff, he had bought furs of another person on a written contract for future delivery; his purchases had been made subject to confirmation. *Held*, to justify a finding of the jury that B had authority to make a binding contract for the purchase of furs to be delivered in the future. Abrohams v. Revillon, 129 Wis. 235.

may be found to have the power to buy stock or supplies as a usual or necessary incident of the business in his charge.[66]

§ 909. ——— Authority from conduct.—It is, moreover, not essential that the authority be deducible from an acknowledged power. It is sufficient that there has been a course of dealing or a line of conduct from which the authority can reasonably be inferred.[67] An open and notorious exercise of the authority without objection, the receipt and payment for goods purchased by the alleged agent, the turning over to the alleged agent of a business and permitting him to conduct it as the business of the principal—these are but a few of the many illustrations of the cases of conduct from which it has been held that the authority to purchase may reasonably be inferred.[68]

§ 910. ——— Limitations.—It cannot be too strongly emphasized, however, that the conduct or relation from which the inference is sought to be deduced must be such as fairly and reasonably to war-

[66] Superintendent of a mine may buy necessary supplies. Stuart v. Adams, 89 Cal. 367; Jones v. Clark, 42 Cal. 180. Or provisions for a boarding house. Heald v. Hendy, 89 Cal. 632. Manager of waterworks may buy a pump. Goss v. Helbing, 77 Cal. 190. So, of a quarry. Dorsey v. Pike, 57 Hun, 586. Manager of a farm may buy fertilizers. Jefferds v. Alvard, 151 Mass. 94. So an agent placed in charge of a lumber yard, may buy necessary supplies. Witcher v. Gibson, 15 Colo. App. 163. See also Columbus Showcase Co. v. Brinson, 128 Ga. 487. Manager of large store may buy team. Montgomery Furn. Co. v. Hardaway, 104 Ala. 100.

G and C who lived in town had an interest in a farm in another county. One H lived upon the farm and had immediate charge of their affairs there. C had for a long time had general personal supervision of the interests of himself and G. C sold out to G, but afterwards appeared to continue to exercise supervision as before. In this situation C bought supplies for the farm while H was present and they were delivered to H who used them in the usual way upon the farm. *Held* sufficient to justify a jury in finding that in the purchase C was also acting for G. Gregg v. Berkshire (10 Kan. App. 579, no opinion), 62 Pac. 550.

Where the owner of a warehouse placed an agent in charge of it and the agent, with the principal's knowledge held himself out as having general control of the principal's business at that place, the agent was held to have implied authority to purchase certain grain placed in the warehouse. Nash v. Classon, 55 Ill. App. 356 (aff'd 163 Ill. 409).

In Conabeer v. Bruenn, 121 N. Y. Supp. 207, a janitor in charge of an ordinary "flat" building was held to have implied authority to buy some necessary coal.

[67] Wilson v. Wyandance Springs Imp. Co., 4 N. Y. Misc. 605; Lamb v. Hirschberg, 1 N. Y. Misc. 108; Jefferson Hotel Co. v. Brumbaugh, 94 C. C. A. 279, 168 Fed. 867.

[68] Purchases of supplies made by the local supervising agent of a contracting company engaged in building a railroad, whose acts were known to the company and apparently acquiesced in by the company, bind the company even though actually contrary to his instructions. Hirschmann v. Iron Range, etc., R. Co., 97 Mich. 384; Black Lick Lum-

rant the inference of authority to buy; because it is clear that one may be authorized to sell, but not to buy; or to care for, manage, or control, but not to purchase.[69] And where the authority to purchase is

ber Co. v. Camp Const. Co., 63 W. Va. 477. So of "extras" ordered under similar circumstances by a supervising architect. Jefferson Hotel Co. v. Brumbaugh, 94 C. C. A. 279, 168 Fed. 867.

The purchaser at a sheriff sale who allows the prior owner to continue the business under his name as agent is liable for goods to replenish the stock purchased on his credit by such agent. McKinney v. Stephens, 17 Pa. Super. Ct. 125.

Where an agent had for several months been representing the defendants in a certain county, buying cattle to be shipped to the defendants, soliciting consignments of cattle to be sold by the defendants, and during this time drafts drawn by the agent upon defendants had been honored; and the agent then bought certain cattle upon which plaintiff had a lien, agreeing that, if plaintiff would release his lien and accept certain drafts drawn upon the defendants, defendants would pay the drafts, it was held that the agent had apparent authority to make the agreement in question. Greer v. First Nat. Bank (Tex. Civ. App.), 47 S. W. 1045.

A physician who owned a drug store, turned it over to an agent to run it at a definite wage, to be determined by the success or failure of the enterprise. *Held*, that the physician was liable for goods bought for the store. Bice v. Hover, 2 Colo. App. 172. See also, Mahoney v. Butte Hardware Co., 19 Mont. 377; C. & C. Electric Motor Co. v. Frisbie, 66 Conn. 67.

[69] A mere agency to sell does not imply authority to buy (Keyes, etc., Co. v. Union Pac. Tea Co., 81 Vt. 420); nor an agency to solicit orders (Klump v. American Hardware Co., 50 N. Y. Misc. 662). The relation of master and coachman does not clothe the latter with ostensible authority to pledge his master's credit for feed supplied for his horses. Wright v. Glyn, [1902] 1 K. B. 745.

A chauffeur has no implied authority to buy supplies or to order repairs other than such as a journey or an emergency requires. Gage v. Callahan, 57 N. Y. Misc. 479.

A mortgagor left in possession of goods, with authority to sell them and apply the proceeds in the payment of the mortgage, has no implied authority to bind the mortgagee by a purchase of new goods. Kelly v. Tracy and Avery Co., 71 Ohio St. 220. See also Herd v. Bank of Buffalo, 66 Mo. App. 643; Bentley v. Snyder, 101 Iowa, 1. A store clerk "employed to sell goods, keep the store books, and to act generally in the conduct of the store" has no authority to purchase goods on his principal's account. Doan v. Duncan, 18 Ill. 96. The foreman in general charge of the construction of a mill, authorized to employ and pay workmen, has no authority to contract to purchase necessary timber for it. Rankin v. New England and Nevada Silver Mining Co., 4 Nev. 78. The general manager of a branch selling office of a concern engaged in the business of manufacturing and selling mining machinery has no authority to purchase mining machinery. Gates Iron Works v. Denver Eng. Works Co., 17 Colo. App. 15.

An employee upon a ranch has no implied or apparent authority to buy personal supplies upon the credit of the owner. Young v. Chi Psi Cattle Co., 79 Neb. 268.

See also Wales-Riggs Plantations v. Dye, — Ark. —, 151 S. W. 998; Sackville v. Storey, — Tex. Civ. App. —, 149 S. W. 239.

inferred, its operation must be confined to the purchase of goods for the principal's benefit and on his account, and be limited to those reasonably adapted to or customarily used in a business, or under circumstances, of the kind in question.[70]

§ 911. ——— **Ratification.**—It is not indispensable that authority for a purchase shall have been given in advance. In this, as in other cases, there may be ratification; and ratification may be found where, with full knowledge of the facts, the principal has voluntarily accepted or taken the benefit of a purchase, made on his account, by one who purported to be his agent.[71]

The mere fact, however, that the goods came to the benefit of the principal is not enough to work a ratification. There must be knowledge and voluntary action or acquiescence, following a purchase made by one who acted as his agent.[72]

[70] Wallis Tobacco Co. v. Jackson, 99 Ala. 460. Manager of a plantation "authorized to purchase mules, farming implements, and supplies for it" has no authority to buy goods for the hands employed on it. Carter v. Burnham, 31 Ark. 212.

One authorized to buy cattle, sheep and hogs has therefrom no implied authority to buy hotel properties. *In re* Miley, 187 Fed. 177. The traveling agent and solicitor of a commission house, with express authority to sell the goods in which his principal dealt, and to buy hides and wool, may be found by the jury to have apparent authority to purchase fowls. Brochman Commission Co. v. Pound, 77 Ark. 364.

General authority to purchase cannot be inferred from express authority in a single instance. Rice v. James, 193 Mass. 458. To same effect: Town v. Hendee, 27 Vt. 258; Heathfield v. Van Allen, 7 Up. Can. C. Pl. 346. A book-keeper was given express authority in one instance to buy a typewriter. *Held*, to confer no implied or apparent authority to later buy another. Smith Premier Typewriter Co. v. National Light Co., 72 Misc. 405. Where principal gave his son express permission to make one purchase which was duly made and paid for, *held*, that the son had no authority two months later to make another purchase on his father's account. Cohen v. Mincoff, 96 N. Y. Supp. 411.

[71] See *In re* Cohen, 163 Fed. 444; Hayward Lumber Co. v. Cox (Tex. Civ. App.), 104 S. W. 403; Keyes v. Union Pac. Tea Co., 81 Vt. 420; Patton v. Brittain, 32 N. Car. (10 Ired. L.) 8; Witcher v. Gibson, 15 Colo. App. 163; Greenbrier Distillery Co. v. Van Frank, 147 Mo. App. 204.

[72] "While from the fact that goods belonging to one party pass into the possession of another a contract of purchase may sometimes be implied, it will not be implied when it appears that such transfer of possession was surreptitious, and without the knowledge of the latter. A party cannot be compelled to buy property which he does not wish to buy; and no trick of the vendor, conspiring with an agent of such party, by which possession is placed in him, creates on his part a contract of purchase. Nor is any contract of purchase created, even if it also appears that, unknown to such party, his agent who has entered into this wrongful combination has sold the property and put the proceeds into his principal's possession. Whatever

Quasi-contractual liability for a purchase, if any such liability may be enforced, is not within the scope of this discussion.

§ 912. Powers and limitations incident to authority to purchase.—Having thus seen something concerning the existence of the main authority, that is, the authority to purchase, it is next necessary to determine what authority, if any, is incident to it, whether it be expressly given or arise by implication, and what limitations, if any, attend its exercise.

§ 913. Agent with general authority may buy on credit.—A general agent having full and discretionary authority to buy goods for his principal may, it is held, buy either for cash or upon credit, as may in his discretion, best subserve the interests of his principal at the time.[73] It is clear, however, as will be seen in the following sections, that authority to buy upon credit is by no means an invariable attribute of a mere authority to purchase.

Even though such an authority would not ordinarily exist, however, its existence in a given case may appear from conduct, as where the principal knows that the agent is regularly making purchases upon the principal's credit, and does not dissent.[74]

§ 914. May not buy on credit, when furnished with funds.—An agent authorized to purchase goods, who is supplied with funds for that purpose, and who has not been held out as having a more general authority, has no implied authority to bind his principal by a purchase on the principal's credit; and in such a case the principal will not be bound by a purchase on credit, although the goods come in fact to his use, unless he has knowledge of the fact and does something in ratification of it, or unless there be shown a custom of trade or a course of dealing justifying a purchase on the principal's credit.[75] Mere

liability might exist in an action brought under these circumstances for money had and received, no action will lie for goods sold and delivered. The party is not responsible under a contract and as a purchaser, whatever may be his liability for the money he has received as the proceeds of the sales." *Per* Brewer, J., in Schutz v. Jordan, 141 U. S. 213, 35 L. Ed. 705. See also Swindell v. Latham, 145 N. C. 144, 122 Am. St. R. 430.

Involuntary and unavoidable use of goods purchased without authority is not of itself a ratification. Ayer & Lord Tie Co. v. Young, 90 Ark. 104.

Receipt of proceeds by the principal in the belief that they were being paid to him in satisfaction of a debt owed by the agent, is not a ratification. Bohart v. Oberne, 36 Kan. 284.

[73] Ruffin v. Mebane, 41 N. C. 507; Swindell v. Latham, 145 N. C. 144, 122 Am. St. R. 430.

[74] Witcher v. Gibson, 15 Colo. App. 163.

[75] Stubbing v. Heintz, 1 Peake's N. P. Rep. 47; Pearce v. Rogers, 3 Esp. 214; Rusby v. Scarlett, 5 Esp. 76;

authority to buy does not imply authority to buy on credit.[76] *A fortiori*

Boston Iron Co. v. Hale, 8 N. H. 363; Komorowski v. Krumdick, 56 Wis. 23; Jacques v. Todd, 3 Wend. (N. Y.) 83; Laing v. Butler, 37 Hun (N. Y.), 144; Saugerties, etc., Co. v. Miller, 76 App. Div. 167; Brittain v. Westall, 137 N. Car. 30; Wheeler v. McGuire, 86 Ala. 398, 2 L. R. A. 808; Proctor v. Tows, 115 Ill. 138; Americus Oil Co. v. Gurr, 114 Ga. 624; Chapman v. Americus Oil Co., 117 Ga. 881; First Nat. Bank v. Pennington, 75 Tex. 272 (in the absence of ratification); Patton v. Brittain, 37 N. C. (10 Ired. L.) 8; Brooks v. Mortimer, 10 App. Div. 518; Taber v. Cannon, 8 Metc. (Mass.) 456; Fraser v. McPherson, 3 Desaussure (S. C.), 393; Parsons v. Armour, 3 Pet. (U. S.) 413, 7 L. Ed. 724. An agent authorized to draw on his principal for amount of purchases is governed by the same rules that govern agents in whose hands funds are placed. Parsons v. Armor, 3 Peters (U. S.), 412, 7 L. Ed. 724. Where an agent in charge of a livery business bought goods on his principal's credit, evidence is admissible in an action against the principal to show that the agent was at all times in sufficient funds either from the business, or furnished by the principal. Taft v. Baker, 100 Mass. 68.

An agent authorized to buy goods with funds furnished by the principal is not authorized to borrow money with which to buy even though the principal does not supply the funds. Swindell v. Latham, 145 N. Car. 144, 122 Am. St. R. 430.

Defendant, having charge of a farm in this state, employed an agent to manage it, and authorized him to employ, pay and discharge laborers. Defendant arranged with certain merchants to supply such goods as the agent needed. The agent bought clothing for the employees of other dealers, and charged it to the defendant. The sellers knew that the agent bought goods at the appointed places, but did not know and made no inquiry as his authority or the terms on which those purchases were made. *Held*, that defendant was not liable, even though, without his knowledge, the agent supplied the clothing to the employees in payment of their wages. Eckart v. Roehm, 43 Minn. 271.

Where the course of business between a merchant in the country and a merchant in town is such, that the country merchant transmits to his correspondent in town his produce and such articles as he has to sell, and the merchant in town, in return, supplies him with such merchandise as he deals in, charges it to the merchant in the country, the latter is not liable to the seller for any articles thus procured, although he directs the purchase of an article which he knows the merchant in town does not deal in, and the seller is informed for whom the purchase is made, if the merchant in the country has funds in the hands of the merchant in the city, and has never authorized him to pledge his credit on the purchase of any articles thus ordered, or recognized such act. Jacques v. Todd, 3 Wend. (N. Y.) 83.

Where a wife furnished her husband with money to buy lumber for her house, but the money, instead of being applied on the purchase of the lumber, was applied without her knowledge, on a debt owed by the husband, the wife is not liable for the lumber furnished. The fact that she knew the lumber was being used was not a ratification, where she supposed it had been paid for. Young v. Swan, 100 Iowa, 323.

Where an agent who is furnished with funds to buy goods for his principal buys them with his own funds for the principal, having used the principal's funds for other purposes, the title vests in the principal. Edwards v. Dooley, 120 N. Y. 540.

[76] Berry v. Barnes, 23 Ark. 411.

is this true where the seller is expressly notified that the agent has no authority to buy on credit.[77]

§ 915. ——— But where the principal, either expressly or by implication, authorizes a purchase upon his credit, the fact that the agent then had, or was afterwards supplied with funds with which to pay for the goods so purchased, will not relieve the principal from liability if the agent fails to pay.[78] The fact, moreover, that an agent authorized to make purchases, is then, or soon after, supplied with funds with which to pay for them, does not necessarily lead to the conclusion that he was forbidden to purchase upon credit; the inference

[77] American Lead Pencil Co. v. Wolfe, 30 Fla. 360.

[78] Thus in Stapp v. Spurlin, 32 Ind. 442, where an agent for the purchase of wheat upon commission bought a quantity of wheat to be paid for on delivery, but the agent on delivery paid only a portion of the price, and sent the wheat to his principal who later settled with the agent in ignorance of the fact that the wheat was not fully paid for; it was *held* that the principal was liable for the balance of the price to the seller even though he had waited several months without presenting his claim. The court said: "If they [the principals] furnished the agent with money to pay for the wheat it was his duty to make the payment, but if he failed to do so, and converted the money to his own use, it was simply a violation of the trust and confidence reposed in him by his principals; and as they trusted him to act for them, as between them and one who has dealt with him as their agent, in good faith, they must suffer the consequences of his bad faith with themselves."

In the same effect is Cruzan v. Smith, 41 Ind. 288, where a general agent to purchase wheat and instructed to buy for cash only had actually bought wheat on credit and shipped it to his principal, who settled with him before learning of the purchase upon credit.

A general agent of trustees having full authority to purchase the particular goods, and to do so upon the principal's credit, obtained from the seller a receipt for the purchase price in full upon his representation that such receipt was necessary in order to secure payment from his principals. The agent then presented the receipt to his principals, who paid the money in ignorance of the circumstances under which the receipt was obtained. The agent failed to turn over the money to the seller and it was held that the latter could maintain an action against the principals for the purchase price. Willard v. Buckingham, 36 Conn. 395.

Plaintiff, upon the request of defendant's architect, supplied lumber which was used in the construction of defendant's house. The contract between defendant and the architect gave the latter authority to make contracts for the construction of the building, and it also provided that defendant should on each Saturday forenoon furnish money to pay the expenses of the preceding week as shown by the architect's estimates. *Held*, that the contract clearly showed that the money was not to be supplied till after bills were contracted and that it was the intention that the architect should have power to pledge the defendant's credit. Larivee v. A'Hearn, 207 Mass. 288.

Authority to an agent to build a house held to justify procuring ma-

to be drawn is one of fact.[79] And where an agent, who has general authority to buy, is instructed not to buy more goods than the funds at his command will enable him to pay for, the principal will, nevertheless, be bound to one who relies upon his apparent authority in ignorance of such instructions.[80] And so where the usual course of business is to buy upon credit, private directions to the agent not to

terials upon the principal's credit. Spry Lumber Co. v. McMillan, 77 Ill. App. 280.

A long continued course of dealing, in which the agent bought upon the principal's credit, with this knowledge and without his dissent, will justify an inference of consent. Witcher v. Gibson, 15 Colo. App. 163.

In the old *nisi prius* case of Hazard v. Treadwell, (1768) 1 Strange, 506, it appeared that "the defendant who was a considerable dealer in iron and known to the plaintiff as such, though they had never dealt together before, sent a waterman to the plaintiff for iron on trust and paid for it afterwards. He sent the same waterman a second time with ready money, who received the goods, but did not pay for them; and the chief justice [Pratt] ruled the sending him upon trust the first time and paying for the goods, was giving him credit, so as to charge the defendant upon the second contract." This case has been often cited, *e. g.* Keyes v. Union Pac. Tea Co., 81 Vt. 420, but it is, of course, questionable whether it is sound. It is at most an inference of fact, and, as has been seen in several places, the inference of authority upon one occasion is not usually to be safely drawn from the existence of a special authority upon another occasion. See *ante*, § 910, note.

[79] An agent who had entire charge of property,—procuring tenants, collecting rents, paying taxes, insurance, etc., was expressly authorized by the owner to make certain quite extensive repairs, being given full authority to act according to his own judgment, but being directed not to spend more than $500 upon them, which sum was given him in cash. The agent procured from the plaintiff lumber and other material, which were charged to the agent, and other supplies elsewhere for cash, in a gross amount in excess of $500. Upon discovery of the agency, the plaintiff filed a bill for mechanic's lien. *Held*, that the $500 limit did not qualify the power as far as third persons were concerned and that since the agent was not expressly prohibited from purchasing on credit, such prohibition, if it existed at all, must be inferred from the fact that money was placed in his hands and that such inference was a question of fact. Paine v. Tillinghast, 52 Conn. 532. Compare Proctor v. Tows, 115 Ill. 138.

[80] Liddell v. Sahline, 55 Ark. 627; Napa Valley Wine Co. v. Casanova, 140 Wis. 289; Wheeler v. McGuire, 86 Ala. 398, 2 L. R. A. 808; Pacific Biscuit Co. v. Dugger, 40 Or. 302.

The fact that the principal was undisclosed does not, it is held, alter the rule. Hubbard v. Tenbrook, 124 Pa. St. 291, 10 Am. St. Rep. 585, 2 L. R. A. 823; Watteau v. Fenwick, [1893] 1 Q. B. 346; Steel-Smith Grocery Co. v. Potthast, 109 Iowa, 413. See also Fees v. Shadel, 20 Pa. Super. 193; Sartwell v. Frost, 122 Mass. 184; Brooks v. Shaw, 197 Mass. 376; Mississippi Valley Const. Co. v. Abeles, 87 Ark. 374.

But see the discussion of the liability of the Undisclosed Principal.

The ordinary rules governing the liability of an undisclosed principal when discovered, of course apply to purchases. See Lamb v. Thompson, 31 Neb. 448; Patrick v. Grand Forks Merc. Co., 13 N. D. 12.

buy in that way will not save the principal from liability to those who, in good faith, sell in ignorance of the limitation.[81]

§ 916. ——— And even where the agent is supplied with funds and is forbidden to purchase upon the principal's credit, it does not necessarily follow that he is expected to pay at the very instant he receives the property. It may well be that it was fairly within the contemplation of the parties, that he was to pay at the termination of the transaction, or at the end of the day, or when the seller presented himself for payment, and the like; and if the agent should not pay when so expected, the principal might still be liable.[82]

§ 917. ——— Moreover, the seller upon a cash sale, who has delivered the goods upon condition of immediate payment and without waiving his right thereto, may, if payment be not made, recover the goods from the agent or from the principal himself, if they have come into his possession, the principal in such a case not being a *bona fide* purchaser.[83] And so, where the agent, supplied with cash wrongfully purchases upon the principal's credit, the principal may make himself

[81] Watts v. Devor, 1 Grant (Pa.), 267.

[82] Where an agent is furnished with money to pay for property which he is authorized to purchase, there is no such limitation on his authority to buy on credit, as to require him to pay the instant, or on the same day, for property which he purchases without any understanding or agreement that credit is to be given therefor. Adams v. Boles, 24 Iowa, 96. The facts alleged were that W. (a resident of Muscatine) acted in that place and throughout the adjacent country as the agent of defendants (grain and cattle dealers, residing in Washington, Iowa), in making purchases and shipments of stock for them. Defendants furnished W. with money to pay for his purchases, and particularly made arrangements with a bank in Muscatine to cash checks drawn upon it by W. W. had acted as the agent of the defendants some eight or ten months, making purchases of stock for them. During that period he had bought hogs of the plaintiff at six different times. When he wished to buy in order to fill up a car he would come in person or send a wagon to plaintiff, get hogs, and then, or very soon afterwards, settle for them. He acted as agent for no other person, and there was no testimony in the case, showing that he bought stock on his own account. The two lots for which this action was brought were sold in the same way that the others had been. On the first of these two lots W. paid $125. In three or four days after the delivery of the second lot the plaintiff went to Muscatine and asked W. for his pay, but did not get it. Shortly after that W. ran away. *Held*, that defendants were liable.

In Spry Lumber Co. v. McMillan, 77 Ill. App. 280, the court points out that a purchase of goods which are delivered in installments and are to be paid for when all are delivered "can hardly be said to be a purchase on credit;" it is not the giving of credit "in the sense in which the word credit is used among merchants."

[83] See Mechem on Sales, §§ 554, 555.

liable for the purchase by ratification, or though he may not be liable upon the contract, he must usually, if he repudiates it, return the goods; and if he does not, or cannot do so, he may be liable in *quasi* contract for their value.[84]

[84] See Patton v. Brittain, 32 N. Car. (10 Ired. L.) 8, in which a principal gave authority to an agent to purchase hides but only so far as he had cash of the principal to pay for them. The agent bought on the credit of his principal, and the goods were delivered to and received by the principal with knowledge that they had not been paid for. *Held*, that the seller could recover from the principal the price of the goods. In Sartwell v. Frost, 122 Mass. 184, the defendant purchased the stock in trade of a bankrupt, left him in charge of the business, with the understanding that he should not buy on credit. Plaintiff sold goods to this agent on credit, without knowledge of any principal. The defendant discovered by investigation of his agents business that purchases had been made on credit, and he thereupon compelled the agent to settle such debts. Afterwards the agent again bought on credit, as the defendant by reasonably diligent inquiry might have discovered. The defendant took possession of the business, and was held liable for the purchases on the theory of a ratification by an acceptance of benefits. In Moffit-West Drug Co. v. Lyneman, 10 Colo. App. 249, the defendant's husband acted as her agent in conducting a drug business. Defendant had notified plaintiff not to sell goods to her husband. The husband, however, bought goods on credit from plaintiff, on various occasions covering a period of five months. On his death, the defendant took charge of the store, and found in stock one barrel of whisky which she apparently knew had been purchased contrary to her orders. The other goods of the account sued on were not brought to her notice, but did in fact go to increase the stock of her business. Defendant was held liable for the price of all the goods on the ground that she had ratified the unauthorized purchase by an acceptance of the subject matter.

In Swindell v. Latham, 145 N. C. 144, 122 Am. St. R. 430, an agent, authorized to conduct a business and purchase goods, borrowed money from the plaintiff with which to buy. Lower court gave this instruction: "If the agent had no authority to borrow money to pay for goods, but was directed to buy for cash with money advanced by the principal, and the latter fails to furnish the cash, and the agent for the purpose of promoting the business borrows money and uses it to pay for goods for his principal, and the goods are used in said business for the benefit of the principal, then the principal is liable for the money so borrowed." This charge was held to be too broad, and the court explains it's decision in Brittain v. Westhall, 135 N. C. 492, upon which decision the trial court had founded its instruction in this case. To hold a principal liable in contract for goods bought on credit where the agent was authorized to buy only for cash acceptance of benefits by the principal is not alone sufficient, but it must appear that the principal had notice of his agents default.

In McDowell v. McKenzie, 65 Ga. 630, there was an action on account for goods purchased and the whole opinion of the court is in this language: "This case turns on a single question: Can a merchant in Georgia whose agent buys goods in New York, though on credit, and the credit unauthorized by the Georgia

§ 918. May buy on credit when not supplied with funds.—An agent, however, who is directed to purchase goods, but is not supplied with the necessary funds, and who is not expected to buy upon his own credit,[85] has ordinarily implied authority to purchase such goods on the credit of his principal, for otherwise, he cannot execute his authority.[86] And it has been held that an agent who has general authority to buy and sell goods for his principal, may buy on credit or for cash at his discretion.[87]

merchant, legally refuse to pay for the goods when they have gone into his possession, been sold for him, and he has pocketed the proceeds, especially when he had paid other bills bought on credit by the same agent? To propound the question plainly is to answer it in law, as well as in good sense and common honesty." If this decision rests on a ratification, it must be noted that there is no mention in the case of knowledge on the principal's part.

[85] In Bank of Indiana v. Bugbee, 3 Keyes (N. Y.), 461, it was said that authority to a broker to buy goods but not supplied with funds, contemplated that he should buy them on his own credit or with his own funds. The broker settles later with his principal.

This is apparently the common understanding in many markets with reference to brokers.

[86] Sprague v. Gillett, 9 Metc. (Mass.) 91; Witcher v. Gibson, 15 Colo. App. 163.

Where the owner of a boat sent a member of the crew to buy supplies for it, which were sold upon the owner's credit, it was held that if the agent was furnished with the money to pay for the goods the principal was not liable for goods furnished on credit since the mere authority to purchase would not justify the agent in buying on credit, but that since he did not always furnish the agent with funds and the agent rendered him an account and received the money in settlement, the agent was authorized to purchase on credit and the principal was liable for the goods. Spear & Tietjen Supply Co. v. Van Riper, 104 Fed. 689.

The defendants, being two of several joint owners of a whaling vessel, authorized a third joint owner to purchase their share of the necessary supplies of the vessel for a coming voyage but advanced him no money. Such third owner, as their agent, bought the supplies on a six months' credit and gave a note payable in six months. The defendants, in ignorance of the credit and the note, paid the third owner their share with a commission, but the note not being paid at maturity, the vendor brought suit against them for the supplies.

Held, that he was entitled to recover. Wilde, J., said: "The defence is, that the agent was not authorized to make the purchase on a credit. That he was not in terms expressly so authorized is admitted; but he was authorized to make the purchase, and no funds were advanced to him, to enable him to purchase for cash. This, by implication, unquestionably authorized him to make the purchase on the defendant's credit. When an agent is authorized to do an act for his employer, all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted." Sprague v. Gillett, 9 Metc. (Mass.) 91.

[87] Ruffin v. Mebane, 41 N. Car. (6 Ired. Eq.) 507.

§ 919. Agent with general authority to purchase has authority to agree upon price and terms.—An agent invested with general authority to purchase goods for his principal has, in the absence of contrary limitations upon his authority, implied power to settle upon the usual incidents of the purchase.[88] Thus, in general, he may select the seller; he may determine upon the particular goods to be supplied; he may, within ordinary and reasonable limits, agree upon the price and terms of payment;[89] he may determine upon the time and method of delivery;[90] he may as part of the act acknowledge the receipt of the goods and the amount of indebtedness therefor;[91] and may in general

[88] The manager of a coal company put in charge of its business and authorized to purchase a track scale, to whom the principal refers the seller to make the contract, and with whom the contract is in fact made is impliedly authorized to arrange the details of the contract and may agree to dig the pit and stipulate that title shall not pass until the scale is paid for. Wishard v. McNeill, 85 Iowa, 474. Compare Elder v. Stuart, 85 Iowa, 690. An agent authorized to purchase window screens *held* to have implied power to agree that the window sash should be so arranged that the screens could be properly put in place. Hogg v. Jackson & Sharp Co. (Md.), 26 Atl. 869. An agent with authority to buy logs has authority to buy in the usual manner and therefore may agree that the logs shall be scaled in the usual way and paid for according to that scale. Watts v. Howard, 70 Minn. 122. The court took judicial notice of the usual manner.

Where the principals wrote to the seller: "R. comes to see you to purchase your cattle in M. County, adjoining our pasture, or any purchase he may make of you on this trip for joint account for us and himself, we have authorized him to do so, and have agreed to make any reasonable advance on delivery of contract at any bank in this city, as an advance on contract, and as to fulfilment of the same," *held*, that this authorized R., in buying a herd of 3,000 cattle, to stipulate for $5,000 liquidated damages, in case of breach by the purchasers. Halff v. O'Connor, 14 Tex. Civ. App. 191. That agent "was placed at the elevator to buy and receive grain; that he contracted for future delivery and attended generally to the corporation's business" showed authority to rescind contract. Middle Elevator Co. v. Vandeventer, 80 Ill. App. 669.

But an agent authorized to purchase has no authority to make unusual and extravagant terms, as in Salmon v. Austro-American Stave Co., 109 C. C. A. 254, 187 Fed. 564, where an agent agreed as part of a contract of purchase that money would be advanced to cover the expense of manufacturing other goods than those included in the purchase.

[89] Boulder Invest. Co. v. Fries, 2 Colo. App. 373. As between principal and agent, the principal is not bound, where the agent has departed materially from his authority. Ross v. Clark, 18 Colo. 90.

And a buying agent has no authority to agree secretly with the seller upon an excessive price in order that the excess may be applied to discharge a debt due from the predecessor in business of the principal. Pacific Lumber Co. v. Moffat, 67 C. C. A. 442, 134 Fed. 836.

[90] Owen v. Brockschmidt, 54 Mo. 285.

[91] Stothard v. Aull, 7 Mo. 318. The agent in this case executed a

do those things, not inconsistent with his authority, which are proper and usual to do in such cases.[92] When employed in a capacity, or to deal in a market, affected by a particular custom, he is presumptively authorized to comply with such custom in making the purchase.[93]

In this case, however, as in others, limitations may lawfully be imposed upon the agent's authority, which will be binding upon the agent, and upon third persons having knowledge or charged with notice of them.[94]

§ 920. May not exceed limits as to quantity.—It is the duty of an agent, commissioned to buy goods up to a certain quantity, to confine his purchase within the limits given.[95] And he has no more implied authority to purchase a smaller than a greater quantity.[96] If no limits are fixed, a reasonable discretion may be exercised. An agent,

promissory note for the price,—an act which the agent ordinarily would have no authority to do (see *post*, § 926)—even though he might agree upon the amount. But in this case there was other evidence from which the court held that a power to make such a note might be inferred. The agent was also a general managing agent and carried on the business, with the principal's consent, in his own name.

But a mere agent to purchase goods, who has done so, has no implied authority at a later time to agree to an account stated. Moore v. Maxwell, 155 Ala. 299.

[92] An agent authorized to purchase property is authorized to receive it. Callahan v. Crow, 91 Hun, 346; affirmed 157 N. Y. 695.

An agent authorized to purchase and receive property has implied power to pass upon the quality and to bind his principal by acknowledging that it conforms to the contract. Schroeder Lumber Co. v. Stearns, 122 Wis. 503; Nunnely v. Goodwin (Tenn. Ch. App.), 39 S. W. 855. In Birge-Forbes Co. v. St. Louis, etc., Ry., 53 Tex. Civ. App. 55, an agent authorized to buy and ship cotton was held to have implied authority to agree that cotton stored on a railroad's platform should be at the risk of the owner.

In St. Louis, etc., Ry. v. Blocker, — Tex. Civ. App. —, 138 S. W. 156, two agents were purchasing and shipping poles for plaintiff, and were working contiguous territories along line of defendant railroad. One agent signed an agreement releasing the railroad from liability on poles stored on its right of way. This agreement held to be binding only as to poles which the agent making it had stored.

[93] Van Dusen-Harrington Co. v. Jungeblut, 75 Minn. 298, 74 Am. St. R. 463.

This is more fully exemplified in the case of brokers. See Brokers.

[94] Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96.

[95] Olyphant v. McNair, 41 Barb. (N. Y.) 446, aff'd 41 N. Y. 619; White v. Cooper, 3 Pa. St. 130.

Where an agent is known by the seller to be authorized to buy goods on credit only to a certain amount, the seller is bound to observe the limitation at his peril. Mussey v. Beecher, 3 Cush. (Mass.) 511.

As to this, see *ante*, § 761.

[96] Olyphant v. McNair, 41 Barb. (N. Y.) 446, aff'd 41 N. Y. 619. An agent authorized to purchase one-sixteenth of a ship at $40 per ton does not bind his principal by purchasing two-sixteenths at $44 per ton, one-sixteenth being on his own

however, having general authority to buy would, in many cases, bind his principal, in accordance with rules already discussed, even although he exceeded the instructions given him, or bought more than his actual authority would justify, if his purchases were within the limits of his apparent powers.[97]

§ 921. Must observe limits as to quality or species.—An agent authorized generally to buy chattels, without limitation as to kind or quality, may undoubtedly exercise a fair and reasonable discretion. But where he is expressly limited to the purchase of a specific thing, he cannot purchase another. And where he is instructed to buy goods only of a given quality or of a certain kind, he must observe the limits fixed.[98]

These rules, however, must be limited as in the preceding section; for it is clear that an agent, having general authority to buy, would, in many cases, bind his principal, though he departed from instructions as to quality or species; and an agent, having apparent authority to buy according to his own discretion, might often bind his principal, though his actual authority were otherwise.[99]

§ 922. Must observe limits as to price.—As stated in the preceding section, an agent authorized to buy without restrictions has im-

account. Starbird v. Curtis, 43 Me. 352.

But the circumstances may easily be such as to show that it was not essential that the agent should buy the entire quantity in one transaction or of one person. Thus a direction to buy one hundred horses might fairly be found to mean that the agent should buy of various persons until he had secured one hundred. A purchase of five horses, toward the hundred, might then be authorized, and, if the agent never succeeded in securing one hundred, the purchase of those he did buy would not necessarily be defeasible, nor would the agent necessarily be liable because he never completed the number if that was found to be impossible under the circumstances. See Johnston v. Kershaw, L. R. 2 Ex. 82; Lathrop v. Harlow, 23 Mo. 209; Gordon v. Buchanan, 13 Tenn. (5 Yerg.) 71.

[97] Herrmann Saw Mill Co. v. Bailey, 22 Ky. Law Rep. 552, 58 S. W. 449. Where, however, the sellers know of the limitation they deal at their peril. Thrall v. Wilson, 17 Pa. Super. Ct. 376.

[98] Davies v. Lyon, 36 Minn. 427; White v. Cooper, 3 Pa. St. 130; Hopkins v. Blane, 1 Call (Va.), 361; Killough v. Cleveland (Tex. Civ. App.), 33 S. W. 1040; Theile v. Chicago Brick Co., 60 Ill. App. 559; Gregg v. Wooliscroft, 52 Ill. App. 214; Hackett v. Van Frank, 105 Mo. App. 384; Day v. Snyder Brokerage Co. (Tex. Civ. App.), 130 S. W. 716; Dick v. Gordon, 6 Grant's Ch. (Can.) 394.

[99] South. Ry. Co. v. Raney, 117 Ala. 270. An agent authorized to purchase peanuts, but only with the approval of his principal, made a purchase of a specific stock, described as "recleaned peanuts" in the written contract, and the principal approved the contract. Later the principal contended that his approval was not binding upon him because the peanuts were inferior to the standard commercially described as

plied authority to agree upon the price which shall be paid. This discretion, however, even in such a case, is not an unlimited one, and should be regulated by the customary or market price, where there is one, and, at all events, by a fair and reasonable price. The principal may, however, limit the price which the agent is to pay, and while private instructions cannot prevail against apparent authority, the seller who has actual knowledge or is charged with notice of the restrictions cannot bind the principal by a contract in violation of them.[1]

The statement is not infrequently found that an agent to buy, though limited as to price, may bind his principal to pay more if the seller be ignorant of the limitations. A so-called general agent, having an apparently unqualified or discretionary power to buy, may doubtless bind his principal, though he exceeds his instructions. An agent, though a special one, may be so held out by his principal as to have an apparently unlimited authority. What was said by the principal concerning price may be found to have been intended as mere instructions for the private ear of the agent, rather than as a real limitation upon his au-

"recleaned." The seller had no knowledge of the restriction, and there was nothing to put him upon notice. *Held*, that the principal was bound. Nunnely v. Goodwin (Tenn. Ch. App.), 39 S. W. 855. Compare Shroeder L. Co. v. Stearns, 122 Wis. 503. But in Day v. Snyder B. Co., *supra*, the defendant in Texas wrote a broker in New York instructing the broker to buy "new soft shell walnuts," leaving the matter of varieties to the broker's discretion. The broker inspected the walnuts offered, and made a contract for the purchase of a quantity of old walnuts. *Held*, that the defendant could repudiate on discovering that its agent had not purchased the kind ordered.

[1] Burks v. Stam, 65 Mo. App. 455. Here an agent bought a pair of race horses for his principal, taking a written bill of sale in which the price was set at $3,500. Though the agent was authorized to buy at that figure, he nevertheless orally agreed at the sale that the seller should receive a certain amount more if the buyer "did well and had no bad luck with the horses." *Held*, that the agent was "under all the evidence, limited to the price stated in the written contract; hence the defendant was not bound by another or different agreement if any such was made." In Atlas Mining Co. v. Johnston, 23 Mich. 36, the plaintiff in a sale under order of court had land bid off to S at $20,500. P, an agent of the defendant, desired to buy the property, but had been told by his principal to pay no more than $20,100. This fact was known to the plaintiff. P, hoping his principal would see the advisability of the purchase, agreed to pay $20,500, and be substituted as purchaser in place of S. *Held*, that the principal was not bound by the agreement to buy for $20,500.

Authority given to an agent to purchase a certain horse for his principal at a limited price, does not justify the agent in sending a third person to buy the horse at a less price and then turn the horse over to the principal at the price limited. Armstrong v. Elliott, 29 Mich. 485.

thority.[2] But it certainly can not be true that a principal may not, in any case, put limitations upon the price which his agent may pay, which will be effective, even though the seller was in fact ignorant of them.[3] A seller is under the same obligation as any one else to ascertain the authority of the agent with whom he deals.

The place at which, or the circumstances under which, the agent buys may be sufficient to indicate limitations as to price; and limitations suggested by the ordinary experience and couduct of men may not be overlooked. An agent sent out, however, with apparent authority to negotiate and conclude a binding purchase from any one having such goods for sale, would doubtless be deemed to have authority to agree upon the price within the limits of what was usual or reasonable. Much that was said in the preceding subdivision respecting the authority of a selling agent to fix the price, is applicable here.

§ 923. May be restricted as to persons with whom to deal.—As has been seen above, an agent authorized to buy without restrictions, may buy from any one who has such goods for sale. The principal, however, may lawfully restrict the agent as to the persons with whom he shall deal in the execution of his authority, and where such restrictions are actually or constructively known, the principal cannot be bound by a purchase from other persons than those designated.[4]

§ 924. May make representations as to principal's credit.—An agent expressly authorized to purchase goods upon his principal's credit, has implied authority to make the natural and ordinary representations as to the solvency and credit of his principal, without which the seller would not sell the goods.[5] This rule is based upon the principle that the agent has implied power to do those things which are

[2] See as to this distinction, § 730, *ante*. Hatch v. Taylor, 10 N. H. 538; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

[3] It is true that Jones Cotton Co. v. Snead, 169 Ala. 566, seems to hold the contrary, upon the authority of § 365 of the first edition of this work; but the court gives to that section an effect which the writer did not intend it to have.

Comer v. Granniss, 75 Ga. 277, is also apparently *contra*, though there is no discussion at all of this particular question.

[4] Peckham v. Lyon, 4 McLean, 45; Thrall v. Wilson, 17 Pa. Super. 376; Robinson v. Thompson, 74 Miss. 847.

An agent apparently put in general charge of the construction of a building may, it is held, bind his principal for materials purchased for and used in the construction of the building, though he bought them of plaintiff, contrary to instructions to buy all materials of another person specified. Mississippi Valley Const. Co. v. Abeles, 87 Ark. 374.

[5] Hunter v. Hudson River Co., 20 Barb. (N. Y.) 493; Morris v. Possner, 111 Iowa, 335. See also Meyerhoff v. Daniels, 173 Pa. 555, 51 Am. St. R. 782.

necessary and usual to accomplish the object sought to be attained, and must, in reason, be limited by that necessity. Thus, if the principal's credit is already established, or if the seller does not require a representation, the principal ought not to be bound by the mere voluntary and gratuitous representations of his agent, nor in any event, for excessive or unusual pledges of responsibility.

§ 925. May not borrow money to pay for goods.—Even though it should be conceded that the agent, not supplied with funds, may buy upon the principal's credit, no authority will be implied to borrow money on the principal's credit with which to pay for the goods, unless such borrowing was authorized by the course of dealing, or was practically indispensable to the execution of the authority.[6]

§ 926. May not execute negotiable paper.—So authority to bind his principal by a note or bill for the price of the goods bought is not

[6] See *post*, of Agent Authorized to Borrow Money; Bickford v. Menier, 107 N. Y. 490. Authority to buy stock does not justify an inference that the agent may borrow money on the principal's credit to pay for it. Martin v. Peters, 27 N. Y. Superior (4 Robt.), 434. In Bank of Indiana v. Bugbee, 3 Keyes (N. Y.), 461, it was held that an authority to a broker to buy and load upon a vessel a cargo of produce, does not, by implication, and in the absence of any sufficient custom, give to the agent the power to borrow, upon the credit of the principal, the money with which to make the purchase. In Bryant v. La Banque Du Peuple, [1893] App. Cas. 170, it was held that the Quebec agent of a London Company, the Canadian business of which was loaning money on the security of timber, whose power of attorney authorized him to make contracts for the purchase or sale of goods, the chartering of vessels, the employment of agents and servants, and a great number of other specified acts necessarily incidental thereto, has no authority to borrow money on behalf of the company or bind it by a contract of loan.

Authority to buy cotton, though general, does not authorize the agent to open a bank account, borrow money, and pledge his principal's securities as collateral therefor. Chicago, etc., Ry. Co. v. Chickasha Nat. Bank, 98 C. C. A. 535, 174 Fed. 923.

A power of attorney, authorizing an agent in England to purchase goods in connection with the business carried on by his principal in the colonies, and either for cash or on credit, and "where necessary in connection with my business or in connection with any purchases made on my behalf as aforesaid," to make, draw and accept bills of exchange, and to sign the name of the principal to any checks on the London banking account of the principal, does not confer on the agent a general borrowing power. Jacobs v. Morrris, [1901] 1 Ch. Div. 261. See also Weekes v. Hardware Co., 23 Tex. Civ. App. 577.

Authority to buy horses held to include authority to borrow money for feed for and care of them after purchase and before shipment to the principal. Rider v. Kirk, 82 Mo. App. 120.

An agent put in charge of a business, with large discretionary authority, may bind his principal by borrowing necessary money. McDermott v. Jackson, 97 Wis. 64.

to be implied from mere authority to purchase. Such an agent, therefore, has no authority to bind his principal by a promissory note or bill of exchange, unless that authority be expressly given, or unless the giving of such note or bill is indispensable to the discharge of the duties to be performed.[7]

Authority to buy on credit when not supplied with funds does not, as seen in the preceding section, justify the borrowing of money to pay for them, and it does not justify either giving a note for the price, or giving a note to obtain money with which to pay the price.[8]

§ 927. May not guarantee payment by his vendor.—An agent authorized to buy goods and to make cash advances upon goods to be delivered, has thereby no implied authority to bind his principal by a guaranty that the person from whom the agent bought will pay what he already owes to his own vendor for the goods.[9]

§ 928. May not sell goods.—An agent authorized to buy goods has therefrom no implied authority to sell them.[10] And this result is,

[7] Where an agent in charge of a butchering business signed his principal's name to a promissory note it was held that the jury should have been instructed that "though an agent employed to make purchases for his principal may undoubtedly bind him by a contract of sale, he cannot ordinarily, without express authority, bind him by a negotiable promissory note; and that the single exception to this positive rule is in relation to agencies, the objects and purposes of which cannot be accomplished without the exercise of such a power." Temple v. Pomroy, 4 Gray (Mass.), 128.

Accordingly where the owners of a whaling vessel appointed an agent to fit her out and furnish the proper supplies for a whaling voyage, it was held that such agent had no authority to bind the owners by accepting a draft in their names as agent for the purchases made by him for the vessel. Taber v. Cannon, 8 Met. (Mass.) 456. An agent placed in general charge of a mercantile business who is given a definite amount of money and directed to conduct the business "upon the cash systme" has no authority to execute a note in the defendant's name as agent for goods purchased for the business. Stoddard v. McIlwain, 7 Rich. (S. Car. L.) 525; Perrotin v. Cucullu, 6 La. 587, is *contra*.

An agent to purchase wool, suggested a certain purchase to his principal, but the latter declined it. Agent nevertheless purchased and induced plaintiff bank to discount a draft for the price. Plaintiff had no knowledge of the instructions not to buy, but made no effort to ascertain his powers and relied on the fact that once before the agent had caused a similar draft to be discounted at the bank which the principal paid. *Held*, that bank could not recover on the draft. First Nat'l Bank v. Hall, 8 Mont. 341.

[8] Swindell v. Latham, 145 N. C. 144, 122 Am. St. R. 430.

Manager of store no implied authority to give note for goods previously bought. Witz v. Gray, 116 N. C. 48.

[9] Oberne v. Burke, 30 Neb. 581.

[10] Hogue v. Simonson, 94 N. Y. App. Div. 139; McIntosh-Huntington Co. v. Rice, 13 Colo. App. 393.

of course, not changed by the fact that the buyer relied on the agent's false assertion that the principal had permitted him to sell them.[11]

§ 929. Authority to alter or cancel contract.—An agent authorized to make a contract of purchase would ordinarily have no implied authority to afterwards consent that the contract should be cancelled or altered; but where the agent has been given general authority over the matter of purchase, with discretion in selecting the purchasers, agreeing upon the amounts, and fixing upon the terms of the sale, a modification or cancellation of a particular contract, done with a view to promote the principal's interests, would ordinarily be within his authority.[12]

§ 930. Authority to make admissions after the purchase.—As has been seen in an earlier section, an agent at the time of the purchase may be deemed to have authority to make the acknowledgments or admissions which are properly a part of the purchase;[13] but there his authority would usually end; and, unless he were an agent with general authority over the whole subject-matter, he could have no implied authority, after the transaction was ended, to affect his principal by admissions or acknowledgments respecting the past transaction.[14]

§ 931. Agent can buy only for principal.—The authority of the agent to buy, like that of other agents, is to be exercised only for the principal's benefit; and the agent therefore cannot bind his principal by purchases openly made on his own account or that of some third person.[15] If an agent, not known to be such, buys for himself, when he should have purchased for his principal, the latter may charge him as a trustee; but a person who, in good faith, sells to the agent is not affected by a secret intention of the agent to use the goods for himself.[16]

[11] Sage v. Shepard & Morse Lumber Co., 4 N. Y. App. Div. 290 (aff'd 158 N. Y. 672).

[12] Anderson v. Coonley, 21 Wend. (N. Y.) 279; Spaulding Lumber Co. v. Stout, 86 Wis. 89; Middle Division Elevator Co. v. Vandeventer, 80 Ill. App. 669.

[13] See *ante*, § 919.

[14] Agent who has made a purchase has no implied authority at a later period to bind his principal by an account stated as to the price. Moore v. Maxwell, 155 Ala. 299.

[15] See Saul v. Lepidus, 46 Colo. 538, where the manager of defendant's store at P, undertook to buy in defendant's name goods to be supplied to the agent to establish a store of his own at F.

[16] Loeb v. Selig, 120 La. 192.

VI.

OF AGENT AUTHORIZED TO COLLECT OR RECEIVE PAYMENT.

§ 932. What here involved.—The question of authority to collect or receive payment has, as its statement suggests, two aspects: One, that of the person who insists that he is authorized to demand and receive of another that which the latter owes to a third person. Whoever makes such a claim, has ordinarily the burden of proving his authority. The other, that of the person who contends that he has discharged a debt, which he owes to another, by paying it to a third person as one authorized to receive it for the creditor. Whoever insists that he has discharged an admitted debt, by paying it to some one other than the creditor himself, has ordinarily the burden of proving that the person to whom he paid it was authorized by the creditor to receive such payment.[17]

§ 933. What constitutes such authority.—Authority to collect or receive payment of a demand may, of course, be conferred in express terms and with more or less of discretionary and incidental power.[18] When such is the case, the rules heretofore laid down are sufficient to determine its construction.

Such an authority however, as in the other cases already considered may also arise by implication. Nevertheless it is not lightly to be inferred. An authority to an agent to receive goods, for example, would be much less likely to be subject to abuse, and much less likely to furnish temptation to the agent, than an authority to receive money.

[17] See, for example, Koen v. Miller, — Ark. —, 150 S. W. 411; Hoffmaster v. Black, 78 Ohio St. 1, 125 Am. St. R. 679, 21 L. R. A. (N. S.) 52, 14 Ann. Cas. 877; Smith v. First Nat. Bank, 23 Okl. 411, 29 L. R. A. (N. S.) 576; Marling v. Nommensen, 127 Wis. 368, 15 Am. St. R. 1017, 5 L. R. A (N. S.) 412, 7 Ann. Cas. 364. See also McNabb v. Hunt, 28 Okl. 43.

[18] See, for example, Schroeder v. Waters, 173 Pa. 422, where the principal not only in terms authorized an agent to receive the money, but also gave him a receipt already prepared to be delivered to the debtor upon payment.

In Lythgoe v. Smith, 140 N. Y. 442, money was to be distributed in pursuance of a decree of court. An agent clothed with a power of attorney executed by his principal who lived in a foreign country demanded his principal's share. There was no question raised respecting the genuineness of the power and nothing to suggest that the principal had died or revoked it. *Held*, that the agent was entitled to receive the money.

Authority given to two persons to receive payment does not justify payment to one of them only. Robbins v. Horgan, 192 Mass. 443.

But where from the relation of the parties, a previous course of dealing, an established custom, or conduct working an estoppel it can fairly and reasonably be inferred that one person is authorized to receive payment for another, payment to the former will bind the latter,[19] irrespective, ordinarily, of what may become of the money.[20] At-

[19] See Grant v. Humerick, 123 Iowa, 571; Wilson v. Fones, 99 Iowa, 132; Sax v. Drake, 69 Iowa, 760; Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. R. 138; Simon v. Brown, 38 Mich. 552; Gross v. Owen, 86 N. Y. Supp. 266; DeWitt v. DeWitt, 202 Pa. 255; McConnell v. Mackin, 22 App. Div. 537; McCarty v. Stanfill, 19 Ky. L. Rep. 612, 41 S. W. 278; McLeish v. Ball, 58 Wash. 690, 137 Am. St. R. 1087; Bennett Piano Co. v. Scace, 130 App. Div. 281.

One who buys a note and mortgage, knowing that his transferrer is authorized to collect interest and principal thereon, and who permits him to make such collections for a considerable period, is bound by payments subsequently made and can not recover again upon the theory that he was a purchaser for value of negotiable paper. Pockin v. Knoebel, 63 Neb. 768.

The transferee of a note who allows the transferror to continue to receive payments thereon as before the transfer, is bound by payments afterwards made to such transferror. Enright v. Beaumond, 68 Vt. 249. To same effect: Morgan v. Neal, 7 Idaho, 629, 97 Am. St. R. 264.

But in Winer v. Bank, 89 Ark. 435, 131 Am. St. 102, the mere fact that the holder of a series of notes allowed the payee to collect one of them, was held not sufficient to confer authority in the payee to collect any others.

Loan agents residing in a city made loans through a local agent in another place and divided commissions with him. The local agent took an application for a loan, in which it was stipulated that the commission should be paid to the general or the local agent. When the loan was consummated, a separate note was taken for the commissions in the name of the general agents and sent to them, and they paid the local agent his share in cash. Later the borrower paid the amount of this note to the local agent who did not have the note in his possession. There was proof of some correspondence between the general and the local agent which indicated that the local agent was to urge payment of this note, at least, if not to receive it. *Held*, that on all the facts, the payment was good. May v. Trust Co., 138 Mo. 275.

A wholesale house established a local agency through which sales were made and accounts collected. The directions to the manager were to deposit all receipts in a certain bank, and they were to be checked out only on checks in the principal's name. This the bank knew. A former manager had often cashed checks received at the agency without depositing them. This practice was continued by the manager in question, with the knowledge of the principal and without objection. Later the principal sued the bank to recover the amount of certain checks so paid to the manager and not deposited. *Held*, that the course of dealing justified the bank in so paying. Heinz v. American Nat. Bank, 9 Colo. App. 31.

Payment to a salesman who would not ordinarily be authorized to receive it may be good where there has been a recognized course of dealing in which payments have been made to him. Murphy v. St. Louis Coffin Co., 150 Ala. 143.

The agent's previous authority be-

tention must therefore be given to some of the circumstances under which an authority to receive payment may be implied.

§ 934. When implied from making the loan or negotiating the contract.—And in the first place it may be noticed that the mere fact that the agent was employed to make the loan or negotiate the contract or draft the securities, upon which the money is payable will not, as of course, confer upon him the incidental authority to receive a payment which may become due upon such contract.[21] If the authority goes no further, the agent's power will be exhausted when the loan is made or the contract is negotiated.

The fact that the money is made payable at the agent's office does not alter this rule, and the rule itself applies alike to principal and interest.[22]

comes practically immaterial where the principal with knowledge accepts the payment without objection. Spencer v. McCament, 7 Cal. App. 84.

Authority to an agent to re-loan money, given before the maturity of the prior loan, implies authority to receive the money upon the prior loan. Wales v. Mower, 44 Colo. 146.

Payment to husband or wife acting as agent of the other is good. Long v. Martin, 71 Mo. App. 569; Stanton v. French, 83 Cal. 194.

A mere payment to "the man in the office" of the principal is not good in the absence of evidence showing his actual or apparent authority. Schneider v. Hill, 19 N. Y. Misc. 56.

Payment in face of notice that agent is not authorized to receive it is not good. Metz v. Harbor Bldg. & Loan Ass'n, 117 App. Div. 825.

[20] It seems scarcely necessary to mention in this connection the *effect* of payment; but it is well settled, of course, that in general one who pays money in good faith to one authorized to receive it, is not bound to follow the money into the hands of the principal, and is not affected by the fact that the agent may misappropriate the money. Schroeder v. Waters, 173 Pa. 422; National Mtg. Co. v. Lash, 5 Kan. App. 633; Indiana Trust Co. v. Building & Loan Ass'n, 36 Ind. App. 685, aff'd 165 Ind. 597; Fayetteville Wagon Co. v. Kenefick Co., 76 Ark. 615; James v. Lewis, 189 Mass. 134; Land Mtg. Co. v. Preston, 119 Ala. 290; Hamil v. Amer. Mtg. Co., 127 Ala. 90; Rogerson v. Leggett, 145 N. C. 7; South Melbourne Bldg. Society v. Field, 19 Vict. L. R. 213.

[21] Thompson v. Elliott, 73 Ill. 221; Smith v. Hall, 19 Ill. App. 17; Cooley v. Willard, 34 Ill. 68, 85 Am. Dec. 296; Fortune v. Stockton, 182 Ill. 454; Ortmeier v. Ivory, 208 Ill. 577; Hefferman v. Boteler, 87 Mo. App. 316; Western Security Co. v. Douglas, 14 Wash. 215; Rhodes v. Belchee, 36 Or. 141.

Attorney or conveyancer employed merely as a scrivener to draw the papers is not thereby made agent to subsequently receive payments. Mynick v. Bickings, 30 Pa. Super. 401.

Mere authority to find a purchaser for real estate (but not to make a contract or deed), confers no implied power to receive the purchase price. See *ante*, § 814; Halsell v. Renfrow, 14 Okl. 674, aff'd 202 U. S. 287, 50 L. Ed. 1032.

[22] Trowbridge v. Ross, 105 Mich. 598; Wood v. Trust Co., 41 Ill. 267; Cadwell v. Evans, 5 Bush (Ky.),

§ 935. When implied from possession of the securities.—Authority to receive payment on securities is not necessarily to be implied merely from their possession by the assumed agent.

Thus, authority to receive payment of a bill or note payable to the order of the principal and not indorsed by him, cannot be presumed from the mere possession by the assumed agent.[23] But where the bill or note is made payable to bearer, or is indorsed in blank, its apparently lawful possession by one whose real relation is not known, may be sufficient evidence of title if not of agency to sustain a payment to him.[24]

Possession, however, when coupled with other facts or acts indicating agency to manage, control or deal with the securities, may be very potent evidence of authority to receive payment.[25]

§ 936. ——— Possession by agent who negotiated loan evidence of authority.—While the mere fact that the agent negotiated the loan, or has possession of the securities, may not alone be enough to create at least an apparent authority to receive payment upon them, the union of both circumstances seems to suffice.[26]

380, 96 Am. Dec. 358; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 24 Am. St. R. 189; Dwight v. Lenz, 75 Minn. 78; Gas Co. v. Pinkerton, 95 Penn. St. 62; Ward v. Smith, 7 Wall. 447, 19 L. Ed. 207; Cheney v. Libby, 134 U. S. 68, 33 L. Ed. 818; Corey v. Hunter, 10 N. D. 5; Hollinshead v. Stuart, 8 N. D. 35, 42 L. R. A. 659; Stolzman v. Wyman, 8 N. D. 108; Cummings v. Hurd, 49 Mo. App. 139.

In Shaw v. Williams, 100 N. C. 272, it appeared that plaintiff and her brother and a sister owned land. An oral sale to defendant was arranged by the brother. All joined in the execution of a deed which, in the usual form, recited the receipt of the consideration. This deed was delivered to defendant by the sister's husband who received his share of the price. Instructions were given by the plaintiff not to collect her share of the price but to leave it with defendant until she called for it. Nevertheless the brother collected the residue of the price from defendant who was not informed of this direction, but the brother failed to pay plaintiff her share. *Held*, that plaintiff could recover her share from the defendant. The brother was merely a special agent. The mere fact that he negotiated the sale gave him no implied authority to collect. Defendant made no inquiries, and was not misled by any holding out on the part of plaintiff of her brother as her agent to receive the money.

[23] Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502; Wardrop v. Dunlop, 1 Hun, 325, affirmed 59 N. Y. 634; Hair v. Edwards, 104 Mo. App. 213; Lawson v. Nicholson, 52 N. J. Eq. 821.

[24] See Woodbury v. Larned, 5 Minn. 339; Cone v. Brown, 15 Rich. (S. Car.) L. 262; Owen v. Barrow, 1 Bos. & Pul. N. R. 101; Whelan v. Reilly, 61 Mo. 565; Drinkall v. Movius State Bank, 11 N. D. 10, 95 Am. St. R. 693, 57 L. R. A. 341.

[25] Dawson v. Wombles, 111 Mo. App. 532.

[26] In Central Trust Co. v. Folsom, 167 N. Y. 285, it is said: "The reason why a payment to an agent who has made the loan and who contin-

Thus it is held that where a loan upon a note, or bond and mortgage has been negotiated, or such a security has been purchased, for the principal through an agent, and the security is left in the agent's possession and control, his authority to receive payments of principal or interest thereon as they accrue may, in the absence of directions to pay it elsewhere, be implied.[27] The reason for this rule, it has been said, "is founded upon human experience, that the payer knows that the agent has been trusted by the payee about the same business, and he is thus given a credit with the payer." [28] This reason is certainly not a very cogent one.

ues to hold the security is good payment to the principal, and why, under such circumstances, the agent has apparent authority to collect the debt is not very clearly stated in either the text books or the earlier decided cases. It was first established in England, and doubtless there grew out of the general course of business as to loans made through attorneys or scriveners. The fact that the attorney or agent has made the loan does not give him authority to collect the debt, nor, it seems, does the mere possession of the security by the attorney give such authority (Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502). Both conditions must concur, that the agent acted for the principal at the inception of the business and that he holds the securities."

[27] Central Trust Co. v. Folsom, 167 N. Y. 285; Crane v. Gruenewald, 120 N. Y. 274, 17 Am. St. R. 643; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; O'Loughlin v. Billy, 95 App. Div. 99; Williams v. Walker, 2 Sandf. (N. Y.) Ch. 325; Hatfield v. Reynolds, 34 Barb. (N. Y.) 612; Van Keuren v. Corkins, 4 Hun (N. Y.), 129, aff'd 66 N. Y. 77; Union Trust Co. v. McKeon, 76 Conn. 508; Haines v. Pohlmann, 25 N. J. Eq. 179; Smith v. Landecki, 101 Ill. App. 248; Stiger v. Bent, 111 Ill. 328; Kranz v. Uedelhofen, 193 Ill. 477; Jolly v. Huebler, 132 Mo. App. 675.

See also, Sessions v. Kent, 75 Iowa, 601.

"Both conditions must concur, that the agent acted for the principal at the inception of the business, and that he holds the securities." Central Trust Co. v. Folsom, *supra*.

The rule applies to an agent who buys an existing security as well as to one who makes an original loan. Central Trust Co. v. Folsom, *supra;* Williams v. Walker, *supra*.

Limitations.—But this rule cannot apply in a case in which, though the alleged agent negotiated the transaction and retains possession of the securities, the securities belong to persons who can not be bound by ostensible authority-like minors, insane persons, etc., and his only authority to receive therefore depends upon some actual fact, such as the possession of an official authority which does not really exist. Thus, where an agent was intrusted with money to be deposited for the benefit of minors, and he took certificates payable to their order or to himself as guardian,—which position he did not occupy,—and he finally drew the money, pretending to act as guardian, and the bank requiring no proof of his authority,—it was held that the payment did not release the bank. McMahon v. German American Bank, 111 Minn. 313, 29 L. R. A. (N. S.) 67.

[28] In Doubleday v. Kress, 50 N. Y. 410, 10 Am. R. 502. See, also, Central Trust Co. v. Folsom, 167 N. Y. 285.

§ 937. ——— Possession indispensable.—The presumption in these cases is founded upon the negotiating agent's possession of the securities; it does not arise if the securities are not left in the agent's possession, and, if once created, it ceases when the securities are withdrawn by the principal.[29] It is incumbent, therefore, upon the debtor to assure himself on each occasion when a payment is made that they still continue in the agent's possession, for if they have been withdrawn the payment will not bind the principal, unless actual authority can be shown or his conduct has been such as to estop him to deny the agency.[30]

It is not, it is held, essential that he shall actually see and examine the securities on each occasion; "if he have trustworthy information of the fact which he believes and relies upon and it shall prove to be true, there seems to be no reason why it should not avail him as well as a personal examination of the securities." [31]

[29] Guilford v. Stacer, 53 Ga. 618; Megary v. Funtis, 5 Sandf. Sup. Ct. (N. Y.) 376; Brown v. Blydenburgh, 7 N. Y. 141; Cooley v. Willard, 34 Ill. 68, 85 Am. Dec. 296; Strachan v. Muxlow, 24 Wis. 21; Garrels v. Morton, 26 Ill. App. 433.

Notice of the withdrawal is not necessary.

[30] Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Brown v. Blydenburgh, 7 N. Y. 141, 57 Am. Dec. 506; Kellogg v. Smith, 26 N. Y. 18; Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532; Williams v. Walker, *supra;* Hatfield v. Reynolds, *supra;* Van Keuren v. Corkins, *supra;* Megary v. Funtis, *supra;* Haines v. Pohlmann, *supra;* Cooley v. Willard, *supra;* Brewster v. Carnes, 103 N. Y. 556; Security Co. v. Graybeal, 85 Iowa, 543, 39 Am. St. R. 311; Fortune v. Stockton, 182 Ill. 454; Stiger v. Bent, 111 Ill. 328; Western Security Co. v. Douglass, 14 Wash. 215; Bloomer v. Dau, 122 Mich. 522; Eaton v. Knowles, 61 Mich. 625; Lane v. Duhac, 73 Wis. 646; Frank v. Tuozzo, 26 N. Y. App. Div. 447; Corbet v. Waller, 27 Wash. 242; Bartel v. Brown, 104 Wis. 493; Walton Guano Co. v. McCall, 111 Ga. 114; Evans Co. v. Holder, 16 Tex. Civ. App. 300.

In Crane v. Gruenewald, *supra*, it was said by Parker, J.: "This rule comprises two elements: First, possession of the securities by the attorney with the consent of the mortgagee; and second knowledge of such possession on the part of the mortgagor. The mere possession of the securities by the attorney is not sufficient. The mortgagor must have knowledge of the fact. It would not avail him to prove that subsequent to a payment he discovered that the securities were in the actual custody of the attorney when it was made. For he could not have been misled or deceived by a fact the existence of which was unknown to him. It is the information which he acquires of the possession which apprises him that the attorney has apparent authority to act for the principal. It is the appearance of authority to collect, furnished by the custody of the securities which justifies him in making payment, and it is because the mortgagor acts in reliance upon such appearance, an appearance made possible only by the act of the mortgagee in leaving the securities in the hands of an attorney that estops the owner from denying the existence of authority in the attorney which such possession indicates."

[31] Crane v. Gruenewald, *supra.*

It is not, of course, essential in these cases that the securities shall have been left with the agent for the express purpose of receiving payment,—that would create an actual authority;—their possession by the agent by the principal's act may create an appearance of authority to receive payment upon which the innocent payer may rely, even though they were in the agent's possession for some other purpose.[32]

A payer who was not aware that the agent originally negotiated the transaction is held not to be within the protection of the rule.[33]

§ 938. Authority by conduct independent of possession.—But although the authority to receive payment in these cases depends upon the subsequent possession of the securities, the principal may, by the course of dealing or other conduct, justify an inference of authority which will be independent of possession. Thus, where the principal has confided to a loan agent money to be invested and has relied upon the agent to select the security and determine upon the loan, has permitted him to receive payment of principal and interest when due, has allowed him to reinvest the proceeds from time to time, and has treated him as having general authority in the premises, payments of principal or interest to such agent have been held to justify a finding of authority in fact to bind the principal, even although the agent may not at the time have had possession of the securities.[34]

[32] See Lawson v. Carson, 50 N. J. Eq. 370. Here the conveyancer who negotiated the loan, but who did not keep possession of the securities, had been authorized to receive the interest and had done so frequently. Later the principal handed him a covered and sealed package containing papers for safe keeping merely, and without informing him of the contents. This bundle contained the securities in question. The bundle was opened by the attorney without authority. Later a subsequent purchaser from the mortgagor came in and paid the principal sum to the attorney who surrendered up the securities so obtained. The Vice Chancellor held that the principal was bound. But this was reversed by the Court of Errors in (*sub. nom.* Lawson v. Nicholson, 52 N. J. Eq. 821). The latter court held that, as to the present payer, the case could stand upon no higher ground than a payment to one in possession who had not negotiated the securities, and that, even upon this ground, it could not be said that the principal had put the agent into possession.

[33] In Lawson v. Nicholson, 52 N. J. Eq. 821, *supra*, where payment was made by a vendee of the original mortgagor—such vendee not knowing or relying upon the fact that he was dealing with the agent employed in the first instance—the rule did not apply.

[34] Thus in General Convention v. Torkelson, 73 Minn. 401, it appeared that a firm of loan agents, of the name of Kelley, residing in Minneapolis, and having various local agents throughout the state, had in sixteen years made about eighteen loans for one Fairbanks, who resided in Vermont. The Kelleys received the applications and passed upon them, determined upon the

§ 939. ——— Estoppel to deny authority.—So, even though the facts may not be sufficient to justify an inference of actual authority, as in the cases considered in the preceding section, there may nevertheless be such a course of conduct as to reasonably lead the debtor

sufficiency of the security, and the question of insurance, and in general decided upon all the questions connected with the loan. The securities when completed were sent to Fairbanks, and the money was payable in Vermont but all principal and interest was in fact collected in Minneapolis, through the Kelleys. In nearly every instance, except the one in question, when principal was paid, the papers were sent on from Vermont, but, as the court found, rather to be delivered upon payment than as evidence of authority to receive payment. Torkelson had borrowed money of Fairbanks through the Kelleys, but there was nothing to indicate that he knew of or relied upon the foregoing facts. When the loan became due, he obtained a new loan, through the Kelleys, from another one of their clients, and out of the proceeds paid the Kelleys the amount due on the Fairbanks mortgage, but without receiving a surrender of the note and mortgage. Kelleys did not send the money to Fairbanks, but themselves paid the interest to Fairbanks for several years giving him various invented excuses for not obtaining the principal from Torkelson. Later the Kelleys failed and the facts came to light. This was an action to foreclose the mortgage given to Fairbanks, and assigned to plaintiff. Defense was payment. The court held that the payment was good, on the ground that the evidence tended to show actual authority on the part of Kelleys, partly express and partly implied, to receive the money.

At the same term, was decided Hare v. Bailey, 78 Minn. 409, wherein the same Kelleys had acted for defendant who also resided in Vermont. The facts were much the same as in the preceding case, and the court held that the facts here also justified an inference of actual authority to receive payment, without the possession of the securities.

See also, involving the same agents and reaching the same conclusion. Springfield Savings Bank v. Kjaer, 82 Minn. 180; Randall v. Eichhorn, 80 Minn. 344; Dexter v. Berge, 76 Minn. 216.

The court takes pains in the case in 82 Minn. 180, *supra*, to point out that in none of these cases has the court held that the evidence was in law or in fact sufficient to establish the agency, but only that from the facts stated a trier of the facts might properly find that the authority in fact existed.

Substantially similar are Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138; Frost v. Fisher, 13 Colo. App. 322; Morgan v. Neal, 7 Idaho, 629, 97 Am. St. R. 264; Townsend v. Studer, 109 Iowa, 103; Harrison v. Legore, 109 Iowa, 618; Shane v. Palmer, 43 Kan. 481; Meserve v. Hansford, 59 Kan. 777; Fowle v. Outcalt, 64 Kan. 352; Doyle v. Corey, 170 Mass. 337; Wilson v. La Tour, 108 Mich. 547; Ziegan v. Stricker, 110 Mich. 282; Bissell v. Dowling, 117 Mich. 646; Johnston v. Investment Co., 46 Neb. 480; Thomson v. Shelton, 49 Neb. 644; Phoenix Ins. Co. v. Walter, 51 Neb. 182; Pine v. Mangus, 76 Neb. 83; Harrison Nat. Bank v. Williams, 2 Neb. Unoff. 400, 89 N. W. 245; Reid v. Kellog, 8 S. D. 596; Edinburgh-American Mtg. Co. v. Noonan, 11 S. D. 141; Campbell v. Gowans, 35 Utah, 268, 23 L. R. A. (N. S.) 414, 9 Ann. Cas. 660; Bantz v. Adams, 131 Wis. 152, 120 Am. St. R. 1030; Security Co. v.

to rely upon the agent's authority and which will protect him if he acts upon it.[35] In this case, however, unlike the preceding one, knowledge by the payer of the circumstances, and reasonable reliance upon them to his prejudice, are essential parts of his case.[36]

§ 940. ——— Limitations.—The inference of an actual or apparent authority in these cases is quite easy to over draw, and the very hardship of many of the cases seems to furnish a strong temptation to do so. Nevertheless, it is an inference which should be drawn with caution. It is not ordinarily to be presumed, for example, that, where negotiable securities for the debt are outstanding, the creditor expects to demand, or the debtor to make, payments without the surrender or indorsement of the securities. So where the payment is secured by mortgage, it is not to be presumed that the debt is to be paid without a surrender and discharge of the mortgage.

The fact that the principal, though in a number of instances, may have expressly confided the securities to the agent for the purpose of receiving a payment upon them ought not to be construed as evidence of a general authority to receive payment at a time when they have not been so confided to him.[37] *A fortiori* would this be true where it

Richardson (U. S. C. C.), 33 Fed. 16.

All the more so is this true where, in addition to the facts indicated, the principal is not disclosed and the securities are taken in the name of the agent. Cheshire Provid. Inst. v. Fuesner, 63 Neb. 682.

[35] See the question discussed in Harrison v. Legore, 109 Iowa, 613, in which case it was held that where the principal, as the payer knew, had allowed the agent to deal in a very general way with reference to his loans; had permitted him to make collections when notes and coupons were sent to him for that purpose, but more frequently had permitted him to collect first and had sent him the papers afterwards; a payment of principal was binding although the agent did not have the papers in his possession for that purpose.

See also, Phillips v. McGrath, 62 Wis. 124; Midland Sav. & L. Co. v. Sutton, 30 Okl. 448.

[36] See Cannon v. Gibson, 162 Mo. App. 386; Thomas v. Swanke, 75 Minn. 326.

[37] Budd v. Broen, 75 Minn. 316, distinguishing Hare v. Bailey and General Convention v. Torkelson, *supra*. To the same effect: Thomas v. Swanke, 75 Minn. 326; Schenk v. Dexter, 77 Minn. 15; Trull v. Hammond, 71 Minn. 172.

In Budd v. Broen, *supra*, the court said: "The fact that she [the principal] did not leave the securities with her loan agents, but retained them in her exclusive possession, is very potent evidence that she did not intend to confer upon them such general authority. By so retaining her securities, and sending them for collection only as they became due, she could keep a wholesome check upon her agents, and avoid the possibility of loss through them, except as to the particular securities sent for collection. If, in such cases, the money was not remitted or the papers returned within a reasonable time, she could investigate, and at once learn

appeared that, in nearly all cases, the principal refused to send the securities to the agent until the money had first been paid to him.[38] So, though one, who has purchased mortgages from a loan company, at whose office they are made payable, may know "that the loan company was systematically trying to get the borrowers to discharge their duty to pay taxes and insurance and get the payments to the Boston office," he does not thereby make the loan company his agent to receive payment upon the securities which he retains in his own possession or sends to another agent for collection.[39] And so where a person, who has bought mortgages in this way, afterwards employs the loan company to collect the interest, in each case sending him the security due with specific instruction, he does not thereby make the loan company his agent for the collection of subsequent installments of interest and principal where the papers have not been sent and no authority for collection has been given.[40]

whether her agents were in default. But if she conferred general authority upon them to collect the principal of any or all of her loans without first receiving the securities, she would hazard the whole of them, for she would then have no check upon her agents, or means of knowing when or what payments were made.

"The defendant, having paid his note and mortgage to the Kelleys without requiring a surrender of the securities, assumed the risk of establishing the authority, express or implied, of the agents to receive such payment for the plaintiff. We are unable to find in the record any evidence that justifies the finding that the agents were so authorized. Their authority was to receive payment for the plaintiff whenever she forwarded her securities for collection, and there is no evidence warranting the conclusion that she ever knew that the Kelleys ever assumed to collect the principal of her mortgage without having first actually received them from her; hence there is no evidence of ratification of their acts, or of actual implied authority to receive payment of the note and mortgage in question."

[38] Security Co. v. Graybeal, 85 Iowa, 543, 39 Am. St. R. 311; Western Security Co. v. Douglass, 14 Wash. 215.

[39] Bradbury v. Kinney, 63 Neb. 754.

[40] Joy v. Vance, 104 Mich. 97. To same effect: Trowbridge v. Ross, 105 Mich. 598; Bromley v. Lathrop, 105 Mich. 492; Church Assoc. v. Walton, 114 Mich. 677; Bacon v. Pomeroy, 118 Mich. 145; Terry v. Durand Land Co., 112 Mich. 665; Bartel v. Brown, 104 Wis. 493; Kohl v. Beach, 107 Wis. 409, 50 L. R. A. 600; Murphy v. Barnard, 162 Mass. 72, 44 Am. St. R. 340; Dexter v. Morrow, 76 Minn. 413; Hollinshed v. Stuart, 8 N. D. 35, 42 L. R. A. 659; Ilgenfritz v. Mutual B. L. Ins. Co., 81 Fed. 27; Mutual B. L. Ins. Co. v. Miles, 81 Fed. 32; United States Bank v. Burson, 90 Iowa, 191; Ortmeier v. Ivory, 208 Ill. 577.

See also Evans Co. v. Holder, 16 Tex. Civ. App. 800.

In Joy v. Vance, *supra*, the court said: "Vance [the debtor] admits he paid the interest to the company without taking the trouble to ascertain whether it had the mortgage or who owned it. When he paid the mortgage he was satisfied with the statement that the mortgage was

§ 941. Payment to agent of the owner of record.—Payment to one who had been the agent to receive payment upon a recorded note and mortgage but made after the record owner has transferred the note and mortgage to another by an unrecorded instrument,—the agent not being in fact the agent of the present holder, and neither he nor the former owner having possession of the securities, is not such a payment as will bind the present holder.[41]

§ 942. Payment to agent as ostensible principal.—Where the agent, with the principal's knowledge and consent, is permitted to appear as the ostensible owner of the securities, as where a loan agent is permitted to take all securities in his own name and generally to deal with them as though he were the owner, though he afterwards transfer them to his principal without notice to the debtor, the principal who subsequently intervenes must be held bound by all payments made to the agent while the principal was still undisclosed.[42]

§ 943. Authority to receive proceeds of securities entrusted to agent for delivery.—Where the principal confides to an agent for delivery securities upon whose delivery money is to be loaned or paid to or for the principal, the agent, in the absence of anything to indicate a contrary intention, would have implied power to receive the money and payment to him would be effective even though through his subsequent default the money never came to the hands of the principal.[43] The case of an agent authorized to negotiate a loan to his principal and entrusted by the latter with the possession of the bond and mortgage which were to secure it, would be a typical illustration.[44]

mislaid, although he received a receipt which indicated that it did not belong to the company to which he was paying it. It was perhaps the natural thing for him to pay it, in reliance upon the statement of these men with whom he was acquainted and in whom he had confidence; but his rights must depend upon their authority to receive the money, not upon his confidence in them."

[41] Bantz v. Adams, 131 Wis. 152, 120 Am. St. Rep. 1030 (distinguishing Marling v. Nommensen, 127 Wis. 363, 115 Am. St. R. 1017, 5 L. R. A. (N. S.) 412, 7 Ann. Cas. 364, on the ground that in the latter case the question arose in dealing with the land with reference to the state of the records); Wilson v. Campbell, 110 Mich. 580, 35 L. R. A. 544.

[42] Cheshire Prov. Institution v. Feusner, 63 Neb. 682. See also McLeod v. Despain, 49 Or. 536, 124 Am. St. R. 1066, 19 L. R. A. (N. S.) 276.

[43] National Mortgage Co. v. Lash, 5 Wyo. App. 633; Gosch v. Fire Ins. Ass'n, 44 Ill. App. 263.

But the delivery by a wife to her husband of a check payable to the order of a third person does not necessarily constitute the husband the agent of the wife to receive the amount of the check. Hunt v. Poole, 139 Mass. 224.

[44] National Mortgage Co. v. Lash, *supra*.

See Land, etc., Co. v. Preston, 119 Ala. 290.

So where an insurance company confides to an agent a policy for delivery, the agent has apparently implied authority to receive the premium.[45]

§ 944. When authority implied from having sold the goods or land.—The presumption as to the authority to receive payment arising from the fact that the agent sold the goods for which the demand is due, has been considered in treating of the implied powers of an agent authorized to sell goods.[46]

The same thing is true of agents for the sale of land.[47] It is not necessary to repeat these discussions here.

§ 945. Authority to receive interest does not authorize receipt of principal.—The mere fact that an agent is, either expressly or by implication, authorized to receive the interest upon a principal sum, will not justify the inference that the agent is authorized to receive the principal sum itself.[48] Thus where the payee of a promissory note, payable to her order, delivered it, unindorsed, to an agent with authority to receive the interest thereon, and to take a new note in renewal with an indorser, and the maker paid the principal and interest to the agent who embezzled the principal, it was held that the payment of the principal was unauthorized and did not discharge the liability of the maker to the payee.[49]

And so, in many cases, it has been held that one to whom interest coupons have been sent for collection, or who has been authorized to receive, or who has been in the habit of receiving the periodical payments of interest, has therefrom no implied authority to receive the principal.[50] And even though the agent negotiated the loan, author-

[45] Gosch v. Fire Ins. Ass'n, *supra*.

[46] See *ante*, § 865, *et seq.*

[47] See *ante*, § 814.

[48] Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Brewster v. Carnes, 103 N. Y. 556; Hoffmaster v. Black, 78 Ohio St. 1, 125 Am. St. R. 679, 21 L. R. A. (N. S.) 52, 14 Ann. Cas. 877; Burnham v. Wilson, 207 Mass. 378; Higley v. Dennis, 40 Tex. Civ. App. 133; Cunningham v. McDonald, 98 Tex. 316; Lester v. Snyder, 12 Colo. App. 351; Hefferman v. Boteler, 87 Mo. App. 316; Barstow v. Stone, 10 Colo. App. 396; Koen v. Miller, — Ark. —, 150 S. W. 411.

[49] Doubleday v. Kress, *supra*.

[50] The fact that the holder of a mortgage from time to time permitted a mortgage company to collect the interest coupons, on the same being forwarded to it for collection, is not sufficient to authorize the company to collect the principal upon the mortgages which had not been sent for collection. Wilson v. Campbell, 110 Mich. 580, 35 L. R. A. 544.

See also, Terry v. Durand Land Co., 112 Mich. 665; Porter v. Ourada, 51 Neb. 510; Trull v. Hammond, 71 Minn. 172.

Where there was evidence that the agents sometimes collected interest on loans before receiving the coupons, and frequently collected the principal before receiving the satis-

ity to receive payments of interest upon it will not justify the receipt of the principal where the agent is not entrusted with the possession of the securities.[51] If he has possession also, a different rule, as has been seen, applies.[52]

§ 946. Can receive nothing but money.—Where an agent is authorized merely to collect a demand or to receive payment of a debt, the law, in the absence of anything to indicate a wider authority, interprets this to mean a collection or payment in fact, and the agent cannot bind his principal by any arrangement short of an actual collection and receipt of the money.[53] He cannot, therefore, take in pay-

faction of the mortgage, and that they occasionally sent interest before they had collected it or received the coupons for it, but there was no evidence that the principal knew that they had ever assumed to collect the principal before receiving the mortgage or a satisfaction of it, it was held that there was not enough to show actual authority to receive principal without having the securities; and since there was also no evidence that the debtor knew or relied upon the facts above set forth at the time he paid the principal, there was no ground upon which the principal could be estopped to deny the agents' authority to receive the principal on securities not in possession of the agents. Thomas v. Swanke, 75 Minn. 336.

[51] Koen v. Miller, —— Ark. ——, 150 S. W. 411; Richards v. Waller, 49 Neb. 639; Gilbert v. Garber, 62 Neb. 464; City Missionary v. Reams, 51 Neb. 225; Campbell v. O'Connor, 55 Neb. 638; Dewey v. Bradford, 2 Neb. Unof. 388, 89 N. W. 249; Ortmeier v. Ivory, 208 Ill. 577; Garrels v. Morton, 26 Ill. App. 433.

A loan was negotiated by an agent and was made payable at his office. Interest thereon was paid at that office and was never again demanded. Plaintiff called there to get the interest and, while she intended that he should reloan the money when it was collected, she never demanded the principal of him. He collected both principal and interest without production of the note and converted the principal. *Held*, no discharge. Klindt v. Higgins, 95 Iowa, 529, following Englert v. White, 92 Iowa, 97 [another case involving the same agent], and distinguishing Sax v. Drake, 69 Iowa, 760.

[52] See *ante*, §§ 935–937.

[53] Bridges v. Garrett, L. R. 5 C. P. 454; Ward v. Evans, 2 Ld. Raym. 928; Hine v. Steamship Ins. Syndicate, 72 L. T. 79; Pearson v. Scott, 9 Ch. Div. 198; Pape v. Westacott, [1894] 1 Q. B. 272; Sweeting v. Pearce, 7 C. B. N. S. 449; Ward v. Smith, 7 Wall. (U. S.) 447, 19 L. Ed. 207; Fretz v. Stover, 22 Wall. (U. S.) 198, 22 L. Ed. 769; Powell's Adm'r v. Henry, 27 Ala. 612; Taylor v. Robinson, 14 Cal. 396; Rodgers v. Peckham, 120 Cal. 238; Hendry v. Benlisa, 37 Fla. 609, 34 L. R. A. 283; Holmes v. Langston, 110 Ga. 861; Padfield v. Green, 85 Ill. 529; Mathews v. Hamilton, 23 Ill. 470; Everts v. Lawther, 165 Ill. 487; Cooney v. U. S. Wringer Co., 101 Ill. App. 468; McCormick Harvesting Co. v. Breen, 61 Ill. App. 528; Corning v. Strong, 1 Ind. 329; Kirk v. Hiatt, 2 Ind. 322; McCormick v. Wood, etc., Co., 72 Ind. 518; Robinson v. Anderson, 106 Ind. 152; O'Conner v. Arnold, 53 Ind. 203; Aultman v. Lee, 43 Iowa, 404; Graydon v. Patterson, 13 Iowa, 256, 81 Am. Dec. 432; McCarver v. Nealey, 1 G. Greene (Iowa), 360; British & Amer. Mtg. Co. v. Tibbals, 63 Iowa, 468; Ruthven v. Clark, 109 Iowa, 25; Martin v. United States, 2 T. B. Mon-

ment the note of the debtor payable either to himself [54] or to his prin-

roe (Ky.), 89, 15 Am. Dec. 129; Farmers' & Drovers' Bank v. Bennett, 20 Ky. L. Rep. 852, 47 S. W. 623; Baldwin v. Tucker, 112 Ky. 282, 57 L. R. A. 451; Woodruff v. Amer. Road Mach. Co., 23 Ky. L. Rep. 1551, 65 S. W. 600; Waterhouse v. Citizens' Bank, 25 La. Ann. 77; Rodick v. Coburn, 68 Me. 170; Kent v. Ricards, 3 Md. Ch. 392; Langdon v. Potter, 13 Mass. 319; Pitkin v. Harris, 69 Mich. 133; Woodbury v. Larned, 5 Minn. 339; Nichols & Shepard Co. v. Hackney, 78 Minn. 461; Greenwood v. Burns, 50 Mo. 52; Western White Bronze Co. v. Portrey, 50 Neb. 801; Moore v. Pollock, 50 Neb. 900; Holt v. Schneider, 57 Neb. 523; Gilbert v. Garber, 62 Neb. 464; Dixon v. Guay, 70 N. H. 161; Black v. Dundon, 83 App. Div. (N. Y.) 539; Sier v. Bache, 7 N. Y. Misc. 165; Williams v. Johnston, 92 N. C. 532, 53 Am. Rep. 428; First Nat. Bank v. Prior, 10 N. D. 146; Oliver v. Sterling, 20 Ohio St. 391; McCulloch v. McKee, 16 Pa. 289; Paul v. Grimm, 183 Pa. 330; Googe v. Gaskill, 18 Pa. Sup. Ct. 39; Columbia Phosphate Co. v. Farmers' Alliance Store, 47 S. C. 358; Robson v. Watts, 11 Tex. 764; Rodgers v. Bass, 46 Tex. 505; Chattanooga Pipe Works v. Gorman, 12 Tex. Civ. App. 75; Schleicher v. Armstrong (Tex. Civ. App.), 32 S. W. 327; Western Mfg. Co. v. Maverick, 4 Tex. Civ. App. 535; Willis v. Gorrell, 102 Va. 746; Corbet v. Waller, 27 Wash. 242; Wiley v. Mahood, 10 W. Va. 206; Harper v. Harvey, 4 W. Va. 539; Whitney v. State Bank, 7 Wis. 620.

[54] Corning v. Strong, 1 Ind. 329; McCulloch v. McKee, 16 Pa. 289; Robinson v. Anderson, 106 Ind. 152; Baldwin v. Tucker, 112 Ky. 282, 23 Ky. L. Rep. 1538, 57 L. R. A. 451; Hoffman v. Ins. Co., 92 U. S. 161, 23 L. Ed. 539; Holt v. Schneider, 57 Neb. 523; Cram v. Sickel, 51 Neb. 828, 66 Am. St. R. 478; Willis v. Gorrell, 102 Va. 746; Everts v. Lawther, 165 Ill. 487; Scott v. Gilkey, 153 Ill. 168; Davis v. Severance, 49 Minn. 528; McGrath v. Vanaman, 53 N. J. Eq. 459.

Especially, where the note is for more than the amount and the principal is expected to pay the difference. Moore v. Pollock, 50 Neb. 900.

The fact that the note is secured by a mortgage is immaterial. Moore v. Pollock, *supra*.

There are, indeed, some cases to the contrary; the most important one is Galbraith v. Weber, 58 Wash. 132, 28 L. R. A. (N. S.) 341. There the owner of a horse, which the owner valued at $3,000, put the horse into the hands of an agent for sale, with no specific instructions as to the amount of the price, although he evidently expected to receive therefor approximately $3,000; and he authorized the agent to sell the horse upon time and to take good notes. The agent, not being able to sell for $3,000, finally sold to the defendants for $1,000, and received in payment two time notes for $500 each, payable to himself. The agent immediately discounted these notes at a bank and absconded with the money; before doing so, however, he forged three notes for $900 each, in the names of the defendants, payable to the principal, and sent them to the principal who retained them until the forgery was discovered. In an action by the principal to recover the horse, it was held that the buyers had obtained a good title. After disposing of the question of the amount of the price, the court held that an agent, authorized to sell for cash or for notes, might bind his principal by taking notes payable to the agents own order. The argument was, not that the notes were a means of obtaining the cash like a check, but that there was no more danger to the principal in permitting the agent to take notes to his own order than there would be in allowing him to receive money; it would

cipal;[55] or the note or bond of himself,[56] or of a third person;[57] or a draft or order on a stranger,[58] or horses, wheat, merchandise, services or other property of any kind;[59] nor can he set off a

be no more easy to misappropriate the notes than the money. The court relied upon the dissenting opinion of three justices against four in Baldwin v. Tucker, 112 Ky. 282, 57 L. R. A. 451, wherein the argument of the dissenting justices was that, in many cases, agents for the sale of goods were required by their principals to take notes in the agents own names, and to indorse them to the principals, and that, in view of this practice, a person buying of the agent and required by the agent to give a note, in the agents name, might well suppose that this was in accordance with the principal's instructions.

The Washington court also relied upon a very briefly reported case, Schleicher v. Armstrong (Tex. Civ. App.), 32 S. W. 327, a case not officially reported. There, in upholding a sale in which notes had been taken in the agent's name, the court simply said that the agents, "being in lawful possession of and having authority to sell the engine, the fact that they may have violated their instructions and taken the purchase money notes payable to themselves" did not invalidate the sale.

[55] Miller v. Edmonston, 8 Blackf. (Ind.) 291; Smith v. Powell, 98 Va. 431; Nickelson v. Dial, 77 Kan. 8; West Pub. Co. v. Corbett, 165 Mo. App. 7.

He may not receive a time bill drawn by the agent upon the debtor and accepted by the latter. Hine v. Steamship Ins. Syndicate, 72 L. T. 79.

[56] McCarver v. Nealey, 1 G. Greene (Iowa), 360; Farmers' Bank v. Bennett (Ky.), 47 S. W. 623, 20 Ky. L. Rep. 852; Wilcox, etc., Organ Co. v. Lasley, 40 Kan. 521.

But in the last case it was held that the principal could not complain if the agent himself supplied the money which was received by the principal.

[57] Langdon v. Potter, 13 Mass. 319; Paul v. Grimm, 183 Pa. 330; Scully v. Dodge, 40 Kan. 395; Wilkinson v. Holloway, 7 Leigh (Va.), 277; Smock v. Dade, 5 Rand. (Va.) 639; Smith v. Lamberts, 7 Gratt. (Va.) 138; Wiley v. Mahood, 10 W. Va. 206.

Nor can he take an assignment of a mortgage in payment. Columbia Phosphate Co. v. Farmers' Store, 47 S. Car. 358.

[58] McCarver v. Nealey, 1 G. Greene (Iowa), 360; Drain v. Doggett, 41 Iowa, 682; Goldsborough v. Turner, 67 N. C. 403; Hine v. Steamship Ins. Syndicate, 72 L. T. 79; Rogers v. Tiedeman, 9 Ga. App. 811.

Unless the agent actually receives the money upon the draft in due course. See later section on checks. Gibson v. Ward, 9 Ga. App. 363.

[59] Rhine v. Blake, 59 Tex. 240; Wright v. Daily, 26 Tex. 730; Kent v. Ricards, 3 Md. Ch. 392; Harper v. Harvey, 4 W. Va. 539; Kirk v. Hiatt, 2 Ind. 322; Aultman v. Lee, 43 Iowa, 404; Martin v. United States, 2 T. B. Monr. (Ky.) 89, 15 Am. Dec. 129; Reynolds v. Ferree, 86 Ill. 570; Williams v. Johnston, 92 N. C. 532, 53 Am. Rep. 428; Pitkin v. Harris, 69 Mich. 133; Cram v. Sickel, 51 Neb. 828, 66 Am. St. R. 478; Hayes v. Colby, 65 N. H. 192; Block v. Dundon, 83 App. Div. (N. Y.) 539; McCormick Harvest Co. v. Breen, 61 Ill. App. 528; Wees v. Page, 47 Wash. 213.

Obviously, he may not take payment in goods delivered to the agent for his own use. Woodruff v. American Road Mach. Co. (Ky.), 23 Ky. L. Rep. 1551, 65 S. W. 600.

Or take payment in cancellation of a debt owing by himself. Grooms v. Neff Harness Co., 79 Ark. 401; Miller v. Springfield Wagon Co., 6 Ind. Ter. 115; Hook v. Crowe, 100 Me. 399; and other cases cited in § 354.

The fact that the agent is to sell the property so received and apply

claim due from himself;[60] or take property for his own use in payment.[61]

The money which he is authorized to receive in payment is limited to that which the law declares to be a legal tender, or which by common consent is considered and treated as money and which passes as such at par.[62]

the proceeds upon the claim is immaterial. Woodruff v. Amer. Road Mach. Co. (Ky.), 65 S. W. 600, 23 Ky. L. Rep. 1551.

An agent authorzed to collect money due upon a mortgage is not authorized to receive the mortgaged property in payment. Rodgers v. Peckham, 120 Cal. 238.

Can not take pay in services, especially for some other person of whom also he may chance to be agent. Gunter v. Robinson (Tex. Civ. App.), 112 S. W. 134.

But his authority may be broad enough to justify his taking lands in payment. Renwick v. Wheeler, 48 Fed. 431.

In Moore v. Murrel, 56 Ark. 375, an attorney was authorized to collect notes, with directions "to do with them the best that he can." *Held*, that such directions as matter of law did not authorize him to receive goods in payment, but that the question was for the jury.

[60] Whitney v. State Bank, 7 Wis. 620; Butts v. Newton, 29 Wis. 632; Stewart v. Woodward, 50 Vt. 78, 28 Am. Rep. 488; Rodick v. Coburn, 68 Me. 170; Greenwood v. Burns, 50 Mo. 52; McCormick v. Keith, 8 Neb. 143; Western Bronze Co. v. Portrey, 50 Neb. 801; Irwin v. Workman, 3 Watts (Penn.), 357; Coffman v. Hampton, 2 Watts & Serg. (Penn.) 377, 37 Am. Dec. 511; Bridges v. Garrett, L. R., 5 C. P. 454; Sykes v. Giles, 5 M. & W. 645; Scott v. Irving, 1 B. & Ad. 605; Catterall v. Hindle, L. R. 1 C. P. 187; Hurley v. Watson, 68 Mich. 531; Maloney Mercantile Co. v. Dublin Quarry Co. (Tex. Civ. App.), 107 S. W. 904; Parker v. Leech, 76 Neb. 135; Chattanooga Foundry v. Gorman, 12 Tex. Civ. App. 75; Union, etc., Co. v. Mason, 3 S. D. 147; Smith v. James, 53 Ark. 135; St. John v. Cornwell, 52 Kan. 712; Deatherage v. Henderson, 42 Kan. 684; Hodgson v. Raphael, 105 Ga. 480; Stetson v. Briggs, 144 Cal. 511; Martin v. Mathews, 62 Hun, 620; Zang v. Hubbard Bldg. Co. (Tex. Civ. App.), 125 S. W. 85; Plano Mfg. Co. v. Doyle, 17 N. D. 386, 17 L. R. A. (N. S.) 606.

[61] Williams v. Johnston, 92 N. C. 532, 53 Am. Rep. 428. In National Loan Co. v. Bleasdale, 140 Iowa, 695, an agent to rent premises was held to have no implied authority to set off board to himself against rent due.

[62] Ward v. Smith, 7 Wall. (U. S.) 447, 19 L. Ed. 207; Fretz v. Stover, 22 Wall. (U. S.) 198, 22 L. Ed. 769.

Confederate money. — Where an agent was authorized to receive payment of a note, payable in one of the confederate states during the civil war although given to him for collection before the outbreak of the war and by one not a resident of any of the confederate states, he has authority to receive payment in confederate money, that being the currency of that section of the country at that time. Rodgers v. Bass, 46 Tex. 505; Burford v. Memphis Bulletin Co., 9 Heisk. (Tenn.) 691; Pidgeon v. William's Adm'rs, 21 Gratt. (Va.) 251; Hale v. Wall, 22 Gratt. (Va.) 424; Hendry v. Benlisa, 37 Fla. 609, 34 L. R. A. 283. But see, Alley v. Rodgers, 19 Gratt. (Va.) 366; Fretz v. Stover, 22 Wall. (U. S.) 198, 22 L. Ed. 769, where, under similar facts, it was held that payment in confederate money did not discharge the debt, as the agent was authorized to receive in payment only what was

He would, ordinarily, have no authority to receive more than was due and to bind his principal by independent contracts as to the excess.[63]

§ 947. ——— **Debt payable in goods.**—Conversely, where a debt is expressly payable in goods, an agent authorized merely to receive the goods, would have no implied authority to accept other goods, or different qualities or quantities, or to accept a money payment in lieu of the goods.[64] Where, however, the agent has been given general authority in the matter, or has been held out as having authority to accept money his taking of cash instead of the goods may be deemed authorized.[65]

§ 948. ——— **Enlarged authority—Authority by conduct or ratification.**—But while the general rule is as has been stated, the agent's authority over the subject-matter may be greater than that of a mere collecting or receiving agent, and he may be found to be vested with a discretion which will authorize him to receive payment otherwise than in cash. Thus, the general state agent of an implement company, having full authority to make settlements with the company's debtors, has been held to have implied authority to receive the note of a third person in payment.[66] So the conduct of the principal, his directions to the agent, or the exigency of the case, may justify the

accepted as currency at the time the agent was given the notes to collect; that war having cut off all communication between principal and agent, the fact that the notes were left in the hands of the agent after confederate money had become the money of the place of payment, did not give the agent implied authority to collect in that currency. In Harper v. Harvey, 4 W. Va. 539; and Waterhouse v. Citizens' Bank, 25 La. Ann. 77, where the facts were similar, it was held that payment to an agent in Confederate money was not a good payment, on the ground that the money was illegal.

See also Anderson v. Bank, Chase 535, Fed Cas. No. 354; Bank of Kentucky v. Express Co., 1 Flip. 242, Fed. Cas. No. 889; Webster v. Whitworth, 49 Ala. 201; Mangum v. Ball, 43 Miss. 288, 5 Am. Rep. 488; Shuford v. Ramsour, 63 N. C. 622; Pilson v. Bushong, 29 Gratt. (Va.) 229.

May not accept Mexican money. Edwards v. Davidson (Tex. Civ. App.), 79 S. W. 48.

[63] While the agent is undoubtedly usually authorized to make change at the time in the ordinary way, it has been held that he may not bind his principal by agreeing at some future time to bring back the change. Pearks Stores v. Watt, [1907] Transvaal Sup. Ct. 755.

[64] Cushman v. Somers, 62 Vt. 132, 22 Am. St. Rep. 92.

[65] Cushman v. Somers, 62 Vt. 132, 22 Am. St. Rep. 92.

[66] Nichols & Shepart Co. v. Hackney, 78 Minn. 461. See also, Holmes v. Langston, 110 Ga. 861.

In Dusenberry v. McDole, 42 Wash. 470, a person, really agent for a non-resident principal, but not known to be such by the defendant here, loaned money of his principal to defendant agreeing to accept grain in payment from time to time.

exercise of a wider authority. Thus, an agent sent by a foreign creditor to endeavor to get pay from a debtor on the eve of bankruptcy, and given "full authority to act for us in the matter," was held to have implied authority to take property in payment.[67] So an agent sent "to receive such amount" as the debtor was able to pay upon the debt, was held to have implied authority to receive from the debtor an order for money about to become due to him.[68]

And in any case, moreover, the principal, who with knowledge receives without objection the proceeds of the unauthorized method of collection, may be found to have ratified the same.[69]

§ 949. No authority to take checks, certificates of deposit, etc.— Being authorized to receive nothing but money, the agent has ordinarily no implied power to accept checks as payment, that is, as satisfaction of the demand.[70] The check is not money; it is at most but the means of getting the money. If there are no funds, it is, of course, worthless for any purpose. If the check be drawn upon funds to the agent's order and he obtains the money upon it, it is a good payment[71] even

Defendant signed notes payable to the principal without observing that they were not payable to the agent. For a period of ten years he made payments in grain without objection. Principal claimed that if agent took grain he had sold it and reported to principal in cash, and that principal had no knowledge of the agreement to accept grain. More payments in grain were claimed than the agent had reported. If the payments in grain were not counted, action on the notes was barred by the statute of limitations. *Held*, in an action on notes that principal was bound by payments in grain.

See also Eggleston v. Advance Thresher Co., 96 Minn. 241, where a sales agent had been allowed to act with large discretion. He accepted certain property in payment. Later the whole contract was rescinded by mutual consent. The agent did not return the property so received, and the company was held liable for its value.

[67] Oliver v. Sterling, 20 Ohio St. 391.

[68] Ruthven v. Clark, 109 Iowa, 25. An agent directed by his principal to take anything he can get in settlement has authority to accept a promissory note. Mitchell v. Finnell, 101 Cal. 614.

[69] Billingsley v. Benefield, 87 Ark. 128; Sawyer v. Vermont Loan Co., 41 Wash. 524.

[70] Broughton v. Silloway, 114 Mass. 71, 19 Am. Rep. 312; Cooney v. U. S. Wringer Co., 101 Ill. App. 468; Bernheimer v. Herrman, 44 Hun (N. Y.), 110; Roberts, etc., Shoe Co. v. McKim (Nev.), 117 Pac. 13.

Where the agent is authorized to receive checks, but only those of a certain kind, *i. e.*, "crossed cheques," the principal may lose his right to insist upon this requirement by permitting the agent to accept ordinary checks. International Sponge Co. v. Watt, [1911] App. Cas. 279.

[71] Harbach v. Colvin, 78 Iowa, 638; Griffin v. Erskine, 131 Iowa, 444, 9 Ann. Cas. 1193; Bridges v. Garrett, L. R. 5 C. P. 451; Stevenson Co. v. Fox, 19 N. Y. Misc. 177; Cohen v. O'Connor, 5 Daly (N. Y.), 28, affirmed, 56 N. Y. 613; Prochownick v. Boyd, 48 Hun, 618, aff'd 119 N.

though the agent afterwards converts the money to his own use.[72] In many cases it would make no practical difference to the principal if the check were not paid; because he would still have the liability of the debtor upon the check if not upon the original claim. But where goods were delivered, securities surrendered, liens discharged and the like, upon the receipt of the worthless check, the principal might sustain an immediate loss. In such a case, not only would the debtor remain liable to the principal, but as between the principal and the agent, the agent is liable to the principal for any loss resulting from receiving the check.[73]

§ 950. ——— A deposit of money in a bank to the order of the principal, the deposit book of which was delivered to the agent, has also been held not to be the equivalent of money and therefore the receipt of the book by the agent did not constitute payment, it not appearing that either the agent or the principal ever received the money.[74]

Where, however, the agent was a bank of deposit, it was held, while recognizing the general rule, that it might receive in payment one of its own certificates of deposit.[75]

And so, it has been held, that an agent authorized to negotiate a note might accept in place of money a certificate of deposit payable on demand, issued by a solvent bank.[76]

The principal, moreover, may in any of these cases be found to have ratified the unauthorized act, where, with knowledge, he has retained the proceeds without objection.

§ 951. ——— But while the agent may have no authority to receive a check or draft *as payment*,—that is in satisfaction of the debt,—he may, it is held, unless forbidden, receive it as conditional payment where he has good reason to believe that it will be paid upon presentation, and he takes it in the ordinary way as a convenient and usual method of getting the money.[77] If it be paid, the payment is effect-

Y. 641; Sage v. Burton, 84 Hun, 267. Or though drawn to the principal's order and endorsed without authority by the agent, if the agent actually receive the money upon it and was authorized to receive money, it is held a good payment to the principal. Case v. Kramer, 34 Mont. 142.

See also, Gibson v. Ward, 9 Ga. App. 363, where it was held that payment by draft on a third person was good, where the draft was paid and the proceeds came into the collecting agent's hands.

[72] Cohen v. O'Connor, *supra;* Griffin v. Erskine, *supra.*

[73] Hall v. Storrs, 7 Wis. 253; Harlan v. Ely, 68 Cal. 522; Pape v. Westacott, [1894] 1 Q. B. 272.

[74] Dixon v. Guay, 70 N. H. 161.

[75] British, etc., Mortgage Co. v. Tibbals, 63 Iowa, 468.

[76] Poorman v. Woodward, 21 How. (U. S.) 266, 16 L. Ed. 151.

[77] Griffin v. Erskine, 131 Iowa, 444, 9 Ann. Cas. 1198; Cunningham v. Wabash R. Co., — Mo. App. —, 149 S. W. 1151.

ual; if it be not paid, the principal will ordinarily sustain no loss as he still retains his original demand.

§ 952. If authorized to take check or note, has no authority to indorse and collect it.—But even if the agent be authorized to accept check or note in payment of the demand, and has taken one to the order of his principal the agent has no implied authority to indorse it and collect the money thereon, and the bank paying the check so indorsed is still liable to the principal for the amount thereof.[78] The principal, moreover, is not liable upon the indorsement.[79]

In like manner, an agent authorized to take a bill or note in the name of his principal, has no implied authority to indorse and transfer it so as to deprive the principal of his property,[80] or make him liable upon the indorsement.[81]

So an agent authorized to accept a note in settlement of a debt has no implied authority, after delivering it to his principal, to receive payment of the note.[82]

[78] Jackson v. Nat. Bank, 92 Tenn. 154, 36 Am. St. Rep. 81, 18 L. R. A. 663; Robinson v. Bank of Winslow, 42 Ind. App. 350; Brown v. Peoples' Nat. Bank, — Mich. —, 136 N. W. 506; Dispatch Printing Co. v. National Bank, 109 Minn. 440; McFadden v. Follrath, 114 Minn. 85, 37 L. R. A. (N. S.) 201; Deering v. Kelso, 74 Minn. 41, 73 Am. St. R. 324; Graham v. United States Saving Inst., 46 Mo. 186; Thomson v. Bank of British, etc., 82 N. Y. 1; Robinson v. Chemical Bank, 86 N. Y. 404; Schmidt v. Garfield Nat. Bank, 64 Hun, 298, aff'd 138 N. Y. 631; Millard v. Republic Bank, 3 McArthur (D. C.), 54; Jackson Paper Mfg. Co. v. Com. Nat. Bank, 199 Ill. 151, 93 Am. St. R. 113, 59 L. R. A. 657; Sinclair v. Goodell, 93 Ill. App. 592; Goodell v. Sinclair, 112 Ill. App. 594.

Even if he takes the note without authority, he has no implied power to indorse and discount it. Lonier v. Ann Arbor Savings Bank, 162 Mich. 541, 127 N. W. 685.

[79] Jacoby v. Payson, 85 Hun, 367, 91 Hun, 480.

[80] Hogg v. Snaith, 1 Taunt. 347; McClure v. Evartson, 14 Lea (Tenn.), 495; Holtsinger v. Nat. Bank, 6 Abb. (N. Y.) Pr. (N. S.) 292, 37 How. 203, affirmed by the Court of Appeals, 3 Alb. L. J. 305, 40 How. Pr. 720.

[81] National Fence Mach. Co. v. Highleyman, 71 Kan. 347; Hamilton Bank v. Nye, 37 Ind. App. 464, 117 Am. St. R. 333; Essick v. Buckwalter, 1 Monag. 309 (Pa.). Distinguish from National Fire Ins. Co. v. Eastern Bldg. Loan, 63 Neb. 698, aff'd 65 Neb. 433, where an agent, authorized to adjust and collect insurance due, was held to have authority to indorse an order given him by the insurance company's adjustor on the company, and question was not liability on the endorsement but payment of the claim.

[82] Draper v. Rice, 56 Iowa, 114, 41 Am. Rep. 88; Rhodes v. Belchee, 36 Or. 141.

An agent who has sold goods for the price of which a negotiable promissory note payable to his principal or order was given, has no implied authority, before the maturity of the note and without having the same in his possession, to allow a discount upon the amount

§ 953. ——— Any of these results, however, may be altered by the circumstances. Thus there may be express authority, or it may be an incident of the agent's position,[83] or the course of dealing may be such as to give the agent apparent authority to indorse and collect checks, and in such events the bank will not be liable to pay again.[84] And where there is such an apparent authority, the bank will not be affected by secret instructions which would limit the apparent power,[85] nor will the title of a third person who has relied thereon be affected.[86]

Of course, where the agent is authorized to receive the check, the fact that he afterwards wrongfully indorses it and obtains the money upon it, does not destroy the effect of the check as payment by the drawer.[87]

And though he was neither authorized to receive the check nor to indorse it, and does both, but turns the money over to the principal, it is held a good payment to the latter.[88]

§ 954. **No authority to release or compromise the debt.**—It follows, as a corollary of the rules already stated, that an agent authorized merely to collect or receive payment, has no implied power to release the debt, in whole or in part, or to compromise the claim, with-

of the note and receive payment of the balance. Holland v. Van Beil, 89 Ga. 223.

[83] As in the case of a general manager, and the like. Burstein v. Sullivan, 134 App. Div. 623; Morris v. Hofferberth, 81 App. Div. 512, aff'd 180 N. Y. 545.

[84] Lorton v. Russell, 27 Neb. 372; Levy v. First Nat Bank, 27 Neb. 557.

An agent authorized to indorse and procure the discount of notes taken for goods sold, held to have authority to discount renewal notes. Marine Bank v. Butler Colliery Co., 52 Hun, 612, 125 N. Y. 695.

[85] Kansas City, etc., R. Co. v. Ivy Leaf Coal Co., 97 Ala. 705.

[86] Where an agent is put in general charge of the business of a principal, with power to sell its goods, collect for the same, make purchases, etc., it is a question for the jury to determine, whether the agent had apparent authority to pay for the goods so purchased, by indorsing checks payable to his principal. Graton & Knight Mfg. Co. v. Redelsheimer, 28 Wash. 370.

An agent was employed to sell goods and collect accounts. From the very first day he frequently indorsed checks received in payment and obtained the money, which was used in the principal's business. Later he endorsed such a check to the defendant and appropriated the money to his own use. In an action by the principal, *held*, that evidence of such a course of dealing was sufficient to justify a finding that the agent was authorized to indorse the check sued on. Best v. Krey, 83 Minn. 32. See also, Witcher v. McPhee, 16 Colo. App. 298.

[87] Burstein v. Sullivan, 134 App. Div. 623; Allen v. Tarrant, 7 App. Div. 172; Sage v. Burton, 84 Hun (N. Y.), 267; Morris v. Hofferberth, 81 App. Div. 512, aff'd 180 N. Y. 545.

[88] Case v. Kramer, 34 Mont. 142; Cf.: Dowdall v. Borgfeldt, 113 N. Y. Supp. 1069.

out payment in full;[89] neither has he any implied authority to discharge part of the debtors,[90] release liens,[91] discharge sureties, or surrender securities[92] except on full payment of the debt. He has no implied authority to allow for deficiencies, admit counterclaims or set-offs or recognize any other adverse claims.[93] An agent authorized merely to collect rents has no implied authority to accept a surrender of the lease, or to consent to the discharge of the tenant and the substitution of a stranger.[94] An agent to collect a bill is not authorized to receive conditionally less than the entire amount and to surrender the bill before learning whether the condition will be accepted.[95]

§ 955. Authority to receive part payment.—Authority to collect or receive payment of a demand must ordinarily be construed as authorizing the receipt of the whole of the demand only, and not merely of a part of it, at least where receipt of a part only would be prejudicial to the principal's rights. Cases wherein there would be a reduction in interest, or the loss of a remedy, or the right to sue in a particular court, or where the right to costs would be affected would furnish

[89] Herring v. Hottendorf, 74 N. C. 588; McHany v. Schenk, 88 Ill. 357; Melvin v. Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199; Eaton v. Knowles, 61 Mich. 625; Baird v. Randall, 58 Mich. 175; Nolan v. Jackson, 16 Ill. 272; Whittington v. Ross, 8 Ill. App. 234; Danziger v. Pittsfield Shoe Co., 204 Ill. 145; First Nat. Bank v. Prior, 10 N. D. 146; Corbet v. Waller, 27 Wash. 242; Tompkins Mach. Co. v. Peter, 84 Tex. 627; Scales v. Mount, 93 Ala. 82; Craig Silver Co. v. Smith, 163 Mass. 262; Murphy v. Kastner, 50 N. J. Eq. 214; Ogilvie v. Lee, 158 Mo. App. 493; Hoster v. Lange, 80 Mo. App. 234.

[90] Torbit v. Heath, 11 Colo. App. 492. In Cram v. Sickel, 51 Neb. 828, 66 Am. St. R. 478, an attorney with authority to collect a claim against a partnership was held to have no authority to release the retired partner on consideration of security given by the continuing partner.

[91] Couch v. Davidson, 109 Ala. 313. But the power of the collecting agent over means and methods may be so great as to authorize him to permit a sale of mortgaged property in expectation of payment out of the proceeds; and if he does so, the fact that he does not receive payment as expected will not defeat the title of the purchaser. Winter v. Elevator Co., 88 Minn. 196; Partridge v. Elevator Co., 75 Minn. 496.

[92] Knoche v. Whiteman, 86 Mo. App. 568; Robinson v. Nipp, 20 Ind. App. 156; Harrison v. Burlingame, 48 Hun, 212; Dugan v. Lyman (N. J. Eq.), 23 Atl. 657; Hutchings v. Clark, 64 Cal. 228.

[93] Johnson v. Wilson, 137 Ala. 468, 97 Am. St. R. 52; Bynum v. Pump Co., 63 Ala. 462; Railroad Co. v. Cogsbill, 85 Ala. 456; Gund Brewing Co. v. Peterson, 130 Iowa, 301.

A general agent may make an allowance on a bill, because of delays in performance. Stevenson Co. v. Fox, 19 N. Y. Misc. 177.

[94] See *ante*, § 836; Blake v. Dick, 15 Mont. 236, 48 Am. St. R. 671; Scanlan v. Hoerth, 151 Ill. App. 582; Wallace v. Dinniny, 11 N. Y. Misc. 317, aff'd 12 Misc. 635; Barkley v. Holt, 84 N. Y. Supp. 957. See also, Goldsmith v. Schroeder, 93 N. Y. App. Div. 206.

[95] Bank of Scotland v. Dominion Bank, [1891] App. Cas. 592.

illustrations.[96] But, on the other hand, there are many cases wherein the receipt of a part might fairly be deemed not only within the authority but also within the duty of the agent. Thus, claims are constantly put into the hands of agents for collection, under circumstances which clearly indicate that the principal desires and expects that, if the agent cannot collect the whole, he will collect as much as possible.[97]

§ 956. May not extend time.—But although the agent may be authorized to receive payment in part, he has usually no implied authority, upon such payment, or in consideration of it, to extend the time of payment of the balance.[98]

Express authority would ordinarily be requisite to extend the time in any case,[99] though it is clear that there may be such general authority, such a course of dealing between the parties, or such other

[96] In Lowenstein v. Bresler, 109 Ala. 326, is said that an agent to collect a check cannot receive a part payment upon it. Probably he could not if he would have to surrender the check or permit it to be stamped as paid, but otherwise it is not so clear.

[97] An attorney at law is authorized to receive partial payments on account of any claim put in his hands for collection. Pickett v. Bates, 3 La. Ann. 627. To same effect: Whelan v. Reilly, 61 Mo. 565.

In Williams v. Walker, 2 Sandf. (N. Y.) Ch. 325, where an agent who had made a loan upon bond and mortgage and was left in possession of the bond was held authorized to receive the principal as well as the interest, it was said by Sanford, V. C.: "I do not think that the authority thus implied is to be limited to a receipt of the whole principal in one sum. The implication is that the bond was left with him on the same footing as if it were left with an attorney for collection. In such a case if any discretion is to be exercised as to the receipt of a part only of the debt, it is a discretion with which the agent is clothed by the possession of the security."

So in Peck v. Harriott, 6 S. & R. (Pa.) 146, 9 Am. Dec. 415, it was said of an agent authorized to receive payment for land sold, "If he had power to receive the whole, he had power to receive any part."

That an agent authorized to collect a note may receive part payment of it, see also, Frost v. Fisher, 13 Colo. App. 322.

[98] Hutchings v. Munger, 41 N. Y. 155; Ritch v. Smith, 82 N. Y. 627; Gerrish v. Maher, 70 Ill. 470; Chappel v. Raymond, 20 La. Ann. 277; Karcher v. Gans, 13 S. D. 383, 79 Am. St. R. 893. Agent authorized simply to collect a note, has no implied authority to extend the time of payment, and thus discharge the sureties on the note. Lawrence v. Johnson, 64 Ill. 351.

To same effect: Behrns v. Rogers (Tex. Civ. App.), 40 S. W. 419.

The mere relation of attorney and client is not sufficient to empower the attorney to extend the time of payment of a mortgage debt. Hazelton v. Florentine Marble Co., 94 Fed. 701. In Mason v. Thompson Co., 94 Minn. 472, it was held that an attorney at law, with notes to collect, could not extend the time of payment thereon.

[99] See Behrns v. Rogers; Karcher v. Gans; and other cases cited in the preceding note; Powell v. Henry, 96 Ala. 412.

conduct, as to justify the inference that the agent is authorized to renew or extend.[1]

§ 957. Or otherwise change the terms of the contract.—Neither has an agent authorized to receive payment any implied authority to change or alter any other of the terms and conditions of the contract. His authority is to receive payment on the contract as the parties made it, not to make a new contract for them or to change or alter the old one.[2] He may not therefore, for example, surrender the contract or consent to the substitution of debtors.[3]

§ 958. Not authorized to receive before due.—And even though an agent have authority to receive payment of an obligation, this would not ordinarily authorize him to receive it before it is due, and thus, for example, cut off future interest, or surrender a valuable security; or even expose the principal to the risk of a payment at a time when he had not bargained for it. A power to receive payment must, therefore, usually be construed as authority to receive payment at maturity and not before.[4] A known usage of trade or course of business in a particular employment, or a habit of dealing between the parties,

[1] As where agent for the collection of notice has to the knowledge of the principal, been accustomed to take new notes and new securities. First Nat. Bank v. Ridpath, 47 Neb. 96.

See also McDonald v. Kingsbury, 16 Cal. App. 244, where a general agent's assurance that then would be no forfeiture because of delay in payment, was held binding.

[2] Halladay v. Underwood, 90 Ill. App. 130; Burgess v. Willis, 43 N. Y. Misc. 672; Ridgeley National Bank v. Barse Commission Co., 113 Mo. App. 696 (where the agent was held to have no authority to give the security he was authorized and directed to enforce and take another in its stead).

[3] Blake v. Dick, 15 Mont. 236, 48 Am. St. R. 671; Wallace v. Dinniny, 11 N. Y. Misc. 317. In Board of Education v. Kelly, 126 Ga. 479, it was held that the clerk of a court authorized to collect costs and sheriff's fees had no authority to release a party owing such fees and charge the same against the party's attorney.

[4] Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502; Fellows v. Northrup, 39 N. Y. 117: Walsh v. Peterson, 59 Neb. 645; Bronson v. Ashlock, 2 Kan. App. 255; Madison v. Cabalek, 86 Ill. App. 450; Williams v. Pelley, 96 Ill. App. 346; Schenk v. Dexter, 77 Minn. 15; Security Co. v. Graybeal, 85 Iowa, 543, 39 Am. St. R. 311; U. S. Bank v. Burson, 90 Iowa, 191; Park v. Cross, 76 Minn. 187, 77 Am. St. Rep. 630; City Nat. Bank v. Goodloe-McClelland Com. Co., 93 Mo. App. 123; Lester v. Snyder, 12 Colo. App. 351; Little Rock & Ft. S. Ry. Co. v. Wiggins, 65 Ark. 385; Cunningham v. McDonald, 98 Tex. 316; Campbell v. Hassel, 1 Stark, 233; Parnther v. Gaitskell, 13 East, 437.

In Realty Transpr. Co. v. Kimball, 66 Misc. 185, payment to an agent authorized to collect rents of rent upon April 28 which was not due until May 1, was held not good.

may, however, extend the ordinary reach of the authority.[5] Thus an agent to loan money may be given such general authority over the subject as to authorize him to re-invest, change the form or amount of securities, and receive payment upon securities before they are due.[6] And many cases may be imagined, as, for example, the case of commercial claims bearing no interest, wherein an early payment would be to the principal's advantage, and in which the agent might fairly be deemed to be authorized to receive payment whenever he could obtain it.[7]

§ 959. Not authorized to accelerate maturity.—An agent authorized to collect and remit interest upon a note and mortgage which provides that, if default be made in the payment of any interest, the entire principal sum shall, at the option of the mortgagee, become at once due and payable, is held to have no implied authority in case of such default to exercise the option.[8] The effect of this option, when exercised, being to entirely change and supersede the contract existing between the parties, it must be shown that the agent was authorized to exercise it.

[5] Thompson v. Elliott, 73 Ill. 221; Noble v. Nugent, 89 Ill. 522; Thornton v. Lawther, 169 Ill. 228; McIntosh v. Ransom, 106 Ill. App. 172.

"The fact that the plaintiff forwarded coupons, and insisted on prompt payment of the principal, through the agent, weeks before the maturity, indicates that he intended the agent to receive the money when offered." Dilenbeck v. Rehse, 105 Iowa, 749. So where, though only upon one occasion a payment not due had been made to the agent and accepted by the principal without objection. Harrison v. Legore, 109 Iowa, 618.

So where a note is due after five years but the maker has the privilege of paying it after three years, an agent to receive payment is presumptively authorized to receive payment whenever the maker has the right to pay it. Frost v. Fisher, 13 Colo. App. 322.

A contract may often show by its terms that stipulations as to time of payment were intended merely for the convenience of the debtor, and in that event he may pay before. See *per* Brett, L. J., in Lancashire Waggon Co. v. Nuttall, 42 L. T. Rep. 465.

[6] In Bleser v. Stedl, 135 Wis. 124, while the authority of a loan agent to mature the paper by taking payments before due was denied, the court held that he would have authority to receive payments a few days earlier or later to be counted as of the day of maturity. Here the money was due December 12. Payments made on December 7 and December 17 were held to be good.

An agent to manage his principal's money who "made loans and accepted re-payment, changed loans, collected interest, received money on loans before due and placed it again and generally transacted the business as he saw fit" may receive payment of a note before maturity and release a mortgage securing it. Peterson v. Fullerton, 106 Ill. App. 237.

[7] See Bliss v. Cutter, 19 Barb. (N. Y.) 9.

[8] Wilcox v. Eadie, 65 Kan. 459.

§ 960. Authority to collect does not authorize sale of debt.—Authority to an agent to collect or receive payment of a note or other demand, does not imply authority to sell, transfer, or otherwise dispose of it.[9] Nor will authority to an agent to accept a note in settlement of a demand, imply authority in the agent to afterward sell the note so taken.[10]

§ 961. No authority to deal with funds collected.—An agent authorized to collect and transmit funds to his principal, has no implied authority to enter into any contract concerning the money in his hands, or to exchange it for other money with third persons.[11]

A third person dealing with the agent with knowledge of the circumstances, could acquire no rights against the principal; and if the agent lost the money or took a counterfeit he would be liable to the principal.[12] An agent so possessed of funds, having no authority to borrow money, even for his principal's benefit, would have no implied authority to open a bank account in the name of his principal and make the principal liable for an overdraft.[13] Neither would such an agent have implied authority to apply, or agree to apply, the money received, upon or in payment of a debt due by the principal.[14]

§ 962. May give receipt or discharge.—An agent authorized tc collect has implied authority to give to the debtor upon payment such

[9] Smith v. Johnson, 71 Mo. 382; Texada v. Beaman, 6 La. 84, 25 Am. Dec. 204; Hardesty v. Newby, 28 Mo. 567, 75 Am. Dec. 137; Quigley v. Mexico Southern Bank, 80 Mo. 289, 50 Am. Rep. 503; Moore v. Skyles, 33 Mont. 135, 114 Am. St. R. 801, 3 L. R. A. (N S.) 136; Goodfellow v. Landis, 36 Mo. 168; Dingley v. McDonald, 124 Cal. 682; Rigby v. Lowe, 125 Cal. 613; Lederer v. Union Sav. Bank, 52 Neb. 133.

A fortiori he may not sell to himself. Appeal of Yard (Pa.), 12 Atl. 359. In Feiner v. Puetz, 77 Mo. App. 405, it was said that an attorney authorized to collect a note had *prima facie* no authority to sell it, but that in the case at bar this presumption was rebutted by evidence that the agent had authority to sell or do with it as he pleased, provided he did subject his principal to liability as an indorser.

[10] Ames v. Drew, 31 N. H. 475.

[11] Such an agent has no authority to reloan the money after it has been collected. Haynes v. Carpenter, 86 Mo. App. 30.

[12] Darling v. Younker, 37 Ohio St. 487, 41 Am. Rep. 532; Kent v. Bornstein, 12 Allen (Mass.), 342; Greenwald v. Metcalf, 28 Iowa, 363.

[13] Case v. Hammond Pack. Co., 105 Mo. App. 168. In Dixon v. Jackson Exch. Bank, 149 Mo. App. 585, an agent to collect notes, deposit the proceeds and check out for one specific purpose, was held to have no authority to draw out the funds for any other purposes.

[14] Hill v. Van Duzer, 111 Ga. 867. In Dowlen v. Georgs Mfg. Co. (Tex. Civ. App.), 125 S. W. 931, a lessor assigned rents to defendant to collect and pay over to the plaintiff, a creditor of the lessor. *Held*, that the effect of the assignment was to make the defendant an agent to collect, and that in such capacity he had no authority to use money collected in making repairs.

a receipt or discharge as the payment entitles him to receive. Thus if the debt be evidenced by a note or other security the agent, upon payment, may deliver the security to the debtor.[15]

And where the transaction involves the adjustment of accounts or the settlement of disputes, the agent authorized to make it, has implied authority not only to agree upon the terms of the settlement, if fair and reasonable, but to bind the principal by inserting in the receipt the terms and conditions upon which the settlement was made.[16] And while an agent, authorized to discharge a mortgage upon receiving payment, may, of course, do so, he can not bind his principal by giving a discharge when no payment had in fact been made.[17]

§ 963. Authority to sue.—While mere authority to demand or receive payment of a debt would not imply authority to sue for it, yet as every endowment of power carries with it implied authority to do those things which are usual and necessary to accomplish the object sought to be attained, an agent having general instructions *to collect* may, if it becomes necessary, sue upon the claim, cause execution to issue and direct the seizure of property.[18] He has, however, no implied authority to instruct the sheriff to levy upon any particular property.[19]

Where the principal is a non-resident, an attorney instructed to sue upon a claim, has been held to have implied power, when necessary,

[15] Padfield v. Green, 85 Ill. 529. See also, Lindley v. Lupton, 118 Mich. 466; Scammon v. Wells, Fargo, & Co., 84 Cal. 311.

May give discharge of mortgage or release of trust deed. Dawson v. Wombles, 111 Mo. App. 532.

[16] Vogel v. Weissmann, 23 N. Y. Misc. 256.

[17] Hutchings v. Clark, 64 Cal. 228.

[18] Joyce v. Duplessis, 15 La. Ann. 242, 77 Am. Dec. 185; McMinn v. Richtmyer, 3 Hill (N. Y.), 236; Bush v. Miller, 13 Barb. (N. Y.) 481; Scott v. Elmendorf, 12 Johns. (N. Y.) 317; Hirshfield v. Landman, 3 E. D. Smith (N. Y.), 208.

Such an agent may properly secure a confession of judgment for his principal. Briggs v. Yetzer, 103 Iowa, 342.

But where a note is already in judgment, and is put into the hands of a collecting agency with express instructions not to sue, the principal is not bound by the bringing of a suit thereon by the agency. Satterlee v. First Nat. Bank, 78 Neb. 691.

[19] Averill v. Williams, 4 Den. (N. Y.) 295, 47 Am. Dec. 252; Welsh v. Cochran, 63 N. Y. 181, 20 Am. Rep. 519; Oestrich v. Gilbert, 9 Hun (N. Y.), 242.

But see the chapter on Attorneys at Law.

Authority "to receive tenants for, receive rents, make contracts for . . . repairs to and insurance upon" a building does not authorize agent in having distress warrant levied on tenant's property. Fishburne v. Engledove, 91 Va. 548.

to indemnify the sheriff against the results of the seizure[20] as otherwise the attorney would not be able to accomplish his undertaking.

For the same reason, if the exigencies of the case demand immediate action, he may make the necessary affidavit, cause the issue of a writ of attachment, and execute in his principal's name the statutory bond therefor.[21] But an attorney has not necessarily the authority to indemnify the surety upon an injunction bond,[22] nor, it has been held, to execute a replevin bond in the name of his principal.[23]

His authority to sue, however, must be confined to the institution of the ordinary and appropriate actions for the collection of the debt, and can not be deemed to justify unusual and inappropriate actions, such, as for example, a criminal proceeding.[24]

§ 964. Authority to sue in his own name.—An agent authorized to collect a negotiable note or bill payable to bearer,[25] or indorsed in blank[26] for the purpose of collection, may sue thereon in his own name. Not so, however, if the note be payable to order and is not indorsed.[27]

Such an indorsement and delivery for the purpose of collection passes the legal title in trust; and the trust is not terminated by the principal's death.[28]

§ 965. Authority to foreclose mortgages.—Authority to foreclose mortgages is not one lightly to be inferred. The mere fact that a single interest coupon is sent to the agent for collection certainly does not justify it. And even the fact that one has acted as agent in negotiating the mortgage, or the fact that he has, from time to time, been

[20] Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252; Schoregge v. Gordon, 29 Minn. 367; (see also, Swartz v. Morgan, 163 Pa. 195, 43 Am. St. R. 786) but he has no authority to indemnify after the levy and sale have been made. Snow v. Hix, 54 Vt. 478.

See also American Bonding Co. v. Ensey, 105 Md. 211, 11 Ann. Cas. 883, where a letter written to the attorney was held to authorize him to procure a bond from plaintiff.

[21] DePoret v. Gusman, 30 La. Ann. Part II, 930; Fulton v. Brown, 10 La. Ann. 350; Trowbridge v. Weir, 6 Id. 706; Alexander v. Burns, Id. 704.

[22] White v. Davidson, 8 Md. 169, 63 Am. Dec. 699. But see *post*, chapter on Attorneys at Law.

[23] Narraguagus Land Proprietors v. Wentworth, 36 Me. 339. But see *contra*, Merrick v. Wagner, 44 Ill. 266, under a very general power of attorney. See generally the chapter on Attorneys at Law.

[24] Equitable L. Ass'n Society v. Lester (Tex. Civ. App.), 110 S. W. 499; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493.

[25] Hotchkiss v. Thompson, 1 Morris (Iowa), 156.

[26] Orr v. Lacy, 4 McLean (U. S. C. C.), 243, Fed. Cas. No. 10,589; Brigham v. Gurney, 1 Mich. 348; Boyd v. Corbitt, 37 Mich. 52; Hazewell v. Coursen, 45 N. Y. Super. Ct. 22; Moore v. Hall, 48 Mich. 143.

[27] Padfield v. Green, 85 Ill. 529.

[28] Moore v. Hall, *supra*.

authorized to receive interest upon it, or the fact that interest coupons have been sent to him for collection as they matured,—the principal retaining all of the time the possession of the note and mortgage,—does not authorize the agent to foreclose. If, therefore, in such a case, without the principal's knowledge or consent, a foreclosure sale is had, the principal's title is not affected by it.[29] Where, however, in a long series of transactions, extending over a period of about fifteen years and involving about $135,000, the agent had been permitted to assume complete control over the investments, receiving and accepting applications, accepting payments before they became due, making changes in the mortgages, and reloaning, at his discretion, it was held that the agent, although not having possession of the securities, was so far authorized to foreclose that a foreclosure, at which the agent became the purchaser, and a redemption made to the agent, constituted payment, and destroyed the principal's lien, although the agent failed before accounting for the proceeds.[30]

§ 966. May not submit claim to arbitration.—An agent authorized merely to collect or receive payment of a claim, has therefrom in case of dispute no implied authority to submit the claim to arbitration.[31]

§ 967. May employ counsel.—Where the agent is in fact authorized to collect, and by legal process if necessary, the agent may not only bring suit, but may employ appropriate counsel to conduct it.[32]

§ 968. Authority to employ subagents.—The implied authority of an agent, authorized to collect, to employ a subagent, and his liability for the acts of such subagent, is a question which has been considered in other sections and need not be repeated here.[33]

[29] Burchard v. Hull, 71 Minn. 430. To same effect: Dexter v. Morrow, 76 Minn. 413; White v. Meeker County Bank, 78 Minn. 286 (does not confer "ostensible authority" under the Code); Corey v. Hunter, 10 N. D. 5; Plummer v. Knight, 156 Mo. App. 321 (but an unauthorized foreclosure in such case may be ratified). Plummer v. Knight, *supra*.

[30] Springfield Sav. Bank v. Kjaer, 82 Minn. 180. See also, Alexander v. Alexander, 8 Kan. App. 571; Curtis v. Cutler, 22 C. C. A. 16, 76 Fed. 16, 37 L. R. A. 737.

[31] See Manufacturers, etc., Ins. Co. v. Mullen, 48 Neb. 620; Mich. C. R. Co. v. Gougar, 55 Ill. 503; Allen v. Confederate Pub. Co., 121 Ga. 773.

[32] Ryan v. Tudor, 31 Kan. 366; Davis v. Waterman, 10 Vt. 526, 33 Am. Dec. 216; Swartz v. Morgan, 163 Pa. 195, 43 Am. St. R. 786; Strong v. West, 110 Ga. 382.

[33] See *ante*, Delegation of Authority.

VII.

OF AGENT AUTHORIZED TO MAKE OR INDORSE NEGOTIABLE PAPER.

§ 969. An important power, not lightly inferred.—The power to bind the principal by the making, accepting or indorsing of negotiable paper is an important one, not lightly to be inferred. The negotiable instrument, in our law, is a contract which stands upon an independent footing. It is designed by its nature to circulate freely in the business world, and may come to persons and to places far remote from those of its creation. It may confer upon a subsequent holder rights which the original holder did not possess, and its transfer may impose upon the maker obligations, against which his defenses are unavailing. The authority to create such obligations is obviously a delicate one, easily susceptible of abuse, and, if abused, bringing disaster and financial ruin to the principal. Our law therefore properly regards such an authority as extraordinary, and not ordinarily to be included within the terms of general grants; and the rule is abundantly established that it can exist only when it has been directly conferred or is warranted by necessary implication.[34] To use the language of a learned judge: "The power of binding by promissory negotiable notes, can be conferred only by the direct authority of the party to be bound, with the single exception where, by necessary implication, the duties to be performed cannot be discharged without the exercise of such a power. To facilitate the business of note making and thus affect the interest and estates of third persons to an indefinite amount, is not within the object and intent of the law regulating the common duties of principal and agent; neither is the power to be implied because occasionally an instance occurs in which a note so made should in equity be paid." [35]

[34] Paige v. Stone, 10 Met. (Mass.) 160, 43 Am. Dec. 420; Stock Exch. Bank v. Williamson, 6 Okl. 348; Lafourche Transp. Co. v. Pugh, 52 La. Ann. 1517; Connell v. McLoughlin, 28 Or. 230; Bank of Morganton v. Hay, 143 N. C. 326; Seattle Shoe Co. v. Packard, 43 Wash. 527, 117 Am. St. R. 1064.

In Morris v. Hofferberth, 81 N. Y. App. Div. 512, 520 (aff'd 180 N. Y. 545) it is said by Hiscock, J.: "It is perfectly understood as a matter of ordinary business observation and experience, that almost the last authority which a man confers upon his agent is the right to bind him by signing or indorsing his name upon negotiable paper. Very naturally men are reluctant to confer upon others an authority which, if misused, may be so injurious as this. I think the courts have respected and followed the general course and conduct of business men in dealing with this subject, for they have always been slow to infer a power to perform such acts unless it was clearly given or fairly to be implied.

[35] Hubbard, J., in Paige v. Stone, *supra*.

§ 970. How authority conferred.—Authority to execute negotiable instruments need not be conferred in any particular manner. Unless required by some statute it is not essential that authority to execute it be in writing.[36] It need not always be express:[37] as has been seen, it may arise from necessary implication.[38] The principal may also by his conduct either show that the act was really authorized, or he may estop himself from denying it,[39] and an unauthorized execution may be rendered valid by a subsequent ratification.

§ 971. When authority implied.—As has been seen, general words made use of in conferring authority must be limited to the legitimate scope of the business in the transaction of which it is to be exercised, and authority to bind the principal by negotiable paper will only be implied where it is practically indispensable to accomplish the object.[40]

[36] People's Bank v. Scalzo, 127 Mo. 164; Fountain v. Bookstaver, 141 Ill. 461.

[37] Under the code in Louisiana, it is required to be express. Lafourche Transp. Co. v. Pugh, 52 La. Ann. 1517. See also, People's Bank v. Scalzo, *supra*.

[38] Gambrill v. Brown Hotel Co., 11 Colo. App. 529; Whitten v. Bank of Fincastle, 100 Va. 546.

[39] Thus where the principal in numerous instances or for considerable periods, has permitted the alleged agent to execute negotiate instruments, he will be liable to one who has dealt with the agent in reliance thereon. See Eoff v. Citizens Bank (Ark.), 112 S. W. 213; Bank of Ukiah v. Mohr, 130 Cal. 268; Greer v. First Nat. Bank (Tex. Civ. App.), 47 S. W. 1045; Witcher v. McPhee, 16 Colo. App. 298. See also, Taylor v. Angel, 162 Ind. 670; Appeal of Nat. Shoe and Leather Bank, 55 Conn. 469. Notes being among the usual instrumentalities to evidence a loan, if the principal requests a third person to loan the agent money to carry on the principal's business, the lender may properly assume that the agent is authorized to execute notes therefor. Lytle v. Bank of Dothan, 121 Ala. 215.

Principal honoring agent's drafts.—But the mere fact that the principal has honored drafts drawn upon him by his agent does not, it is held, show that the agent is *authorized* to draw drafts upon the principal. It may just as well be the fact that the agent had a deposit, or credit or commissions, in the principal's hands, and that he had drawn the drafts as owner and not as agent and that the principal had paid them for that reason only. Seattle Shoe Co. v. Packard, 43 Wash. 527.

See also Bank of Morganton v. Hay, 143 N. C. 326; Cook v. Baldwin, 120 Mass. 317, 21 Am. Rep. 517; Bank of Deer Lodge v. Hope Mining Co., 3 Mont. 146, 35 Am. Rep. 458.

But in Valiquette v. Clark Co., 83 Vt. 538, 138 Am. St. R. 1104, 34 L. R. A. (N. S.) 440, where the principal, though protesting to the agent, had paid within four weeks three drafts drawn by the agent in favor of the plaintiff without protesting to the latter, the court held him estopped to deny liability upon a fourth drawn within three weeks thereafter.

See also Greer v. First Nat. Bank (Tex. Civ. App.), 47 S. W. 1045.

[40] Bickford v. Menier, 107 N. Y. 490.

See Gardner v. Baillie, 6 T. R. 591; Howard v. Baillie, 2 H. Bl. 618.

Thus an authority to an agent "to accomplish a complete adjustment" of all the principal's concerns in a certain state does not authorize him to bind the principal by a promissory note,[41] nor will authority given by a farmer to his agent to sign his name in the general transaction of his business, confer power upon the agent to sign the

[41] Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62. A power of attorney "to transact all such business as I may not be able to attend to in person, to take charge of and attend to the collection of all my outstanding debts, * * * to look after the collection of rents, make division of crops with tenants, make such compromises and settlements as in their judgment, is for my interest, make sale of such property as I may desire to dispose of from time to time, and generally to do and perform all acts that I might do were I in good health; and, for this purpose * * * to sign my name to bonds, receipts, and such other papers as may be necessary in the transaction of the business heretofore set forth," does not give authority to purchase mules and wagons and give promissory notes therefor. Born v. Simmons, 111 Ga. 869.

An agent placed in charge of a stock of goods which had been bought in by the principal to secure his debt against such agent, "with authority to transact any business in reference thereto that may be necessary and in accordance with the desire of or by agreement with said first party," has no authority, except in reference to that very stock, and hence may not buy goods on credit to replenish the stock and give a note therefor. Weekes v. Shapleigh Hdwe. Co., 23 Tex. Civ. App. 577.

Authority "to superintend . . . the Snyder mine and all other mines acquired by us by purchase or otherwise . . . and to preserve, manage, sell and dispose of any and all of the said mines, mills or other property in such manner as he shall deem meet and proper and for our best interest", does not authorize agent to give a promissory note for money paid to workmen in the mines and merchandise purchased for the mines, prior to its execution. Golinsky v. Allison, 114 Cal. 458.

A power of attorney "to ask, demand, receive, and recover all and every sum of sums of money whatsoever that are or is now due and owing . . . to investigate, adjust, settle and to compromise all accounts, debts, claims, disputes, and matters . . . to commence and prosecute and defend all actions, suits, claims, demands and proceedings . . . to give effectual receipts in full discharge of all claims; and generally to do, perform and execute all and every such act and acts, duty and duties, in and about the premises as he . . . shall think proper, as fully and as effectually to all intents and purposes whatsoever, as the said (principals) might or could do if personally present" does not empower the agent to indorse and negotiate a check which he has received in settlement of a claim belonging to his principal. Jacoby v. Payson, 71 Hun, 480. The court relied upon the case next stated as conclusive.

A power of attorney gave an attorney "full power to execute and deliver all needful instruments and papers, and to perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully and completely, to all intents and purposes, as I might and could do if personally present." *Held*, that this did not authorize the attorney to indorse a draft in the name of his principal. Holtsinger v. Bank, 1

principal's name to a note;[42] nor will authority to settle a controversy of itself imply power to bind the principal by a note given in settlement.[43]

§ 972. ——— So an agent authorized to attend to and manage a grocery and provision store;[44] an agent employed in the manufacture of carriages;[45] a mere clerk employed in a merchant's store;[46] an agent authorized to manage his principal's farm;[47] an agent authorized to superintend his principal's mine;[48] and an agent employed generally to manage his principal's business;[49] has no implied power to bind his principal by the execution of negotiable paper.

An agent authorized to buy goods and pay for them, is not thereby authorized to give his principal's note, or to accept a bill of exchange drawn for the amount.[50]

An insurance agent authorized merely to solicit risks and write policies, has no implied authority to borrow money upon promissory notes in the company's name.[51] An agent authorized merely to deposit his principal's money in a bank, has therefrom no implied authority to

Sweeny (N. Y. Super.), 64, 6 Abb. Pr. (N. S.) 292, 37 How. Pr. 203, and affirmed by court of appeals in 3 Abb. L. J. 305, 40 How. Pr. 720.

In McClure's Ex'r v. Corydon Bank (Ky.), 106 S. W. 1177, a power of attorney authorized an agent "to take charge of, manage, and control all of my business relating to my personal estate," justifies the agent in making a renewal of a note on which his principal was bound. Such renewal was only a continuance of a present obligation, and "related to her personal business."

See also American Savings Bank v. Helgesen, 64 Wash. 54.

[42] Brantley v. Southern Ins. Co., 53 Ala. 554.

[43] Hills v. Upton, 24 La. Ann. 427.

[44] Smith v. Gibson, 6 Blackf. (Ind.) 369; Terry v. Fargo, 10 Johns. (N. Y.) 114; Perkins v. Boothby, 71 Me. 91.

[45] Paige v. Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420.

[46] Kerns v. Piper, 4 Watts (Penn.) 222; Terry v. Fargo, *supra*.

[47] Davidson v. Stanley, 2 M. & G. 721.

[48] New York Iron Mine v. Negaunee Bank, 39 Mich. 644; McCullough v. Moss, 5 Den. (N. Y.) 567; Sewanee Mining Co. v. McCall, 3 Head (Tenn.), 619.

[49] See *post*, § 926; Perkins v. Boothby, *supra;* New York Iron Mine v. Negaunee Bank, *supra;* Connell v. McLoughlin, 28 Or. 230; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 93 Am. St. R. 113, 59 L. R. A. 657; Fairly v. Nash, 70 Miss. 193.

But see Glidden Varnish Co. v. Interstate Bank, 69 Fed. 912, 16 C. C. A. 534; Lerch v. Bard, 153 Pa. 573; Whitten v. Bank of Fincastle, 100 Va. 546; Wimberly v. Windham, 104 Ala. 409, 53 Am. St. R. 70.

[50] Brown v. Parker, 7 Allen (Mass.), 337; Taber v. Cannon, 8 Metc. (Mass.) 456; Webber v. Williams College, 23 Pick. (Mass.) 302; Gould v. Norfolk Lead Co., 9 Cush. (Mass.) 338, 57 Am. Dec. 50; Emerson v. Providence Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66.

[51] Burlingame v. Aetna Ins. Co., 36 N. Y. App. Div. 358. Here it was done to pay what the agent owed the company.

draw checks upon the deposit.[52] An agent authorized upon one occasion to get certain sum at a bank for a stated period, has thereby no implied authority to bind the principal by making promissory notes generally.[53]

§ 973. Authority strictly construed.—Authority to execute negotiable instruments will be strictly construed, and the power will be held to extend only to those cases in which it is clearly given, or in which it is a manifestly necessary and customary incident to the act which the agent is called upon to perform.[54]

§ 974. ——— Illustrations of acts not authorized.—Authority to sign the principal's name to promissory notes will be limited to notes drawn in the usual form, and will not authorize the execution of a note containing a provision that if not paid at maturity, an additional sum of ten per cent. would be paid.[55] Authority to an agent to draw a bill in the principal's name will not authorize a bill drawn in the joint names of the principal and the agent; nor will authority to draw a bill, authorize an agent to contract to indemnify the acceptor against the consequences of his acceptance;[56] nor will joint authority from several persons to indorse a bill in their names jointly, authorize several and successive indorsements.[57] Nor will authority to sign as surety authorize the signing as principal.[58] Authority to draw checks upon a certain bank will not justify the agent in overdrawing his principal's account.[59]

Authority to indorse checks of the donor of the power for deposit in a certain bank, authorizes the indorsement of such checks as are the property of such donor but not those which are acquired by the donee of the power in an unauthorized manner.[60] Authority to draw

[52] Heath v. New Bedford Safe Deposit Co., 184 Mass. 481. See also, Schmidt v. Garfield Nat. Bank, 64 Hun, 298 (aff'd 138 N. Y. 631); Exch. Bank v. Thrower, 118 Ga. 433.

[53] Stock Exch. Bank v. Williamson, 6 Okl. 348.

[54] Turner v. Keller, 66 N. Y. 66; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Brantley v. Southern Life Ins. Co., 53 Ala. 554; Hills v. Upton, 24 La. Ann. 427; Webber v. Williams College, 23 Pick. (Mass.) 302; Stainback v. Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Avery v. Lauve, 1 La. Ann. 457; Nugent v. Hickey, 2 Id. 358; Duconge v. Forgay, 15 Id. 37.

[55] First National Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430.

[56] Stainback v. Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648.

[57] Bank of United States v. Beirne, 1 Gratt. (Va.) 234, 42 Am. Dec. 551. See also Union Bank v. Beirne, 1 Gratt. (Va.) 226; Bank of United States v. Beirne, 1 Gratt. (Va.) 539.

[58] Farmington Savings Bank v. Buzzell, 61 N. H. 612; Bryan v. Berry, 6 Cal. 394.

[59] Union Bank v. Mott, 39 Barb. (N. Y.) 180.

[60] Fay v. Slaughter, 194 Ill. 157, 88 Am. St. R. 148, 56 L. R. A. 564.

drafts upon the principal for goods purchased and received by the agent, involves no authority to draw drafts for goods not received.[61] Authority to make a promissory note implies no authority, twelve years later, to make a small payment upon it in order to prevent the bar of the statute of limitations.[62] Authority to make a prescribed and restrictive indorsement for the deposit of checks on the principal's account, involves no authority to indorse or discount them generally so as to permit the agent to collect the proceeds on his own account.[63] A special authority to negotiate a certain draft for cash at a reasonable discount, does not authorize the agent to negotiate it for cash and merchandise.[64] Authority to collect and remit the amount of a certain check confers no implied authority to transfer the check and bind his principal by a general indorsement.[65] Authority to insert a guaranty over an indorsement does not justify inserting an unqualified promise to pay.[66]

§ 975. ——— **Illustrations of acts authorized.**—But authority to discount bills confers authority to indorse the same when necessary to accomplish the purpose.[67]

Authority to manage and act generally for another in the conducting of his saloon business, including the depositing of money, and the drawing of checks, will justify the making of a note to secure a li-

[61] Gray Tie & Lumber Co. v. Farmers' Bank (Ky.), 78 S. W. 207, 25 Ky. Law Rep. 1596.

[62] Miller v. Magee, 49 Hun, 610.

[63] An agent authorized to indorse checks for deposit with a rubber stamp has no authority to indorse checks in blank, and collect the money thereon. Exchange Bank v. Thrower, 118 Ga. 433. To same effect: Schmidt v. Garfield Nat. Bank, 64 Hun, 298 (aff'd 138 N. Y. 631).

But when a bank upon which a check has been drawn by a customer pays it to an agent of the customer's creditor, which agent had authority to indorse the check for deposit and collection but whose limited authority to indorse for collection only, is unknown to the bank, and checks with similar indorsements had been previously paid through the clearing house without objection on the part of the agent's principal, this operates as a payment of the debt for the settlement of which the check was drawn, even though the agent absconds with the money so drawn. Kansas City, etc., R. R. v. Ivy Leaf Coal Co., 97 Ala. 705.

And where the bookkeeper of a corporation is authorized to endorse checks in blank, such endorsement to be used only for the purpose of depositing the check in the defendant bank to the account of the corporation, the bank is not liable if it pays a check so endorsed but negotiated by the bookkeeper for his own purposes, the limitation on the power to endorse being a secret limitation not known to the bank. Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. App. 182.

[64] Dowden v. Cryder, 55 N. J. Law, 329.

[65] Nat. City Bank v. Westcott, 118 N. Y. 468, 16 Am. St. R. 771.

[66] Clymer v. Terry, 50 Tex. Civ. App. 300.

[67] Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

cense for the saloon.[68] Authority from a wife to her husband "to transact all business of every nature, and to execute and deliver any and all papers, documents, deeds, or other instruments," justifies him in transferring a note belonging to her.[69] Power of attorney "to sell . . . and to convey . . . to change any of the mortgages upon any of said lands . . . or upon the payment of a part of any one of said mortgages to execute a new note and mortgage for the residue upon the same . . . or to renew any of said mortgages; but in no event to increase the incumbrances . . . or pay a greater interest" justifies the agent in executing a new note and mortgage to a person who, as surety on a prior note, was compelled to pay off the balance of the mortgage which had been given to secure it.[70] Authority by telegram "to indorse" a note, given in renewal of a note which had been indorsed with a guaranty and waiver of notice, justifies the indorsement of the note in question in the same manner.[71]

§ 976. Must be confined to principal's business.—Authority to make or indorse negotiable paper will be confined to the making or indorsing of such paper in the legitimate business of the principal or for his benefit. Such an agent cannot, therefore, bind his principal by making or indorsing notes for his own benefit or the benefit of third persons,[72] subject, of course, to the rules governing the rights of *bona fide* purchasers for value.[73]

[68] Flewellen v. Mittenthal (Tex. Civ. App.), 38 S. W. 234.

[69] Presnall v. McLeary (Tex. Civ. App.), 50 S. W. 1066.

[70] Barbour v. Sykes (Ky.), 1 S. W. 600.

[71] State Bank v. Evans, 198 Mass. 11.

[72] North River Bank v. Aymer, 3 Hill (N. Y.), 262; Stainer v. Tysen, Id. 279; Stainback v. Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; Camden Safe Dep. Co. v. Abbott, 44 N. J. L. 257; Duncan v. Gilbert, 29 Id. 521; Hamilton v. Vought, 34 Id. 187; Gulick v. Grover, 33 Id. 463, 97 Am. Dec. 728; Bird v. Daggett, 97 Mass. 494; Wallace v. Branch Bank, 1 Ala. 565; Brantley v. Southern Life Ins. Co., 53 Ala. 554; Citizens' Savings Bank v. Hart, 32 La. Ann. 22; Odiorne v. Maxcy, 13 Mass. 178; Boord v. Strauss, 39 Fla. 381; Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. 742; Merchant's Nat. Bank v. Detroit, 68 Mich. 620; Myers v. Walker, 104 Ga. 316.

Even if authorized to indorse, he cannot indorse to himself. Englehart v. Peoria Plow Co., 21 Neb. 41. Authority to borrow money, draw and endorse notes and execute deeds does not authorize drawing notes, making loans and executing deeds of trust to secure them, for the benefit and use of the agent individually. Mechanics' Bank v. Shaumburg, 38 Mo. 228. An agent authorized to sign his principal's name to "any paper" is not justified in signing paper outside of the principal's business. Camden Safe Deposit Co. v. Abbott, *supra*.

In First National Bank v. Bean, 141 Wis. 476, an agent was given a power of attorney to take general control of principal's affairs, make notes, and do every act which the

In accordance with the rule prevailing in New York, it is held that, if the question whether the paper is executed within the scope of the principal's business depends on extrinsic facts peculiarly within the knowledge of the agent, a third person, dealing with the agent in good faith, may rely upon the agent's representation as to the existence of those facts.[74]

So where an agent is authorized to draw checks "for the use of" the principal and draws a check which appears to be, and which he declares is, for the use of the principal the bank is justified in paying even though the agent subsequently embezzles the funds. "The authority to sign checks for the use of the principal," said the court, "imposed no affirmative duty upon the bank to inquire into the purposes of the check or the use to which the money was to be put." [75]

§ 977. Execution must be confined to limits specified.—Parties dealing with an agent assuming to be authorized to draw, accept, or indorse negotiable paper, must see to it that his authority is adequate, and both they and the agent must keep strictly within the limits fixed to the agent's authority or the principal will not be bound. Thus authority to draw and discount a note for a given purpose, implies no authority to draw and discount one for another and different purpose;[76] authority to bind the principal for a given sum will not au-

business would require; the agent made a note in name of a Fruit Growers Association, indorsed the name of his principal thereon, discounted it, and kept the proceeds as a settlement of a claim for services against the association. Later the agent signed the principal's name to a guaranty of the same debt, and later made a mortgage to secure it. *Held*, that the authority conferred was restricted to management of the principal's affairs and that the note and mortgage were not authorized. In Mathis v. Bank (Ky.), 105 S. W. 157, a father about to leave on a short visit, gave his son a power of attorney to sign checks and notes. The son used the power for about three years, signing small checks and using proceeds for personal purposes. The son opened an account in his own name, over-drew to a considerable extent, and, to cover the deficit, checked on his father's account. There was evidence that the father may have known of the smaller checks from observation from time to time of his bank book. *Held*, that for the latter he was liable, but for others the father was not liable.

But in Moore v. Gould, 151 Cal. 723, where the payee of a note [now an agent] executed a renewal in the name of the maker as his agent, it was held that this rule did not apply, because the note had been negotiated away and the agent was not now dealing with himself but with third parties.

[73] Bryant v. La Banque du Peuple, [1893] App. Cas. 170.

[74] Marine Bank v. Butler Colliery Co., 52 Hun, 612, aff'd 125 N. Y. 695; Huie v. Allen, 87 Hun, 516, aff'd 156 N. Y. 658.

[75] Warren-Scharf Co. v. Com'l Nat. Bank, 38 C. C. A. 108, 97 Fed. 181.

[76] Callender v. Golsan, 27 La. Ann. 311; Nixon v. Palmer, 8 N. Y. 398;

thorize the binding for a greater sum;[77] power of attorney "to make deposits, draw, sign and indorse notes, checks, or bills of exchange" in the course of the principal's business and with one particular bank does not authorize the agent to execute notes to totally different bank for money which he has borrowed from it to use in his own individual business;[78] authority to do all things at a particular bank, which the principal could do if present, will not authorize the agent to draw money of his principal from another bank where the principal has an account;[79] authority to draw checks and notes payable at any bank where the principal has an account, will not justify making a note payable at a bank where the principal has no account;[80] authority to draw on a principal's funds will not empower the agent to draw upon the principal's credit;[81] authority to draw checks on a bank for property purchased by the agent, implies no authority to borrow money;[82] authority to execute notes gives no authority to renew them;[83] authority to make a note for a given time will not authorize the making of a note payable in a different time,[84] unless from the circumstances it is evident that the principal did not intend to fix an exact limit and the variance be not great;[85] authority to issue bonds does not authorize the issuing of notes;[86] authority to draw a bill does not of itself imply power to indorse,[87] or to accept one;[88] nor does authority to indorse empower the agent to accept a bill, or make a joint and several note;[89] authority to draw bills of exchange payable on time or at sight does not imply au-

Hortons v. Townes, 6 Leigh (Va.), 47.

See also, Great Western Elevator Co. v. White, 118 Fed. 406, 56 C. C. A. 388.

[77] Blackwell v. Ketcham, 53 Ind. 184; King v. Sparks, 77 Ga. 285, 4 Am. St. Rep. 85; Batty v. Carswell, 2 Johns. (N. Y.) 48.

[78] Citizens' Savings Bank v. Hart, 32 La. Ann. 22.

[79] Sims v. United States Trust Co., 103 N. Y. 472.

[80] Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150.

[81] Breed v. First Nat. Bank, 4 Colo. 481.

[82] Mordhurst v. Boies, 24 Iowa, 99.

[83] Ward v. Bank of Kentucky, 7 T. B. Mon. (Ky.) 93.

[84] Batty v. Carswell, 2 Johns. (N. Y.) 48; Tate v. Evans, 7 Mo. 419.

[85] Adams v. Flanagan, 36 Vt. 400; Bank v. McWillie, 4 McCord (S. C.), 438.

[86] School Directors v. Sippy, 54 Ill. 287; Bank of Deer Lodge v. Hope Mining Co., 3 Montana, 146, 35 Am. Rep. 468.

[87] Robinson v. Yarrow, 7 Taunt. 455; Murray v. East India Co., 5 B. & Ald. 204.

But in Marsh v. French, 82 Ill. App. 76, it is held that authority to an agent to draw upon the principal for amounts necessary to carry on the business will justify his procuring an endorser of drafts so drawn.

[88] Attwood v. Munnings, 7 B. & C. 278; Sewanee Mining Co. v. McCall, 3 Head (Tenn.), 619; Bank v. Hope Min. Co., *supra*.

[89] Cuyler v. Merrifield, 5 Hun (N. Y.), 559.

thority to draw post-dated bills;[90] authority to execute a note does not of itself imply authority to pay it when due, or to receive demand of payment;[91] or to receive notice of dishonor;[92] authority to draw on A at Portland, or B at New York, does not authorize the agent to draw on A payable at New York;[93] authority to make a particular draft on the principal payable "to the order of the court," will not empower him to make it payable to bearer.[94]

§ 978. Negotiable paper delivered to agent in blank.—The full discussion of the effect of the signing and delivering of blank paper or blank forms to a third person to be filled up or completed as negotiable instruments, belongs more appropriately to a treatise dealing with such instruments.[95] In general however it may be said that a principal who delivers to his agent negotiable paper executed in blank, to be filled out by the agent according to certain instructions, will be liable upon the paper as the agent may fill it out, to one who takes it in good faith, for value and without notice, although the agent may have violated his instructions.[96]

But if the third person had notice of the instructions or if he does not take the paper for value, he will not be protected.[97] Whether mere knowledge that the paper was delivered to the agent in blank is enough

[90] New York Iron Mine v. Citizens' Bank, 44 Mich. 344; Forster v. Macreth, L. R., 2 Exch. 163.

[91] Luning v. Wise, 64 Cal. 410.

[92] Bank of Mobile v. King, 9 Ala. 279.

[93] Lanusse v. Barker, 3 Wheat (U. S.) 101, 4 L. Ed. 343.

[94] Com'l Assur. Co. v. Rector, 55 Ark. 630.

[95] See Daniel on Neg. Inst. § 142, *et seq.*

[96] Davis v. Lee, 26 Miss. 505, 59 Am. Dec. 267; Johnson v. Blasdale, 1 Smedes & M. (Miss.) 17, 40 Am. Dec. 85; Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206; Roberts v. Adams, 8 Port. (Ala.) 297, 33 Am. Dec. 291; Hall v. Bank of Commonwealth, 5 Dana (Ky.), 258, 30 Am. Dec. 685; Holland v. Hatch, 11 Ind. 497, 71 Am. Dec. 363; Gillaspie v. Kelley, 41 Ind. 158, 13 Am. Rep. 318; Blackwell v. Ketcham, 53 Ind. 186; Snyder v. Van Doren, 46 Wis. 602, 32 Am. Rep. 739; Friend v. Yahr, 126 Wis. 291, 110 Am. St. R. 924, 1 L. R. A. (N. S.) 891; Bank of Pittsburgh v. Neal, 22 How. (U. S.) 96, 16 L. Ed. 323; Frank v. Lilienfeld, 33 Gratt. (Va.) 377; Market Nat. Bank v. Sargent, 85 Me. 349, 35 Am. St. R. 376; Weidman v. Symes, 120 Mich. 657, 77 Am. St. R. 603; First Nat. Bank v. Mfg. Co., 61 Minn. 274; Ward v. Hackett, 30 Minn. 150, 44 Am. Rep. 187; De Pauw v. Bank of Salem, 126 Ind. 553, 10 L. R. A. 46; Bradford Nat. Bank v. Taylor, 75 Hun (N. Y.), 297; Binney v. Globe Nat. Bank, 150 Mass. 574, 6 L. R. A. 379; Boston Steel Co. v. Steuer, 183 Mass. 140, 97 Am. St. Rep. 426.

[97] Davidson v. Lanier, 4 Wall. (U. S.) 447, 18 L. Ed. 377; Johnson v. Blasdale, *supra.* Where the note bears evidence on its face that it is being delivered contrary to directions, it cannot be enforced by person to whom it is so delivered. Mills v. Williams, 16 S. C. 593.

to put third persons upon inquiry as to his instructions, is a question upon which the authorities differ, but the better opinion seems to be that it is not.[98]

VIII.

OF AGENT AUTHORIZED TO MANAGE BUSINESS.

§ 979. What is meant.—The idea of management seems not to be one of precise legal import.[99] To manage is to direct, to control, to conduct, to carry on. The good manager is one who wisely directs and expedites an enterprise, conserving its resources, making the most of its opportunities, adding to its influence, increasing its efficiency,

[98] See Daniel Neg. Ins. § 147.

[99] Many attempts at definition have been made, not always with complete success.

In Hodges v. Bankers' Surety Co., 152 Ill. App. 372, a collection of definitions is given. The court says: "The powers of a manager are at least as broad and comprehensive as those of a general agent," quoting, "The term, in our judgment, when used in connection with such a corporation cannot, in the absence of any evidence on the subject, be presumed to mean anything more than that the person filling the position has general charge of those business matters for the carrying on of which the company was incorporated,"—from Washington Gas Light Co. v. Lansden, 172 U. S. 534, 547, 43 L. Ed. 543; and "Where a company is located in a state remote from that in which the insurance is effected, one intrusted with the general management of its business in the latter state should be regarded as a general agent (Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344); and as possessing all the powers of those in charge of its business at the head or home office,"—from Hartford Life Ins. Co. v. Hayden, 90 Ky. 39, 47.

In Booker-Jones Oil Co. v. National Refining Co., — Tex. Civ. App. —, 132 S. W. 815, the court quotes several judicial definitions, among which are the following: "The term 'general manager' of a corporation, according to the ordinary meaning of the term, indicates one who has general direction and control of the affairs of the corporation." Louisville, etc., Ry. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770. "A general manager of a corporation is the person who has the most general control over the affairs of the corporation and who has knowledge of all of its business." Lee Mining Co. v. Omaha, etc., Smelting Co., 16 Colo. 118; and "The term 'general manager' is synonymous with general agent. A general manager is virtually the corporation itself." Atlantic, etc., R. Co. v. Reisner, 18 Kan. 458. It is said that the general manager of a corporation has "power *prima facie* to do any act which the directors of the corporation could authorize or ratify." Jenkins S. S. Co. v. Preston, 108 C. C. A. 473, 186 Fed. 609, citing other cases. "It will be presumed that he is authorized by the corporation to do any act that the corporation might lawfully do." Tourtelot v. Whithed, 9 N. D. 467, 474. See also the elaborate discussion in Sencerbox v. First Nat. Bank, 14 Idaho, 95.

and the like, as the nature, scope and purpose of the enterprise may properly require.

§ 980. Extent of authority depends on nature of business.—The extent of the implied or incidental authority of an agent who has general authority to manage his principal's business, must therefore be dependent largely upon the nature of the business and the degree to which it is placed under the agent's control. Thus it is obvious that the implied powers of the general manager of a great continental insurance company, while they might be of the same kind, would differ greatly in degree from those of a clerk in an inland store who is given general control of the business during his principal's absence.

In general terms, it may be said that the authority of such an agent will be presumed to be co-extensive with the business to be performed, and will include the authority to do all of those things which are necessary and proper to be done in carrying out the business in its usual and accustomed way, and which the principal could and would usually do in like cases if present.[1]

His authority, moreover, in this respect must, as in other cases, be deemed to be what it is held out as being, and is not to be limited by private instructions of which the persons who deal with him have no notice.[2]

§ 981. Execution must be confined to principal's business and for his benefit.—It would seem to go without saying, however, that the exercise of such an agent's authority, broad though it may be, must still be confined to the scope of the business he is thus authorized to manage, and be availed of only for the principal's benefit. He is not to exercise his authority for the benefit or accommodation of third persons, even though indirectly a benefit may enure to his principal;[3]

[1] German Fire Ins. Co. v. Grunert, 112 Ill. 68; Lowenstein v. Lombard, 164 N. Y. 324; Tennessee R. Transp. Co. v. Kavanaugh, 101 Ala. 1; American Graphic Co. v. Railway Co., 44 Minn. 93; Havens v. Church, 104 Mich. 135; Byxbee v. Blake, 74 Conn. 607, 57 L. R. A. 222.

In Duncan v. Hartman, 143 Pa. 595, 24 Am. St. R. 570 (aff'd 149 Pa. 114), it is said that "an agency to manage implies authority to do with the property what has previously been done with it by the owners, or others with their express or implied consent; or further, to do with it what is usual and customary to do with property of the same kind in the same locality."

[2] Montgomery Furn. Co. v. Hardaway, 104 Ala. 100; Tice v. Russell, 43 Minn. 66; Hartford L. Ins. Co. v. Hayden, 90 Ky. 39; Allis v. Voigt, 90 Mich. 125; Levy v. First N. Bank, 27 Neb. 557; Cox v. Brewing Co., 56 Hun, 489; Benesch v. Ins. Co., 16 Daly, 394; Georgia Mil. Academy v. Estill, 77 Ga. 409.

[3] Bullard v. DeGroff, 59 Neb. 783. An agent of a townsite corporation has no implied authority to purchase lumber or other material for private

and, no more than any other agent, is he to exercise it on his account or for his own benefit.[4]

With these general principles in mind, attention will next be given to some illustrations of the construction of such a power. Thus—

§ 982. Authority to pledge principal's credit—Supplies for store or business.—An agent employed generally to manage his principal's store or business has usually implied authority, for the keeping up of the stock, to make reasonable and proper purchases of goods upon his principal's account on such terms as to credit and time of payment as are customary in the purchase of such goods in like cases,[5] but this implied authority would not extend to goods of a kind or amount not usually kept or bought for such a business or store;[6] and his authority by the terms of the grant, may be limited to the sale

individuals to build houses upon lots which they had purchased of the company. Union Pac. Townsite Co. v. Page, 54 Kan. 363.

[4] See Clarke v. Kelsey, 41 Neb. 766; McClendon v. Bradford, 42 La. Ann. 160; Page v. Webb, 9 Ky. L. Rep. 868, 7 S. W. 308; Stewart v. Cowles, 67 Minn. 184.

[5] The general agent of barge and tow boat business has implied power to agree that a boat which he has chartered will stand at the risk of the charterer during the bailment. Dunwoody v. Saunders, 50 Fla. 202.

The manager of a quarry may buy necessary machinery. Dorsey v. Pike, 10 N. Y. Supp. 268. The manager of waterworks may purchase necessary pump. Goss v. Helbing, 77 Cal. 190; Banner Tobacco Co. v. Jenison, 48 Mich. 459; Schmidt v. Sandel, 30 La. Ann. 353; Pacific Biscuit Co. v. Dugger, 40 Or. 362; Louisville Coffin Co. v. Stokes, 78 Ala. 372.

The power to buy is coextensive with the business as actually conducted with the principal's apparent consent and approval. Witcher v. Gibson, 15 Colo. App. 163.

See also, Lesher v. Loudon, 85 Mich. 52. In Keyes v. Union Pac. Tea Co., 81 Vt. 420, the power was sustained on long acquiescence.

One made general manager of a retail drug store has implied authority to contract for telephone service at store. New York Telephone Co. v. Barnes, 85 N. Y. Supp. 327.

If the agency be to carry on a mercantile business, and to do this, it is necessary to rent a house, agent may do so. Baldwin v. Garrett, 111 Ga. 876. To same effect, see, Singer Mfg. Co. v. McLean, 105 Ala. 316.

A "bookkeeper" who is left in charge of an office during the absence of the regular manager has implied authority to direct a delivery of goods sold. Fitzgerald Cotton Oil Co. v. Farmers' Supply Co., 3 Ga. App. 212.

See also, Kramer v. Compton, 166 Ala. 216. The fact that the manager wrongfully appropriates the goods to his own use is immaterial if his act of purchasing them was within his authority. Austin v. Elk Merc. Co., 38 Wash. 365.

[6] An agent, having charge of a beer business, has no implied power to buy whisky in quantities, that not being an authority commonly incident to the principal business. Hackett v. Van Frank, 105 Mo. App. 384. See also Getty v. Milling Co., 40 Kan. 281.

District agent of an insurance company has no implied authority to buy furniture upon the company's credit to fit up an office. Beebe v. Equitable, etc., Ass'n, 76 Iowa, 129.

of goods which the principal may supply.[7] One employed merely as "shop superintendent" may easily be found to have much less extensive authority, not including the authority to purchase.[8]

Limitations upon an implied authority to buy upon credit, resulting from the fact that the agent is supplied with funds and directed to buy only when he has funds to pay, are discussed in the earlier section dealing with agents to purchase.

§ 983. ——— **Supplies for hotel.**—An agent authorized to take charge of and manage his principal's hotel and to purchase the necessary supplies, may buy suitable and appropriate goods for use in the hotel upon his principal's credit;[9] but he has no implied authority to bind his principal for the safe keeping and return of carriages furnished by a livery-stable keeper for use by guests of the hotel.[10]

§ 984. ——— **Supplies for farm or plantation.**—So though an agent authorized to manage a plantation or farm would have implied authority to purchase, on his principal's account, the necessary supplies therefor,[11] he would have no such authority to pledge the credit of his principal for supplies furnished to the "hands" engaged upon the plantation.[12]

§ 985. ——— **Board and provisions for help.**—Where it is customary in the business for the employer to board the workmen employed, such an agent may lawfully contract in his principal's name for the board of the men employed by him.[13] So it is held that a mine superintendent, by virtue of his position, has the authority to bind his principal for the price of provisions furnished to the keeper of a boarding house at which the miners board, where it is necessary that the provisions be furnished in order that the mine may continue in opera-

The superintendent of one paper mill among several located at distant points, who has authority to buy pulp for his own plant, has no authority to buy for the others. Hinde & Dauch Paper Co. v. Atterbury Bros., 107 C. C. A. 296, 185 Fed. 76.

[7] See, as to the effect of such a restriction upon persons not advised of it. Watteau v. Fenwick, [1893] 1 Q. B. 346.

[8] Parr v. Northern Electrical Mfg. Co., 117 Wis. 278.

[9] Beecher v. Venn, 53 Mich. 466; Cummings v. Sargent, 9 Metc. (Mass.) 172; Wallis Tobacco Co. v. Jackson, 99 Ala. 460; Fisk v. Greeley Elec. L. Co., 3 Colo. App. 319.

The general manager of a hotel, may bind his principal by a contract for ordinary advertising. Mullin v. Sire, 34 N. Y. Misc. 540; Calhoon v. Buhre, 75 N. J. L. 439; Kastor Adv. Co. v. Coleman, 6 Ont. W. R. 791.

[10] Brockway v. Mullin, 46 N. J. L. 448, 50 Am. Rep. 442.

Nor has such an agent implied authority to make extensive alterations and renewals in the plant. Fisk v. Greeley Elec. L. Co., 3 Colo. App. 319.

[11] Jefferds v. Alvord, 151 Mass. 94. But see Meyer v. Baldwin, 52 Miss. 263.

[12] Carter v. Burnham, 31 Ark. 212.

[13] Burley v. Kitchell, 20 N. J. L. 305.

tion; but the authority is limited to necessary provisions.[14] But it is held that it is not incidental to the operation of a railway to board its employees; nor is it within the apparent scope of the authority of such an agent as a roadmaster to bind the company to pay for their board.[15]

§ 986. ——— Supplies procured by husband as manager of wife's business.—So where a husband is given by his wife the general management of her business, property or estate, or assumes the management with her knowledge and acquiescence, contracts which he makes for labor or supplies needed therefor in the ordinary course of events, or for improvements, buildings and the like added with her knowledge and apparent approval, will be binding upon her.[16]

But, as has often been pointed out, the husband has no authority simply because he is husband;[17] his authority to bind her as manager of her affairs will not extend to supplies and labor for his own business or estate;[18] nor can he by such authority charge her for goods and supplies which it is his duty as head of the family to furnish on his own account.[19]

His authority to bind her by borrowing money and giving negotiable paper would be as limited as that of any other managing agent.[20]

§ 987. ——— Supplies procured by wife as domestic manager.—So it has been seen in a preceding section that, where a husband maintains a domestic establishment, and puts his wife in charge, she has therefrom implied authority to pledge her husband's credit for such supplies, service and the like, as are ordinarily procured by a wife placed in charge of a similar establishment.[21] Many illustrations of this rule have already given.

"Walking-boss" of railway contractor whose duties are to superintend construction and see that sub-contractors complete their contracts and who has authority to compel the keeping of sufficient men at work to fulfill such contract may bind his principal by a promise to see that laborer's board bills are paid. Cannon v. Henry, 78 Wis. 167, 23 Am. St. Rep. 399.

[14] Heald v. Hendy, 89 Cal. 632.

[15] St. Louis, etc., Ry. Co. v. Bennett, 53 Ark. 208, 22 Am. St. R. 187.

[16] Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436; Roberts v. Hartford, 86 Me. 460; Arnold v. Spurr, 130 Mass. 347; Wheaton v. Trimble, 145 Mass. 345, 1 Am. St. Rep. 463; Jefferds v. Alvord, 151 Mass. 94.

Compare Parker v. Collins, 127 N. Y. 185.

[17] *Ante*, § 169.

[18] Lime, etc., Clay Co. v. Hileman, 24 Pa. Co. Ct. 184; Collins v. Fairchild, 56 Sup. Ct. Rep. 609 (N. Y.).

[19] Hutchinson v. Brooks, 15 Daly, 486.

[20] See *ante*, § 169; Taylor v. Angel, 162 Ind. 670; Witz v. Gray, 116 N. Car. 48; Lane v. Lockridge (Ky.), 17 Ky. L. Rep. 1082, 33 S. W. 730; McMurray v. Gage, 19 App. Div. 505.

[21] See *ante*, § 162.

§ 988. ——— Hiring help.—A general manager, put in complete charge of a business in which servants, and the like, are ordinarily employed would have implied authority, within the range of what is reasonable and proper, to employ the necessary help.[22] In doing so, he may make contracts of a usual and reasonable sort,[23] such as for example, the hiring of an employee for a year;[24] or the assumption of

[22] Jenkins S. S. Co. v. Preston, 108 C. C. A. 473, 196 Fed. 609; King v. Seaboard Air Line R. Co., 140 N. C. 433. In Raike v. Rubber Mfg. Co., 127 Mo. App. 480, a territorial manager put in charge of the business in that territory and told that the principal looked to him for results and left the "ways and means" in his hands, was held to have implied authority to hire the necessary employes.

In Phillips v. Geiser Mfg. Co., 129 Mo. App. 396, a "secretary," in the offices of the general manager who did have authority, was found to have by acquiescence the same authority to hire necessary employes.

In Simpson v. Harris, — Ala. —, 56 So. 968, the general manager of a lumber firm was held to have at least apparent authority to contract for the cutting of timber belonging to the firm.

But in the late case of Stephens v. Roper Lumber Co., — N. C. —, 75 S. E. 933, 41 L. R. A. (N. S.) 1141, it was held that the general superintendent of a lumber company had no implied authority to make a contract "by the terms of which plaintiff was to be dropped from the company's pay roll for an indefinite period, and cease all regular work for the company, and was to be paid during such time as he was unemployed $100 per month, and meantime was not to take other employment, but hold himself in readiness to resume work when notified."

If the principal has given apparent authority to here help, he will be bound although the agent violates his private instructions not to hire at all, or not to hire upon particular terms. Benesch v. Ins. Co., 16 Daly (N. Y.), 394; Cox v. Brewing Co., 56 Hun, 489; Rice v. Jackson, 16 Pa. Cir. Ct. R. 15.

A station agent has no implied authority to employ a detective to investigate the robbery of cars at his station. Schlapbach v. Richmond R. R., 35 S. Car. 517; neither has a "superintendent of trucking" such a power. Rebenstein v. Frost, 116 N. Y. Supp. 681.

But in Grand Pacific Hotel v. Pinkerton, 217 Ill. 61, the general manager of a hotel was held to have authority to engage detective service.

A "route agent" of an express company directed to investigate a theft has no implied authority to make a special contract with a constable to pay the latter for services in aiding to detect the thief. Fee v. Adams Express Co., 38 Pa. Super. 83.

In Thiel Detective Service Co. v. McClure, 74 C. C. A. 122, 4 L. R. A. (N. S.) 843, a son acting under a very broad power of attorney to attend to his mother's affairs, was held to have no implied authority to procure a costly investigation by a detective agency of the affairs of a corporation in which she was a stockholder.

See also, Merritt v. Huber, 137 Iowa, 135; Blowers v. Southern Ry. Co., 74 S. Car. 221.

[23] Garner v. Brewing Co., 6 Utah, 332.

[24] Laming v. Peters Shoe Co., 71 Mo. App. 646; Roche v. Pennington, 90 Wis. 107; Cox v. Brewing Co., 56 Hun, 489; Armstrong v. Tyndall Quarry Co., 16 West. L. Rep. 111.

Or by the season. Tunison v. Copper Co., 73 Mich. 452, or for the balance of the season. King v. Seaboard Air L. R. Co., *supra*, or for

the risk of the employee's competency to fill the position.[25] He would not, on the other hand, have any implied authority to contract to give the employee, as part of his compensation, an interest in the principal's business or its profits.[26]

The questions of an implied authority, if there be any, to hire help in a sudden emergency,[27] and the liability of a master for the negligence of a third person assisting his servant,[28] are discussed in other places.

§ 989. **Other incidental contracts.**—A general agent charged with the exclusive management of a real estate loan business, which involved the examination of titles and the foreclosure of mortgages, has implied authority to direct the employment of a lawyer whenever the interests of his principal demand such professional assistance.[29] So the general manager of a mining company has implied authority to buy and sell personal property for use about the premises,[30] but such

two seasons; Jenkins S. S. Co. v. Preston, 108 C. C. A. 473, 186 Fed. 609.

But, of course, not for a period which the employee knows is beyond the manager's actual authority. Francis v. Spokane Athletic Club, 54 Wash. 188.

[25] Roche v. Pennington, *supra*.

[26] Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242.

[27] See *ante*, § 339.

[28] See *post*, Book IV, Chap. V.

[29] Davis v. Matthews, 8 S. D. 300. In Keenan v. Lauritzen Malt Co., 57 Wash. 367, a general territorial agent of a company engaged in manufacturing and selling an alleged nonintoxicating liquor was arrested and prosecuted for selling upon the ground that the liquor was really intoxicating and within a prohibitory statute: the goods in his possession were also seized. He employed an attorney to defend him and the goods on his principal's account, and advised the principal of what he had done. The principal made no objection. *Held* that the principal was liable to the attorney.

Manager of business of advertising in street cars has implied authority to agree that rival goods shall not be advertised in the cars if a particular contract for space is made. Stitt v. Ward, 142 App. Div. 626.

[30] Scudder v. Anderson, 54 Mich. 122.

The general manager of a mining company may employ necessary labor, purchase necessary tools and supplies, mine and sell the ore, and bind the company for bills necessarily contracted in the prosecution of the work (Lee S. M. Co. v. Smelting Co., 16 Colo. 118; Oro, etc., Co. v. Kaiser, 4 Colo. App. 219); but he may not bind the company by the purchase of an expensive mill. Victoria, etc., Co. v. Fraser, 2 Colo. App. 14.

See also, Gates Iron Works Co. v. Denver Eng. Works Co., 17 Colo. App. 15.

In Hodges v. Bankers' Surety Co., 152 Ill. App. 372, the defendant surety company had furnished a bond for faithful performance by a construction company of its part of a building, for which the plaintiff was general contractor. The construction company abandoned its agreement, whereupon the plaintiff and the Chicago agent of the surety company agreed that the plaintiff himself should complete the work, and be reimbursed for the same by the surety company. The agent,

an agent has no implied authority to bind his principal for debts of a third person;[31] nor has an agent, authorized to operate a shingle mill, and to contract for shingle bolts, negotiate for a right of way, and purchase timber, any implied authority to bind his principal by a contract for the building of a logging road;[32] nor has an agent authorized to carry on his principal's farm any implied authority to permit a creditor to cut, remove and sell on execution, grass growing on the farm.[33] A conductor of a railroad train, as general manager thereof, has implied authority to hire a temporary brakeman if necessary in place of one taken suddenly ill upon the way;[34] but he would, on the other hand, have no general authority to hire, or to bind his principal to hire, laborers for construction work upon a remote part of the road.[35]

§ 990. Authority to waive liens, rights, conditions, notices, etc.— It is not within the ordinary interpretation of authority to manage that the agent shall have any general authority to waive, surrender or

upon whose directions this was done, was the general representative of the defendant company, an Ohio corporation; he described himself in business as "Manager for Illinois," and this was done with the knowledge of defendant. *Held*, that the agent had at least apparent authority to authorize a completion of the contract, and to charge his principal with expenditures incurred therein.

In Simpson v. Harris, —— Ala. ——, 56 So. 968, the manager of a lumbering firm was held to have authority to make a contract for the cutting and sawing of the principals' timber into lumber. In General Cartage & Storage Co. v. Cox, 74 Ohio St. 284, 113 Am. St. R. 959; the acting general manager of a storage company was held to have implied authority to agree that goods left in storage would be insured.

A mere "foreman" in charge of a piece of ordinary manual work has no implied power to make contracts for supplies or services respecting it. Langston v. Postal Tel. Co., 6 Ga. App. 833.

[31] Ruppe v. Edwards, 52 Mich. 411; New York Iron Mine v. Negaunee Bank, 39 Mich. 644; Clayton v. Martin, 31 Ark. 217; Meyer v. Baldwin, *supra*.

A managing agent in buying goods has no authority to agree that the seller shall charge and the manager allow an excessive price in order that the excess may be applied upon a debt owing by the principal's predecessor in the business. Pacific Lumber Co. v. Moffat, 67 C. C. A. 442, 134 Fed. 836.

[32] Gregory v. Loose, 19 Wash. 599.

[33] Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

[34] Georgia Pac. R. Co. v. Probst, 83 Ala. 518, 85 Ala. 203.

See also, Newport News, etc., Ry. Co. v. Carrol, 17 Ky. Law Rep. 374, 31 S. W. 132.

But not when there was no emergency or unusual circumstance. St. Louis, etc., Ry. Co. v. Jones, 96 Ark. 558, 37 L. R. A. (N. S.) 418.

[35] Olson v. Great Northern Ry. Co., 81 Minn. 402. The action here was not upon the contract of employment, but for damages caused by inducing plaintiff to go to the place in question, and then failing either to give him work, provide for his accommodation or bring him back.

qualify his principal's rights, privileges, immunities or protective conditions. Management ordinarily involves control, preservation, due ordering, and not waiver, surrender or destruction. This is particularly true, of course, of rights and privileges which arise outside the domain of the agent's activities, but it is also ordinarily true of those which lie within. An agent authorized through management to acquire benefits for his principal, can have thereby no corresponding authority to give them up when once acquired.

There may, however, be cases in which a general authority of management may fairly include some power of waiver or surrender, as a natural incident of the business or affair to be managed—cases in which adjustment, compromise, or waiver of some things for the purpose of properly accomplishing the main end may easily be justified.

Thus the general manager of a lumber yard, authorized to sell lumber with or without security, for cash or on long or short credit, and having general management and conduct of the business, has been held to have implied authority to waive a mechanics lien, provided for by statute, for lumber sold by him, especially where he did it in order to secure payment by other means.[36]

But, on the contrary, where such a lien has attached it has been said that "the ordinary duties of even a business manager would not authorize him to execute a release under seal, in the name of his employer, of a valid lien on real estate," the debt not having been paid, and no consideration having been given for the release.[37]

§ 991. ——— There are many cases in which a general manager, a general superintendent or a general agent may properly make adjustments of questions arising in the business, may meet emergencies, and provide for unexpected exigencies; and these may involve waivers of time, or alteration of terms, or waivers of conditions, or surrender of technical rights, as mere natural and ordinary incidents.[38] Where the whole question of determining what contracts shall be made, and how; and what performance shall be provided or demanded, is con-

[36] Badger Lumber Co. v. Ballentine, 54 Mo. App. 172, citing White Lake Lumber Co. v. Stone, 19 Neb. 402. To same effect: Hughes v. Lansing, 34 Or. 118, 75 Am. St. R. 574.

[37] Deacon v. Greenfield, 141 Pa. 467. See also, Carr v. Greenfield, 134 Pa. 503.

[38] Thus, it has been held that the president of a manufacturing corporation, who has authority to make contracts, has implied authority to terminate or release contracts made. Indianapolis Rolling Mill v. St. Louis, etc., Ry., 120 U. S. 256, 30 L. Ed. 639. In Van Santvoord v. Smith, 79 Minn. 316, a "general contracting and travelling agent" was held to have implied authority to change by parol a term of the company's contract with a sales agent although the contract itself was in writing.

fided to the agent, the same authority which might have shaped the transaction differently in the first instance seems ordinarily sufficient to mould its form accordingly afterwards.

So, in many cases in which notice is required to be given, and it is provided by the contract that it shall be given in some particular manner, as by writing, by registered mail, and the like, it has been held that an agent, authorized to receive the notice and actually receiving it, may waive compliance with the requirement that it shall be given in that particular manner.[39]

§ 992. Contracts by architects, superintendents, etc.—An architect, engineer, or other superintendent employed to supervise the construction of a building, railroad, or other similar structure, is usually an agent with limited authority. His authority, of course, may be given a wider range,[40] but, in the absence of such an enlargement, his authority and duty are confined to seeing that the work is done in

and expressly provided that modifications be submitted to the company for acceptance in writing.

In Burley v. Hitt, 54 Mo. App. 272, it was held that a general manager with power to conduct the business, and make contracts has authority to release, waive or vary contracts made. In Tice v. Russel, 43 Minn. 66, a son in general charge of his father's lumber business, and in charge of collections, had authority to extend the time within which a mortgagor could redeem after foreclosure sale.

See also Newberry v. Chicago Lumbering Co., 154 Mich. 84; Schultheis v. Caughey, 146 N. Y. App. Div. 102; Galveston, etc., Ry. v. House, 4 Tex. Civ. App. 263; Randall v. Fay Co., 158 Mich. 630; Herpolsheimer v. Harvester Co., 83 Neb. 53.

Many other cases of waiver by general sales agents will be found in the sections dealing with the authority of agents to sell personal property.

[39] See Western Union Tel. Co. v. Prevatt, 149 Ala. 617; Western Union Tel. Co. v. Cunningham, 99 Ala. 314; Syndicate Ins. Co. v. Catchings, 104 Ala. 176; Western Union Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Hill v. Western Union Tel. Co., 65 Ga. 425, 21 Am. St. Rep. 166.

[40] See the excellent case of Michaua v. MacGregor, 61 Minn. 198. Here an agent, acting under a very general power of attorney in the construction of a building, was held to have authority, partly as a matter of emergency to make an additional contract with the contractors for the removal of rocks which were sunk below the surface and were unknown to either party at the time the original contract was made.

See also, Henderson Bridge Co. v. McGrath, 134 U. S. 260, 33 L. Ed. 934.

A superintendent put in charge of tunnel construction, and having to arrange for the disposition of the excavated material, *held*, to have implied authority to arrange with a broker to dispose of the earth and to give him all over a certain sum for his services. Thompson v. Mills, 45 Tex. Civ. App. 642.

A mere inspector or overseer employed by the architect cannot bind the owner by accepting performance of the contract. Louisville Foundry Co. v. Patterson (Ky.), 93 S. W. 22.

See also, Merrill v. Worthington, 155 Ala. 281, Cf. Rumble v. Cummings, 52 Or. 208.

accordance with the plans and specifications agreed upon. He has, therefore, no implied authority to alter the terms of the contract,[41] or to waive compliance with its provisions. He has no implied authority to order extra work or materials,[42] extend the time of performance,[43] make any change in the plans and specifications,[44] or accept different or inferior materials and bind his principal to pay for them.[45] Where the contract provides that payment shall be made upon his certificate of compliance, this goes no further than to authorize him to pass upon the manner of performance; it gives him no general authority to waive compliance with any of the substantial conditions of the contract, such, for example, as that the payments shall not be due until the work has been done to the architect's satisfaction.[46]

§ 993. Contracts by station and ticket agents.—A railway station agent having general charge of the company's business at that station and authorized to receive and forward freight, has implied authority to bind the company by stating what is the rate of transportation of goods;[47] or to contract to furnish a certain number of cattle cars at his station on a specified day, the shipper being ignorant of any limitation upon his powers.[48] Such an agent has also been held to have implied authority, no rule or regulation to the contrary being shown.

[41] Sweeney v. Indemnity Co., 84 Wash. 126; Watts v. Metcalf, 23 Ky. Law Rep. 2189; Forman v. Liddesdale, [1900] App. Cas. 190. But in Driver v. Galland, 59 Wash. 201, an agent having general authority to build a house, was held to have authority, after construction had begun, to alter the contract he had made, so far as the method of payment was concerned.

[42] Starkweather v. Goodman, 48 Conn. 101, 40 Am. Rep. 152; Woodruff v. Railroad Co., 108 N. Y. 39; McIntosh v. Hastings, 156 Mass. 344; Gray v. La Societe Francaise, etc., 131 Cal. 566; Dodge v. McDonnell, 14 Wis. 553; Day v. Pickens County, 53 S. Car. 46; Carson v. Mitchell, 41 Ill. App. 241; Clark v. Bird, 46 Ill. App. 583; Miller v. Sullivan, 14 Tex. Civ. App. 112.

[43] Kelly v. Fejervary (Iowa), 78 N. W. 828.

[44] Adlard v. Muldoon, 45 Ill. 193; Mallard v. Moody, 105 Ga. 400.

[45] Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Fitzgerald v. Moran, 141 N. Y. 419.

[46] Leverone v. Arancio, 179 Mass. 439. "An architect is not the general agent of the owner," said the court. See also, Lewis v. Slack, 27 Mo. App. 119.

His certificate, however, within the terms of the contract, binds the owner. Young v. Stein, 152 Mich. 310, 125 Am. St. R. 412, 17 L. R. A. (N. S.) 231.

[47] Ohio, etc., Ry. Co. v. Savage, 38 Ill. App. 148, so as to permit a recovery of excess after goods had been loaded in reliance upon the rate named.

[48] Harrison v. Missouri Pacific Ry. Co., 74 Mo. 364, 41 Am. Rep. 318; Nichols v. Railroad Co., 24 Utah, 83, 91 Am. St. R. 778; Wood v. Railway Co., 68 Iowa, 491, 56 Am. Rep. 861; Pittsburg, etc., R. Co. v. Racer, 10 Ind. App. 503; Gulf, etc., R. Co. v. Hume, 87 Tex. 211; Easton v. Dud-

to bind the company by accepting cattle brought to the station for shipment (but which can not be shipped until the shipper procures a license), and undertaking to hold them as a depositary during the brief time required for obtaining the license.[49]

So a railway ticket agent, authorized to sell tickets for berths in the cars of a sleeping car company, has been held to have implied authority to bind the latter company by undertaking, in response to a telegram, to reserve accommodations for a prospective passenger, in the ordinary way.[50]

But neither the station agent,[51] nor the baggage master,[52] would have authority to incur obligations for transportation beyond the company's own lines, in the absence of some rule or custom so to do.[53] Nor has such an agent any authority to suspend the rules or waive the rights of the company.[54]

§ 994. Contracts for medical aid or nursing.—Although as has been seen in an earlier chapter,[55] there is difference of opinion, the weight of authority concedes to the general manager or general superintendent of a railroad company an implied authority [difficult to sustain in legal theory], to secure on account of the company, medical care and treatment for employees, and perhaps for passengers, injured in the operation of the road.[56] Similar authority, however, is generally denied to subordinate employees such as station agents, yard

ley, 78 Tex. 236; Kansas Pac. Ry. Co. v. Bayles, 19 Colo. 348.

But not to furnish cars at some other station. Gulf, etc., R. Co. v. Hodge, 10 Tex. Civ. App. 543.

[49] Flint v. Railroad Co., 73 N. H. 141.

He may also bind the company by agreeing to arrange for a prompt unloading of the goods at destination. Lake Erie, etc., R. Co. v. Rosenberg, 31 Ill. App. 47.

[50] Pullman Co. v. Nelson, 22 Tex. Civ. App. 223; Pullman Co. v. Willet, 27 Ohio Cir. Ct. 649, aff'd 72 Ohio St. 690.

[51] Minter v. Railroad Co., 56 Mo. App. 282.

[52] Marmorstein v. Railroad Co., 18 N. Y. Misc. 32.

[53] Gulf, etc., R. Co. v. Cole, 8 Tex. Civ. App. 635.

[54] Harris v. Railroad Co., 91 Ga. 317.

[55] See *ante*, § 341.

[56] See the exhaustive discussion of the question by Prof. H. B. Hutchins, 2 Michigan Law Review 1; see also, Marquette, etc., R. Co. v. Taft, 28 Mich. 289; Southern Ry. Co. v. Brister, 79 Miss. 761; Cairo, etc., R. R. Co. v. Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Indianapolis, etc., R. Co. v. Morris, 67 Ill. 295; Pacific R. Co. v. Thomas, 19 Kan. 256; Atchison, etc., R. Co. v. Reecher, 24 Kan. 228; Union Pac. R. Co. v. Winterbotham, 52 Kan. 433; Terre Haute R. Co. v. Stockwell, 118 Ind. 98; Cincinnati, etc., R. Co. v. Davis, 126 Ind. 99, 9 L. R. A. 503. Cf. Hanscom v. St. R. Co., 53 Minn. 119, 20 L. R. A. 695.

As to the authority of the president in such cases see, Canney v. Railroad Co., 63 Cal. 501; Trenor v. Railroad Co., 50 Cal. 222.

No authority to employ aid for an injured passenger when the company was not at fault. U. P. Ry. Co. v. Beatty, 35 Kan. 265, 67 Am. Rep. 160.

masters, conductors and locomotive engineers in the absence of evidence of a subsequent ratification of their acts by some competent officer of the company,[57] unless it be in a case of sudden emergency when he is the highest representative upon the ground and immediate action is necessary.[58] His authority in these cases, however, is strictly construed,[59] and ends with the emergency.[60]

A surgeon employed by a railroad company to attend upon persons injured by an accident, has no implied authority to bind the company by a promise to pay for meals and services furnished to those who were in attendance upon a party injured.[61]

In the case of mining, manufacturing and other similar enterprises, the authority of the general manager has usually been held not to be *per se* sufficient to warrant him in binding his principal to pay for medical services, and the like, furnished to injured employees.[62] *A*

[57] St. Louis, etc., R. Co. v. Olive, 40 Ill. App. 82; Peninsular R. Co. v. Gary, 22 Fla. 356, 1 Am. St. Rep 194 (disapproving Terre Haute, etc., R. Co. v. McMurray, *post*); Atlantic, etc., R. Co. v. Reisner, 18 Kan. 458; Tucker v. St. L., etc., Ry. Co., 54 Mo. 177; Sevier v. R. Co., 92 Ala. 258; St. Louis, etc., R. Co. v. Hoover, 53 Ark. 377; Louisville, etc., R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770; Patterson v. Consol. Trac. Co., 9 Pa. Dist. 362; Adams v. Southern Ry. Co., 125 N. Car. 565.

[58] In a few states, the authority of the subordinate employees is recognized in cases of emergency. See Terre Haute, etc., R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752; Louisville, etc., R. Co. v. Smith, 121 Ind. 353, 6 L. R. A. 320; Arkansas, etc., R. Co. v. Loughridge, 65 Ark. 300; Chicago, etc., R. Co. v. Davis, 94 Ill. App. 54; Toledo, etc., R. Co. v. Mylott, 6 Ind. App. 438; Evansville, etc., R. Co. v. Freeland, 4 Ind. App. 207 (an emergency will not justify employment for any one but a passenger or employee; not as to a trespasser); Adams v. Southern Ry. Co., *supra;* Wills v. International, etc., R. Co., 41 Tex. Civ. App. 58.

[59] See Arkansas, etc., R. Co. v. Loughridge, *supra.*

[60] Evansville, etc., R. Co. v. Freeland, 4 Ind. App. 207; Toledo, etc., R. Co. v. Mylott, 6 Ind. App. 438; Bedford Belt R. Co. v. McDonald, 12 Ind. App. 620, s. c. 17 Ind. App. 492, 60 Am. St. R. 172.

[61] Bushnell v. Chicago, etc., Ry. Co., 69 Iowa, 620.

An agent authorized to secure a doctor cannot authorize the doctor to employ other physicians. Bond v. Hurd, 31 Mont. 314, 3 Am. & E. Ann. Cas. 566. See also Mohlman v. American Grocery Co., 68 N. J. Eq. 602. A local doctor employed by a railroad company in a small town having in fact no authority to employ surgical aid did not bind the company in calling in another doctor when he had said to the other doctor that he did not have authority to make a contract but that he believed the company would pay a reasonable fee. Galveston, etc., R. R. v. Allen, 42 Tex. Civ. App. 576.

[62] Holmes v. McAllister, 123 Mich. 493, 48 L. R. A. 396 (laundry); (see also Hodges v. Electric Co., 109 Mich. 547); Meisenback v. Cooperage Co., 45 Mo. App. 232; Swazey v. Union Mfg. Co., 42 Conn. 556; New Pittsburg Coal & Coke Co. v. Shaley, 25 Ind. App. 282; Chaplin v. Freeland, 7 Ind. App. 676; Spelman v. Mining Co., 26 Mont. 76, 55 L. R. A. 640, 91 Am. St. R. 402; Bond v. Hurd, 31

fortiori would the power of the inferior servant be insufficient even in emergencies; but a few cases apply the same rule as in the case of railway companies.[63]

§ 995. Implied authority to sell product of business.—The general manager of a business, whose product is designed or kept for sale, would ordinarily have implied authority to sell such product, in the ordinary way,[64] and to fix the terms and conditions of the sale within the limits permitted to any selling agent.[65] Thus an agent authorized to manage his principal's plantation may sell the product of it and collect the money therefor;[66] but he has no implied authority to agree to exchange such product for that of another plantation.[67] An agent, having general authority to manage the business of a lumber company, may not only employ the necessary workmen, but he may, if it become necessary, make a sale of lumber to pay them.[68]

§ 996. Authority to collect or receive payment.—In like manner, the authority of a managing agent to collect or receive payment must depend upon the nature of the business. If it be one wherein debts are regularly being contracted and paid, the authority to receive payment of such debts would be unquestioned, as a part of the ordinary and expected course of business.[69] The collection of payment for goods sold, the getting in of the outstanding accounts, the looking

Mont. 314, 3 A. & E. Ann. Cas. 566 and note; Godshaw v. Struck, 109 Ky. 285, 51 L. R. A. 668; Malone v. Robinson (Miss.), 12 So. 709 (plantation). [*Contra:* Mt. Wilson Min. Co. v. Burbridge, 11 Colo. App. 487.]

A fortiori, where the injuries were not received while servant was in line of duty. Chase v. Swift & Co., 60 Neb. 696, 83 Am. St. R. 552; Dale v. Donaldson Lumber Co., 48 Ark. 188, 3 Am. St. R. 224.

As to settlement in consideration of such payment, see American Quarries Co. v. Lay, 37 Ind. App. 386.

The power of the president would be greater. Fraser v. San Francisco Bridge Co., 103 Cal. 79; Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553.

Husband not liable for services of a physician called by the wife during husband's absence to attend a farm servant shot in a personal altercation by their son. Baker v. Witten, 1 Okla. 160.

[63] See Texas Bldg. Co. v. Albert, 57 Tex. Civ. App. 638 (physician employed to attend an injured employee by the foreman of a "crew" of men employed by a building and construction company). See also note to The Kenilworth, 4 L. R. A. (N. S.) 49, 66.

[64] See Silver Mining Co. v. Omaha Smelting Co., 16 Colo. 118.

Cf. Asheville Supply Co. v. Machin, 150 N. Car. 738.

[65] See *ante*, § 854.

[66] Sentell v. Kennedy, 29 La. Ann. 679.

See Michell v. Samford (Mo. App.), 130 S. W. 99, where the general manager of a plantation was held to have implied authority to arrange that sub-tenants might purchase supplies to be paid for when the crop was sold.

[67] Ball v. Bender, 22 La. Ann. 493.

[68] Taylor v. Labeaume, 17 Mo. 338.

[69] See Long v. Jennings, 137 Ala. 190.

after delinquent debtors, and the like, would often constitute one of the chief duties of the manager. The reasonable adjustment of disputed claims and counterclaims would fall within the same rules.[70]

His authority, of course, would not extend to other kinds of business, or to other departments than that entrusted to his care.

§ 997. Authority to revive debt barred by limitation.—The authority of a managing agent to revive debts barred by the statute of limitations, depends largely upon his authority to adjust and settle claims against his principal.[71] He has, as has been seen, authority in many cases to pledge the credit of the principal for supplies and services furnished to the principal; but, as is pointed out by the court in Pennsylvania,[72] "When the debt becomes due an entirely different question is presented; the renewal of it is not a matter of the operation of the business committed to the care of the agent, nor is it an exercise of the power of the agent to create new debts; a new promise to pay is an extension of the liability of the principal beyond the duration affixed to it by law. 'A debt may be taken out of the statute by the act of an agent done in the regular course of his business if he has specific authority for that purpose, or if such authority be necessarily implied from the nature of his duties, but this results not from the power to create new debts but from a distinct and independent power to settle and adjust old ones. These powers are not in their nature the same nor very much alike. The one is not a logical or legal consequence of the other.'" [73]

§ 998. Authority to make negotiable instruments.—As has been pointed out in a preceding section,[74] the authority to bind the principal as a party to negotiable paper is one which the law does not readily imply. Such a power may, however, be conferred expressly, it may

[70] In Grubbs v. Nixon, 93 Ark. 79, 137 Am. St. R. 78, in an action for goods sold, the defendant set up a settlement made with plaintiff's agent, by which a larger claim against the plaintiff, previously assigned to the defendant, was set off. The agent was in general charge of the plaintiff's retail grocery business. It was *held* that a manager in such a case would have authority to adjust claims, even where one owing was barred by the statute of limitations.

[71] See Lilley v. Foad, [1899] 2 Ch. 107, where payments made by a managing agent were held to prevent the operation of the statute.

In Iowa Loan & Trust Co. v. McMurray, 129 Iowa, 65, an agent having general control of a borrower's affairs was held to have implied authority to agree to extensions of time which would prevent the bar of the statute.

[72] Beal v. Adams Ex. Co., 13 Pa. Super. Ct. 143. But see Grubbs v. Nixon, cited in the preceding section.

[73] Citing, Watts v. Devor, 1 Grant (Pa.), 267.

[74] See *ante*, § 973.

result from an established course of dealing, or may arise by necessary implication. As many businesses may be, and constantly are, conducted without the exercise of this extraordinary power, the mere fact that one is authorized to manage a business does not of itself alone imply that he may bind his principal by making, accepting, or indorsing negotiable paper.[75] Where, however, the business is of a sort ordinarily conducted largely upon credit, and to which the making of negotiable paper may fairly be regarded as incident, an agent given a general authority of management may be found to have the authority to execute such paper. Thus, in one case,[76] it was said, "a general manager having the exclusive management and conduct of a manufacturing and commercial business, and admittedly having the power to purchase stock, contract debts, discount notes, may, when there is occasion for so doing, borrow money to pay debts or purchase goods, and give his principal's negotiable note therefor." So where the power under which the managing agent acts, for example, certain articles of partnership, clearly contemplates and provides that notes will be executed when necessary, the authority may be found to exist.[77] And so it has been held to be, where the authority was very general in its terms, authorizing the agent "to do and perform all the necessary acts in the execution and promotion" of the business "in as full

[75] New York Iron Mine v. Negaunee Bank, 39 Mich. 644; Perkins v. Boothby, 71 Me. 91; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Connell v. McLaughlin, 28 Ore. 230; Chicago Elec. Co. v. Hutchinson, 25 Ill. App. 476; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 93 Am. St. R. 113, 59 L. R. A. 657; Fairly v. Nash, 70 Miss. 193; Stock Exch. Bank v. Williamson, 6 Okla. 348; Golinsky v. Allison, 114 Cal. 458; Hazeltine v. Miller, 44 Me. 177; Dobbins v. Etowah Co., 75 Ga. 238; Paige v. Stone, 10 Met. 160, 43 Am. Dec. 420; Whiting v. Stage Co., 20 Iowa, 554; Davidson v. Stanley, 2 M. & G. 721; Brown v. Parker, 7 Allen (Mass.), 337; Weekes v. Shapleigh Hdwe. Co., 23 Tex. Civ. App. 577; Lafourche Transp. Co. v. Pugh, 52 La. Ann. 1517; Helena Nat. Bank v. Rocky Mt. Tel. Co., 20 Mont. 379, 63 Am. St. R. 628.

Thus the general managing agent of a mining company may not bind it by making promissory notes in its name (New York Iron Mine v. Negaunee Bank, *supra;* McCullough v. Moss, 5 Denio (N. Y.), 567); nor may he bind it by acceptance of a bill of exchange even to avoid the suspension of work of great importance. Sewanee Mining Co. v. McCall, 3 Head (Tenn.), 619.

See also, *In re* Cunningham, 36 Ch. Div. 532; Johnston County Sav. Bank v. Scroggin Drug Co., 152 N. C. 142, 136 Am. St. R. 821.

Manager of an insurance company has no implied authority to "kite" checks. Farmers, etc., Bank v. Germania Ins. Co., 150 N. C. 770.

[76] Glidden Varnish Co. v. Interstate Bank, 69 Fed. 912, 16 C. C. A. 534 (Sanborn, J., dissenting on this point); Flewellen v. Mittenthal (Tex. Civ. App.), 38 S. W. 234.

[77] See Lerch v. Bard, 153 Pa. 573. See also, Presnall v. McLeary (Tex. Civ. App.), 50 S. W. 1066.

and ample a manner" as the principal might if he were personally present.[78]

§ 999. ——— The method of conducting the business, with the principal's knowledge and acquiescence, may also furnish sufficient evidence of the existence of the authority. Thus where the agent was given absolute control of a lumber business, "bought material, made all payments and collections, deposited the money received and checked against it, and used [the principal's] credit in the business as he saw fit," and had made other notes, of which the principal had knowledge and some of which he secured, there was held to be sufficient evidence to warrant the jury in finding that the agent had authority to give notes for lumber purchased for the business.[79] And even though the evidence may not be sufficient to show a general authority, the principal may be estopped from denying the authority as to a particular person who, on the faith of an open and long continued exercise of the authority, has dealt with the agent in reliance upon its real existence.[80]

§ 1000. ——— Where the authority in a managing agent to issue bills or notes is shown, but no specific limitation upon it appears, a third person dealing with the agent, in good faith, is not bound by secret limitations, or by local or particular customs, of which he has no knowledge and of which he is not charged with notice.[81] Where the authority of the agent is based upon apparent necessity, the fact that the necessity arose from a misuse by the agent of the principal's funds, of which fact the other party is ignorant, will be immaterial.[82]

§ 1001. **When may borrow money.**—The question of the agent's implied authority to borrow money is closely associated with that of the execution of negotiable paper, as it is through the execution of such instruments that the power to borrow is ordinarily exercised. In this case, as in that, the authority is one reluctantly to be implied. As has been said in a recent case,[83] "Authority to borrow money is

[78] Wimberly v. Windham, 104 Ala. 409, 53 Am. St. R. 70. See also, Whitten v. Bank of Fincastle, 100 Va. 546.

[79] Witcher v. McPhee, 16 Colo. App. 298. See also, Shipman v. Byles, 65 Mich. 690; Buhl v. Smith, 69 Mich. 552.

[80] Collins v. Cooper, 65 Tex. 460; Friedlander v. Cornell, 45 Tex. 585.

[81] Great Western Elevator Co. v. White, 56 C. C. A. 388, 118 Fed. 406.

[82] Atlantic Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. R. 698.

[83] Exchange Bank v. Thrower, 118 Ga. 433.

In Jacobs v. Morris, [1901] 1 Ch. 261 (aff'd, [1902] 1 Ch. 816), it is said, "there is a strong inherent improbability that a principal intends to give his attorney power to borrow money if he does not expressly state it." See also Harper v. God-

among the most dangerous powers which a principal can confer upon an agent. Whoever lends to one, claiming the right to make or indorse negotiable paper in the name of another, does so in the face of all the danger signals of business. He need not lend or discount until assured beyond doubt that the principal has, in fact, appointed an agent who, by the stroke of a pen, may wipe out his present fortune and bind his future earnings. The very nature of the act is a warning; and, if the lender parts with his money, he does so at his own peril. If the power was not in fact conferred, he must bear the loss occasioned by his own folly. A power so perilous is not to be implied from acts which, in other matters less hazardous, might create an agency. It must be conferred in express terms, or be necessarily and inevitably inferable from the very nature of the agency actually created. So strict is the rule that it will not be presumed even from an appointment of one as general agent, unless the character of the business, or the duties of the agent, are of such a nature that he was bound to borrow in order to carry out his instructions and the duties of the office."

And so in a recent case [84] in the court of appeals of New York, it is said, "If the transaction of business absolutely required the exercise of the power to borrow money in order to carry it on, then that power was impliedly conferred as an incident to the employment; but it does not afford a sufficient ground for the inference of such a power, to say the act proposed was convenient or advantageous or more effectual in the transaction of the business provided for, but it must be

sell, L. R. 5 Q. B. Cas. 422; Attwood v. Munnings, 7 B. & C. 278; Hawtayne v. Bourne, 7 M. & W. 595.

[84] Bickford v. Menier, 107 N. Y. 490. Approved in Consolidated Nat. Bank v. Pacific Coast Steamship Co., 95 Cal. 1, 29 Am. St. R. 85. See also, Bryant v. Banque du Peuple, [1893] App. Cas. 170; Heath v. Paul, 81 Wis. 532; Schramm v. Liebenberg, 42 Colo. 516.

A general authority to buy goods does not authorize borrowing money and pledging the principal's property as collateral. Chicago, etc., Ry. Co. v. Chickasha Nat. Bank, 98 C. C. A. 535, 174 Fed. 923.

Authority to wind up a business does not authorize the agent to borrow money. Smith v. McGregor, 96 N. C. 101.

An agent authorized to buy horses may borrow money to buy feed for and take care of them after purchase and before shipment to his principal since it is necessary in order to carry on the business. Rider v. Kirk, 82 Mo. App. 120.

In Merchants' National Bank v. Nichols, 223 Ill. 41, 7 L. R. A. (N. S.) 752, a general sales agent of a Michigan corporation, who had charge of its business over a considerable portion of Illinois, who maintained a store room and office, a sales force and who made the collections for sales, and who was also authorized to open a banking account, overdrew the account. The principal was held not liable because the actual authority of its agent included no implied authority to borrow.

practically indispensable to the execution of the duties really delegated in order to justify its inference from the original employment."

§ 1002. ——— But even though, within these rules, the authority to borrow is not to be implied from the authority expressly given, it may yet arise as an actual incident to an established course of dealing; and the principal may also by his conduct estop himself from denying its existence as to persons really relying upon misleading appearances.[85]

Where the authority to borrow is based upon necessity, the fact that the necessity arose from the wrongful act of the agent himself, would not necessarily defeat a recovery, where the other party was ignorant of it.[86]

And, as will be seen in a later section,[87] even though an agent borrows money without authority, or exceeds the limit of his authority, while the principal will not be liable on the contract unless he ratifies it, still if the money be actually applied by the agent for the principal's benefit, as where he uses it to pay the principal's lawful debts, the principal may often be charged in equity or *quasi* contract for the benefit received.

§ 1003. **May not make accommodation paper.**—If the authority of the agent to bind his principal by negotiable instruments, executed in the principal's business and on his account, is thus so doubtful, *a fortiori* has he no authority to bind his principal by making, accepting or indorsing negotiable paper for the benefit of himself or third persons.[88] Nor can he pledge his principal's credit for the debt of third persons.[89]

§ 1004. **May not pledge or mortgage the property of his principal.** An agent authorized to manage and carry on his principal's business has thereby no implied authority to pledge or mortgage the property in his possession. As is tersely said by a learned judge: "It is not carrying on the business of the company to pledge or mortgage the machinery used by the company and thereby suspend its operations; or place them at the will and pleasure of a mortgagee."[90]

[85] Montaignac v. Shitta, 15 App. Cas. 357; Collins v. Cooper, 65 Tex. 460; McDermott v. Jackson, 97 Wis. 64.

A wife left at home to manage her husband's affairs and look after his family during his absence, may borrow small sums on his credit for immediate family needs. Meader v. Page, 39 Vt. 306.

[86] Compare Atlantic Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. R. 698.

[87] See *post* (Agent authorized to borrow money).

[88] Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Bank v. Johnson, 3 Rich. (S. C.) 42; Boord v. Strauss, 39 Fla. 381.

[89] Ruppe v. Edwards, 52 Mich. 411; Bullard v. DeGroff, 59 Neb. 783; Union Pac. Townsite Co. v. Page, 54 Kan. 363.

[90] Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Edgerly v. Cover, 106 Iowa, 670; Go-

§ 1005. May not sell or lease principal's land.—Neither has such an agent implied authority to sell his principal's land,[91] even though it may have been acquired by him in the execution of the agency.[92] And where he is authorized to manage an affair or conduct a business which contemplates or requires the continued use or occupancy of certain land, he will ordinarily have no implied authority to defeat that purpose by making a general lease of the land.[93] It would be otherwise, of course, with the management of land kept and designed to be leased. In that case he could make any usual or ordinary lease, but not an unusual one.[94]

§ 1006. May not embark in new and different business.—Authority to carry on the principal's business already established, implies no authority in the agent to embark in a new and different business, or to attempt to use his principal's funds or credit in such a business.[95] His authority is to manage that business, not to establish another one.

§ 1007. May not sell the business or property.—For similar reasons, a general authority to manage a business or property clearly contemplates, in the ordinary case, that the business is to be continued or the property retained, and not disposed of. Such a power, therefore, ordinarily implies no authority to sell the business.[96]

§ 1008. Authority to pay debts.—The authority and duty of a managing agent to pay the debts of his principal must depend largely upon the nature of the business confided to his care, and the extent of his authority over it. He would not ordinarily have implied authority to pay his principal's debts generally, or to pay debts arising beyond the scope of the business with which he is entrusted. Where, however, he is put in charge of a business in which debts are regularly in-

linsky v. Allison, 114 Cal. 458; First Nat. Bank v. Kirby, 43 Fla. 376; Henson v. Keet Merc. Co., 48 Mo. App. 214; First Nat. Bank v. Bressler, 38 Ill. App. 499; First Nat. Bank v. Hicks, 24 Tex. Civ. App. 269.

[91] Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235; Saunders v. King, 119 Iowa, 291.

[92] Smith v. Stephenson, 45 Iowa, 645; Watson v. Hopkins, 27 Tex. 637.

[93] Ward v. Thrustin, 40 Ohio St. 347.

[94] Duncan v. Hartman, 143 Pa. 595, 24 Am. St. R. 570, 149 Pa. 114.

[95] Campbell v. Hastings, 29 Ark. 512.

Manhattan Liquor Co. v. Magnus, 43 Tex. Civ. App. 463 (where manager of a saloon business undertook to buy a rival business and to bind his principals to pay the debts owing by the rival dealer).

[96] Vescelius v. Martin, 11 Colo. 391; Quay v. Presidio, etc., R. Co., 82 Cal. 1; Johnson Signal Co. v. Union Switch Co., 51 Fed. 85.

An agent authorized to manage a tanning business has no implied authority to sell the hides which have been purchased for use at the tannery. Holbrook v. Oberne, 56 Iowa, 324.

IX.

OF AGENT AUTHORIZED TO SETTLE.

§ 1012. Of the nature of the authority.—An authority vested in an agent to settle claims and demands is an important one, involving often the exercise of much judgment and discretion. Although this expression may be used under circumstances showing that the agent was authorized simply to receive payment of a claim, without reduction, the authority to settle, as here used, involves more than the mere receipt of payment of an undisputed claim.[12] The very idea of settlement includes the notion of adjustment. It presupposes mutual, if not disputed and conflicting, claims. It involves often the necessity of compromise and concession. It may include the receipt in settlement of that which the law would not ordinarily regard as payment.

§ 1013. Burden of proof.—A debtor who claims that his debt has been discharged by settlement or compromise, made with the creditor's agent, has the burden of proving that the agent's authority was competent for the purpose;[13] and the principal may, of course, show that the agent's authority was limited, and did not include the case in question.[14] It must also appear, in any case, in order to sustain the compromise, that there was the same consideration for it which would have been required if the parties were negotiating in person.[15]

[12] In Scales v. Mount, 93 Ala. 82, it was said, "As a general rule, the authority of an agent will not be extended beyond that which is given in terms, or is necessary and proper to carry the authority given into full effect. An agent with general authority to collect, is not authorized to compromise a claim, or release the debtor, except upon payment of the full amount. Hall Safe and Lock Co. v. Harwell, 88 Ala. 441. Such authority will not be implied from the conjunctive use of the terms, *to settle and collect*. The latter word qualifies and limits the scope and meaning of the former, restricting it to its ordinary signification to adjust any matter that is or may be in dispute—authority to make a settlement and collect the amount as settled. Notwithstanding such is ordinarily the extent of the authority thus conferred, there may be circumstances which would enlarge the meaning, and show an intention to confer authority by the use of the terms, *to settle and collect*, to take a less amount than the entire debt in satisfaction, and upon its payment to discharge the debtor. There is evidence tending to show that defendants failing in business, notified plaintiffs and their other creditors of their failure, stating that they thought they could pay all creditors eighty cents on the dollar. If this be the fact, and upon receiving such notice, plaintiff sent Tatum to settle and collect the debt, authority to release defendants upon payment of eighty per cent. of their claim may well be inferred."

[13] Barker v. Ring, 97 Wis. 53; Tompkins' Mach. Co. v. Peter, 84 Tex. 627.

[14] Grubbs v. Ferguson, 136 N. C. 60.

[15] Barker v. Ring, *supra*.

§ 1014. When authority exists.—By reason of its nature, an authority to settle is one not lightly to be inferred. As has been seen,[16] for example, a mere agent to solicit orders for goods has ordinarily no implied authority even to receive payment, much less to compromise and settle disputed claims as to the price.[17] So an agent authorized to receive payment, merely, has, as has been seen,[18] ordinarily no implied authority to do anything but to receive full payment of the claim in money; he usually may not accept goods or securities, make concessions, or compromise disputed claims.

Authority to settle may, of course, be expressly conferred; but it is not essential that it shall be so. It may arise by implication, but the facts from which it is inferred must, obviously, be such as reasonably to warrant the deduction that this important power of adjustment, compromise, and settlement has been conferred.[19]

§ 1015. ——— Where, after considerable correspondence, the principal wrote to the other party saying, "I have asked Mr. S. to talk over your proposition to me with you. If you trade with him you can count the matter satisfactorily settled with me. Hoping the matter will be amicably settled, I am," etc., it was held that S. was authorized to effect a settlement.[20] Equally clear was it, where the principal wrote, "After consultation by mail with Mr. D. R., we have concluded to authorize him to adjust with you, and to collect the bal-

[16] See *ante*, §§ 863, 869.

[17] Lindow v. Cohn, 5 Calif. App. 388; Scarett-Comstock v. Hudspeth, 19 Okla. 429, 14 A. & E. Ann. Cas. 857.

[18] See *ante*, §§ 946, 954, 955.

[19] See Dabney v. McFarlin (Tex. Civ. App.), 34 S. W. 142; Cobb v. Fogg, 166 Mass. 466; Graves v. Miami S. S. Co., 29 N. Y. Misc. 645.

If the authority is to be proven by circumstances, the occurrence of one act would scarcely be sufficient, but the proponent may show all the circumstances and so prove the authority. Sariol v. McDonald Co., 127 N. Y. App. Div. 648.

In Northwest Thresher Co. v. Dahlgren, 50 Wash. 325, 19 L. R. A. (N. S.) 324, an agent from his general conduct of the transaction was held to have authority to settle, where the agent had sold goods for which notes in controversy were given, received the notes and payments thereon and conducted a foreclosure.

[20] Lindley v. Lupton, 118 Mich. 466. But see, First Nat. Bank v. Wright, 104 Mo. App. 242.

Where after some correspondence the agent wrote asking the principal upon what terms he would settle, and the latter replied that he had full confidence in the agent and whatever he did would be all right, "whether it was one cent or a hundred cents on the dollar," it was *held*, in an action by the principal against the agent, sufficient to authorize the agent to make a settlement. Hussey v. Crass (Tenn. Ch.), 53 S. W. 986. Referring one person to another to settle or determine or decide a controversy, makes the latter agent to so act. Armstrong v. Crump, 25 Okla. 452. But see Hunt v. Johnson & Larimer Dry Goods Co., 7 Ind. Ter. 575.

ance of our account, or any part of the amount, and to make any change that you and he may deem necessary in the future advertisement of your business under our contract. He is on the spot, and will be able to make satisfactory arrangements with you." [21]

So where, on receiving notice of a loss, the secretary of an insurance company wrote to the insured that he would arrange with the other companies so that adjusters could meet with him and "close the matter up as speedily as possible," and later that its adjuster would be there on a certain day, and the adjuster assumed to have authority to agree upon a definite sum to be paid in satisfaction of the loss, it was held that the jury were justified in finding that the agent had the authority he assumed to exercise.[22]

§ 1016. ——— A settlement, though unauthorized, may also be sustained by a subsequent ratification; and such a ratification may be effected, as in other cases, where the principal with knowledge accepts and retains the fruits of the settlement.[23]

§ 1017. **What terms of settlement binding.**—The terms upon which the settlement shall be made, may of course be expressly prescribed by the principal, and if so, they will, unless amounting merely to secret instructions, be effective limitations upon the agent's authority. Usually, however, the matter is, and from its nature must be, largely confided to the agent's discretion; and in such a case, any settlement he makes within the limits of a fair and reasonable discretion, must be binding upon the principal. Thus, where a creditor wrote to his debtor, that the letter would be handed him by W. "who will see you in regard to bill of coffee due us, and has full authority to act for us in the matter," the court said: "Words of authority, by an absent creditor to a present agent, in regard to any particular matter, could hardly be made broader. They seem to authorize any and all *bona fide* acts of the agent which had relation to the debt, and which the principal himself could lawfully perform. Had it been the actual intention to include the power to cancel the debt in whole or in part, by compromise, by payment, or satisfaction otherwise, at the discretion of the agent, it is difficult to see what other more appropriate general language could have been used. The letter specifies no particular act or acts which the agent is authorized to do in regard to the debt. If, for this reason it must be held as giving no authority

[21] Kuhlman v. Hart (Tenn. Ch. App.), 59 S. W. 455.

[22] Miller's Nat. Ins. Co. v. Kinneard, 136 Ill. 199.

[23] Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257; Zelenka v. Port Huron Mach. Co., 144 Iowa, 592.

to take property in payment of the debt, for the same reason it must be held as giving no authority to accept payment of it in money, to cause it to be secured, or to do any other specific act in relation to it. 'Full' authority to act 'in regard' to the debt seems to us to authorize either, any, and all of these, or the like acts of the agent. The plain reading of the letter is, that the 'matter' in regard to which the agent was authorized to act was the debt, the 'bill of coffee,' and not, as counsel assume, the securing of the debt. The letter equally omits to give specific authority to secure the debt, as it does to give specific authority to compromise, compound, or receive satisfaction of it in property." [24]

§ 1018. ——— The terms assented to may, nevertheless, be so unreasonable and unfair to the principal as to properly arouse the suspicions of the other party, and put him upon inquiry as to the agent's authority.[25]

§ 1019. ——— **Illustrations.**—An agent having "full authority to act for" a creditor in the matter of a debt, has implied authority to bind the creditor by agreeing to take personal property in payment.[26] A general agent with full authority to make settlements with his prin-

[24] Oliver v. Sterling, 20 Ohio St. 391.

Authority to agents to manage and settle certain contracts for the sale and delivery of cotton, "as if they were their own," binds the principal by the settlement adopted, in absence of any evidence of fraud or injury. Gruner v. Stucken, 39 La. Ann. 1076. In Keenan v. Empire State Surety Co., 62 Wash. 250, a surety company was notified by the owner that the contractors on a building contract had failed in performance, whereupon the surety replied that it had referred the matter to a certain person, without placing any limitations upon this person's authority. *Held*, that this person became an agent with authority to waive a condition precedent to the surety's liability on the contractor's bond.

In German American Provision Co. v. Jones, 87 Miss. 277, an agent sent to settle a controversy with a buyer who, having purchased a quantity of lard, contended that it was of an inferior quality, agreed with the buyer that it was of an inferior grade and authorized him to sell it as such. *Held*, to bind the principal.

In Pollock v. Cohen, 32 Ohio St. 514, an agent authorized to collect a certain bill, to receive notes therefor "or any way to settle" it, was *held* to have no implied authority to buy property of the debtor exceeding in value the amount of the bill and bind his principal to pay the excess. An agent authorized to settle doubtful claims may not do so by agreeing to set off the same against his own debt. McCormick v. Keith, 8 Neb. 142.

[25] Thus, in Mayor, etc. v. Dubois, 65 C. C. A. 590, 132 Fed. 752, the court speaks of a compromise made by the agent, as "a wanton or reckless sacrifice by him, of the substantial right" of the principal, and of the methods adopted, as "so unusual, unfair, and remarkable," as to impose upon the other party the necessity of ascertaining his authority to make it. See also, Kuhlman v. Hart (Tenn. Ch. App.), 59 S. W. 455.

[26] Oliver v. Sterling, 20 Ohio St.

cipal's debtors, may bind his principal by agreeing to accept and receive the notes of a third person in payment of a debt.[27] An agent authorized to "adjust" with a debtor and "to collect the balance of our account or any part of the amount, and to make any change that you and he may deem necessary in the future advertisement of your business under our contract," is justified in making an entirely new contract, even though less advantageous to the principal, if "it does not, when the nature of the business to which it relates is considered, * * * carry on its face the evidence or inference that [the agent] in making it was betraying or selling out the interest of his employer." [28]

An agent sent by the creditors of a debtor in failing circumstances, at his suggestion, to take a bill of sale of his stock and fixtures as security, if that was found advisable, may bind his principals by an understanding that the conveyance and possession which he takes of the goods shall not be absolute and unconditional, but temporary only, and that after the agent has sold enough of the goods to satisfy the claims, the balance shall be restored to the debtor.[29]

§ 1020. ——— But the ordinary claim agent of a railroad, having general authority to settle claims against it, must, it is held, be

391. Or to take a small sum of money and a conveyance of lands in settlement. Lindley v. Lupton, 118 Mich. 466.

[27] Nichols & Shepard Co. v. Hackney, 78 Minn. 461.

An agent directed by his principal to take anything he can get in settlement has authority to accept a promissory note. Mitchell v. Finnell, 101 Cal. 614.

Under a very wide authority given to an agent to settle up matters connected with a construction contract, where it was found that the balance was against the principal rather than in his favor, and that he owed more than was coming to him, the agents were held authorized to apply the proceeds upon the debts so far as they would go, and to give the principal's notes for the balance due. Wapples-Platter Grocer Co. v. Kinkaid, 86 Kan. 167.

[28] Kuhlman v. Hart (Tenn. Ch. App.), 59 S. W. 455.

[29] Rothschild v. Swope, 116 Cal. 670. Where an agent is sent out by the seller of fruit trees to deliver trees, make settlements, and secure notes therefor, he has implied authority to do the things necessary to entitle the principal to receive a note for the price in accordance with the original contract; and he may therefore renew the obligation of that contract (without which the buyer refused to give his note), that the seller will plant the trees, prune and care for them for four years, and replace any that fail to grow. Griffith v. Fields, 105 Iowa, 362.

In Sunset Orchard Land Co. v. Sherman Nursery Co., — Minn. —, 140 N. W. 112, where there was a controversy respecting the seller's obligation to replace trees which failed to live, and agent sent to settle it, to "try and get the matter adjusted," was held to have authority to bind the seller to replace a considerable portion of the trees.

limited to the employment of the usual and ordinary means of accomplishing a settlement, and has, therefore, no implied authority to settle with an injured employee, by agreeing to pay him a sum of money and to give him steady employment during good behavior, "There was no evidence," said the court, "that corporations are accustomed to give employment for life, or anything except money, for this purpose." [30] But even a local agent of a railway company, shown to have been generally entrusted with the settlement of claims of over charge arising in his territory, has been held to have apparent authority to waive the provision in a bill of lading that suit for an alleged over charge shall be brought within a certain number of days.[31] So a claim agent of a railroad, sent to settle a personal injury case, has been held to have authority to agree that a claim for medical services rendered to the injured passenger will be paid by the company, even though the services had already been rendered, and though the agent had not done the hiring.[32]

§ 1021. ——— A general authority to settle could very rarely be deemed sufficient to justify the agent in discharging the debtor without receiving anything.[33] But where an agent had been given "full powers to close the subscriptions to the permanent fund in such manner as he deems for the best interest of the college," the court said, "No language they could use would convey any more power to discharge without receiving pay than was used. They must have intended that he should learn their circumstances in each particular case, and act upon those circumstances as prudence should dictate. If he found the subscriber of doubtful responsibility, or the claim itself doubtful, he might obtain the best settlement he could and secure what he could. If he found the claim a nullity, he might discharge without payment." [34]

Authority to settle claims against the principal, arising out of a contract between him and a third person, however, would not justify

[30] Bohanan v. Boston & M. R. R., 70 N. H. 526. But in Louisville, etc., R. Co. v. Cox, 145 Ky. 667, an agent sent to make a settlement with an injured employe was held to have apparent authority to do so by agreeing to give him permanent employment. Some of the statements in the opinion, however, must doubtless be regarded as too wide.

[31] Galveston, etc., R. Co. v. House, 4 Tex. Civ. App. 263, distinguishing Gulf, etc., R. Co. v. Trawick, 80 Tex. 270.

[32] Reynolds v. Chicago, etc., R. R., 114 Mo. App. 670.

[33] See Patterson v. Moore, 34 Pa. 69. See also, Hutchings v. Clark, 64 Cal. 228.

[34] Middlebury College v. Loomis, 1 Vt. 189.

the agent in binding his principal to pay that third person's debts to others.[35]

§ 1022. May receive the proceeds.—An agent, given general authority to settle a demand of his principal, has implied authority, not only to agree upon and adjust the amount to be paid in settlement, but also to receive the amount; and the opposite party who pays it to the agent will be discharged, although the agent never pays it over to his principal.[36]

§ 1023. May not submit to arbitration.—Authority conferred upon an agent to settle a dispute or demand, will be presumed to be so conferred in reliance upon the judgment and discretion of the agent, and unless there be clear evidence of a contrary intention, the agent will not be permitted to delegate the trust to another.[37] He cannot therefore submit the dispute or demand to the judgment of arbitrators, and, if he does so, the award will not be binding upon the principal.[38] Like other unauthorized acts, the submission may of course be ratified by the principal, and such a ratification will be presumed where, for example, with full knowledge of the facts, the principal accepts the award.

§ 1024. May not assign the demand.—For the same reasons, an agent employed to collect and settle his principal's demands has no implied authority to assign them to another for that purpose;[39]

[35] Cleveland, etc., Ry. Co. v. Shea, 174 Ind. 303.

In Mead v. Owen, 80 Vt. 273, 12 L. R. A. (N. S.) 655, 13 Ann. Cas. 231, it was held that authority to arbitrate a dispute between a landlord and tenant did not include the implied authority to extend the time during which the tenant might hold over.

But compare Newberry v. Chicago Lumbering Co., 154 Mich. 84.

[36] New York, etc., R. Co. v. Bates, 63 Md. 184.

[37] Thus, where a lumber firm in Oregon, having a dispute on hand over the acceptance of a cargo of lumber sent to Chile, S. A., wrote to another firm in the same city in Oregon, "We will be satisfied with any settlement you may make for us in adjusting the matter at point of destination," knowing that the agent had an allied house in Chile, it was held that the agent was authorized to make the settlement through his house in Chile. Williamson v. North Pacific Lumber Co., 38 Or. 560. See also, cases under *Delegation of Authority.*

[38] Huber v. Zimmerman, 21 Ala. 488, 56 Am. Dec. 255; Scarborough v. Reynolds, 12 Ala. 252; Michigan Central R. R. Co. v. Gougar, 55 Ill. 503; Mayor, etc. v. Dubois, 65 C. C. A. 590, 132 Fed. 752.

[39] Even though it be done merely for the purpose of enabling the assignee to sue upon it. Rigby v. Lowe, 125 Cal. 613. But where the agent's authority over a claim for injuries received in a collision is not limited merely to a settlement, but he is given full power concerning the claim, it is held, that he may, if suit is necessary, employ an attorney and make a contract with him which should include assigning to him a

nor can he pledge them in order to indemnify a surety for his principal.[40]

So a power of attorney authorizing certain persons to "bring suit for, settle up, compromise, release, obtain or recover interest belonging to and owned" by the principal "in all lands or other property" situated in certain counties, gives them no implied authority to sell and convey the lands.[41]

§ 1025. May not assign or transfer proceeds.—When the agent has made the settlement authorized, and has received the proceeds thereof, if any, his authority in the matter will, ordinarily, be exhausted, the proceeds will become the property of the principal, and the agent will usually have no implied authority to deal further with them. Thus, if he has received a conveyance of land for his principal, he would have no implied authority to sell and convey the land. If he has received a promissory note or a check payable to the order of the principal, he will, like the agent to receive payment, already referred to,[42] have ordinarily no implied authority to indorse and transfer the note, or to indorse and collect the check.[43]

X.

OF AN AGENT AUTHORIZED TO BORROW MONEY.

§ 1026. When the authority exists.—As has been pointed out in a preceding section,[44] the power to borrow money on the principal's account, is everywhere regarded as a dangerous one, not readily to be implied. As has there been seen, it cannot usually exist unless it has been expressly given, or is justified by an established course of dealing, or is practically indispensable to the execution of some main authority conferred.[45] It is, of course, not impossible that the power to borrow may be implied, and, stated affirmatively, it may be, where the

share in the cause of action to secure his fees. Tabet v. Powell (Tex. Civ. App.), 78 S. W. 997.

[40] Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612.

[41] Connor v. Parsons (Tex. Civ. App.), 30 S. W. 83.

[42] See *ante*, §§ 952, 953.

[43] Jacoby v. Payson, 91 Hun (N. Y.), 480.

[44] See *ante*, §§ 1001, 1002.

[45] See cases cited in § 1002, *ante*. See also, Hawtayne v. Bourne, 7 Mees. & Wels. 595; Martin v. Great Falls Mfg. Co., 9 N. H. 51; Ladd v. Indemnity Co., 128 Fed. 298, aff'd 135 Fed. 636; Chicago, etc., Ry. Co. v. Chickasha Nat. Bank, 98 C. C. A. 535, 174 Fed. 923; Consolidated Nat. Bank v. Pacific Coast S. S. Co., 95 Cal. 1, 29 Am. St. R. 85; Merchants Nat. Bank v. Nichols, 223 Ill. 41, 7 L. R. A. (N. S.) 752.

conduct of the principal or the course of dealing of the parties reasonably justifies it,[46] or perhaps, where it is practically impossible that the purpose contemplated should be accomplished without its exercise.[47] As in other cases based upon alleged emergency, the possibility of

[46] See Howe v. Finnegan, 61 App. Div. 610.

Authority to expend money does not justify borrowing money. Johns v. Cummings, 11 W. Austr. L. R. 14. A mere clerk in the office of a manufacturing company has no implied authority to borrow money for the company; and no appearance of authority can arise from the fact that he had, on a numer of occasions, borrowed money, under special circumstances, if the lender did not know of, or rely upon that fact. Martin v. Great Falls Mfg. Co., 9 N. H. 51.

No ostensible authority results from previous borrowing of which the principal was ignorant. Consolidated Nat. Bank v. Pacific Coast S. S. Co., 95 Cal. 1, 29 Am. St. R. 85.

The fact that defendants had honored several drafts drawn by his traveling salesman for personal expenses and indorsed at his request by plaintiffs while he was yet in defendant's employment, did not bind defendant to pay another draft drawn and indorsed by the same parties after his discharge even though plaintiffs had no knowledge of such discharge. Groneweg v. Kusworm, 75 Iowa, 237, following Baudouine v. Grimes, 64 Iowa, 370.

Where a principal entrusts an agent with securities and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities and fraudulently appropriates the difference (the lender acting *bona fide* and in ignorance of the limitation), the principal cannot redeem the securities without paying the lender all he has lent. Brocklesby v. Bldg. Society, [1895] App. Cas. 173. To same effect is Robinson v. Brewery Co., [1896] 2 Ch. 841, where an agent, authorized to borrow £3000 and entrusted with securities worth £8000, actually borrowed £6000, paid £3000 to his principal and kept the balance himself.

Authority to purchase for cash or on credit, and to make or indorse negotiable paper in connection with a business, does not imply authority to borrow generally. The language of the instrument is construed narrowly, and the power to make notes is limited to the scope of the business. Bryant v. Banque du Peuple, [1893] App. Cas. 170; Jacobs v. Morris, [1901] 1 Ch. 261, affirmed in [1902] 1 Ch. 816.

In Sublette v. Brewington, 139 Mo. App. 410, a principal made a note payable to the order of his agent for the purpose of enabling the agent to procure a loan. The agent failed to dispose of the note; and, when the principal asked for it, said that it had been destroyed. Thereafter the agent borrowed money, and delivered the note without indorsement as collateral security. The lender knew nothing of the agency or of the circumstances of the making of the note. *Held*, that the principal was liable, on the ground that he had equipped the agent with indicia of ownership.

[47] In Hawtayne v. Bourne, 7 M. & W. 595, Alderson, B., said: "There is no rule of law that an agent may, in a case of emergency suddenly arising raise money and pledge the credit of his principal for its repayment." Parke, B., to same effect. In this case, the managing agent of a mine, who, without applying to his principals, borrowed money in their name to pay the workmen, so as to prevent the closing of the mine by executions obtained by them, was held not authorized.

But see Bickford v. Menier, 107 N. Y. 490.

communicating with the principal and securing his directions, would usually have to be excluded before the authority would arise.

Authority to borrow, as an incident to the power to manage, has been considered in a preceding subdivision.[48]

§ 1027. What execution authorized.—An agent authorized to borrow may be, and usually is, limited as to the amount, time, security, rate of interest and the like, and often as to the person with whom he shall deal. Where he is so limited, and the limitations are not simply secret instructions, the principal will not be bound where the authority is exceeded.[49] If, however, he has a general authority to borrow, or, though his authority is not general, if he is not limited in these respects, or, if any actual limitations are not such as the lender is bound to know, then the agent would apparently be authorized to select the lender, determine the amount, and agree upon the other terms,[50] subject only to the limitation of what is apparently fair and reasonable.[51]

[48] See *ante*, § 1001.

[49] Walsh v. Hunt, 120 Cal. 46, 39 L. R. A. 697 (where agent fraudulently altered the note before delivery). See also, Bryce v. Massey, 35 S. Car. 127, where there was a limited authority.

Where a person is deceived into giving to an agent a deed of land running to a third person, in order that a loan may be obtained from him for the owner, and the agent fraudulently uses it as security for outstanding debts of his own, the principal is not bound. McDonald v. Cool, 134 Cal. 502.

[50] Where the authority to borrow is known to be subject to a fixed pecuniary limit, then, under the doctrine of Mussey v. Beecher, 3 Cush. (Mass.) 511, *ante*, § 761, the principal would not be bound if that limit were exceeded. If, however, the authority is limited to be exercised only upon some condition, the existence of which is peculiarly within the knowledge of the agent, then, under the doctrine of Bank of Batavia v. New York, etc., R. Co., 106 N. Y. 195, 60 Am. Rep. 440, *ante*, §§ 759, 760, the principal would be bound though the condition did not in fact exist. The same rule would apply where the question was whether the money was being borrowed for the principal's benefit, or for use in his business, and the like. North River Bank v. Aymar, 3 Hill (N. Y.), 262, *ante*, §§ 759, 760.

And where an agent who was authorized to borrow money to carry on his principal's business, borrowed money ostensibly for that purpose but but upon somewhat unusual terms the House of Lords, in refusing to reverse the findings of the lower courts, *held*, that if, in an emergency, the agent might properly have made such a loan and upon such terms, it was not necessary for the lender to enquire whether or not the emergency had arisen in the particular case, and that if the money was advanced in good faith without notice that the agent was exceeding his authority, the principal would be liable. Montaignac v. Shitta, 15 App. Cas. 357.

[51] Agents authorized merely to borrow would not be justified in an ordinary case, in paying bonuses or premiums or high rates of interest or in adopting any other extraordinary means of raising the money, without special authority. Shaw v. Stone, 55 Mass. (1 Cush.) 228. But

The authority, of course, is presumptively to be exercised only for the principal's benefit and in his business.

An agent authorized to borrow money and given a very broad authority to execute notes and mortgage as security therefor, may, it is held, obtain it by procuring accommodation notes from the lender,—the proceeds of which the principal receives,—and giving to the lender the principal's notes, secured by mortgage, as security.[52]

§ 1028. Authority to give necessary securities.—A general authority to borrow would include, by implication, it is said, authority to give the lender, in the name of the principal, the appropriate and ordinary securities for the sum borrowed;[53] though it is obvious that this rule must, in certain cases, be subject to necessary exceptions; and that, where pledges, or mortgages of property are involved, it must in many cases be qualified by such considerations as the necessity of authority under seal or authority in writing.

Powers of attorney to borrow money upon the security of land, usually include the power to mortgage in express terms; but even if it were otherwise, the authority to make the necessary instruments would be implied. Where choice as to the form of the security is open, no particular form having been specified, the attorney may adopt any usual and proper form.[54]

it would be otherwise where the local conditions justify it. Montaignac v. Shitta, 15 App. Cas. 357.

A bank desiring to obtain a loan or deposit of state funds offered a bond with certain sureties; the state treasurer objected to this bond, and another was executed with all but one of the sureties upon the first bond, and certain others. The treasurer objected to this one also. To procure the money, the cashier delivered both bonds. A surety on both bonds defended on the ground that the authority of the agent to deliver the first bond terminated with the rejection of it. *Held*, that the surety was liable. The court said that the refusal to loan upon the first bond only was not necessarily a rejection of it; but that, even if it had been, the whole matter was in the hands of the agent, and he was authorized to renew the application with the added security. Young v. Union Sav. Bank & Trust Co., 23 Wash. 360. See Anglo-Californian Bank v. Cerf, 147 Cal. 393.

[52] Burnet v. Boyd, 60 Miss. 627.

[53] Hatch v. Coddington, 95 U. S. 48, 24 L. Ed. 339; Belknap v. Davis, 19 Me. 455.

Authority to borrow money, and secure its payment by a note and mortgage justifies the agent in executing a note with such terms as are usual and proper, and in securing it by a mortgage with all necessary and usual covenants. Richmond v. Voorhees, 10 Wash. 316.

Where an agent is given a deed to secure a loan from a bank, the agent may agree that the security shall cover future advances as well as past, this being a reasonable agreement under the circumstances. Anglo-Californian Bank v. Cerf, 147 Cal. 393.

[54] Posner v. Bayless, 59 Md. 56. *Held* here that an agent who was au-

§ 1029. Authority to receive the money.—One employed merely to negotiate a loan to his principal and not entrusted with the securities to be delivered, would ordinarily have no implied power to receive the money;[55] but such a power could be given him expressly[56] and would ordinarily be implied if he were entrusted to deliver the securities upon whose delivery the money was to be received.[57]

thorized to sell, lease, or mortgage land, was, in giving security for money borrowed, not to be confined to a formal mortgage, but might convey in fee and take back a redeemable lease.

Authority to change securities.—A principal, for the purpose of raising money, placed in the hands of her agent a note and mortgage made out to D; the loan, was not effected but the principal allowed the papers to remain in the custody of the agent. The principal, in pursuance of a sale, had placed with the vendor certain stock to secure the purchase price on an agreement that the form of security could be changed. In this transaction the agent had acted. The agent induced D to assign the note and mortgage to the vendor, and with these papers so assigned the agent effected an exchange of the mortgage for the stock as permitted by the contract of sale. The vendor who accepted this mortgage had no knowledge of the facts. *Held* that the note and mortgage were binding upon the principal. Brown v. Brown, 96 Ark. 456.

[55] See Henken v. Schwicker, 174 N. Y. 298; Higgins v. Moore, 34 N. Y. 417.

[56] In Edinburgh American Land Mortgage Co. v. Peoples, 102 Ala. 241, one P, desirous of obtaining a loan, applied to M, a local loan broker, to effect the loan, and signed this application: "I agree to pay M as my attorney a reasonable fee for taking this application, conducting correspondence, and making ample abstract of my land *and in securing and paying over the money.*" M procured a loan, received the money, and embezzled it. *Held*, that the loss should fall upon P who had by the writing authorized M to receive the money. A like decision on virtually the same facts is found in America Mortgage Co. v. King, 105 Ala. 358, and to same effect, see Hamil v. American Freehold Co., 127 Ala. 90.

But in Land Mortgage Co. v. Preston, 119 Ala. 290, where no express application appeared, the broker was found on the facts not to be the agent of the borrower to receive the money. P applied to M a local broker to obtain a loan; the broker made application to the Alabama Loan Co., which was acting as general agent of several foreign investment companies, one of which was the lender in controversy. The notes and mortgage made out to the lender were forwarded to the Alabama Co., which notified the lending company of the receipt of the papers and was thereupon authorized to appropriate some of its funds in Alabama to the execution of the loan. The Alabama Co. in so doing paid the money to M who absconded with it. *Held*, that the Alabama Co., in paying over the money, was the agent of the lender, and that the loss caused by not paying over to the borrower P, or to an agent of P, must fall on the lender.

[57] Murphy v. Beeker, 101 Minn. 329; Henken v. Schwicker, 174 N. Y. 29; Pepper v. Cairns, 133 Pa. 114.

In Henken v. Schwicker, *supra*, the defendant, whose land was already mortgaged, applied to a broker to procure a new mortgage. The broker induced the plaintiff to advance the money, provided that a

§ 1030. Liability of principal for money borrowed without authority.—Where an agent borrows money having no authority whatever to borrow, or where, having some authority, he borrows in excess or disregard of limitations or conditions with knowledge of which the lender is charged, the principal cannot be held liable upon the contract,[58] unless, with full knowledge of the facts, he ratifies the act. That there may be such ratification is clear,[59] although, as is pointed out in an earlier section, the principal does not ratify merely by receiving a benefit, unless the benefit be received under circumstances indicating a confirmation of the act.[60]

first mortgage be given to secure the loan; the broker promised the plaintiff that a first mortgage would be given, whereupon the plaintiff gave a check for the amount payable to the broker. The defendant, when apprised of the fact that a loan had been obtained, and that a first mortgage must be given, told the broker to pay off the existing mortgages, and delivered to the broker at the same time a new bond and mortgage. The broker used the funds for his own purposes without satisfying the old mortgages, and the question in suit was upon whom this loss should fall. *Held:* (1) that the broker was the defendant's agent to procure a loan, *i. e.*, to produce a person ready to make a loan; (2) that, in paying the broker by check, the plaintiff made the broker his agent to see to the conveyance of the cash; (3) that finally when the defendant learned that the money was in the broker's possession, the defendant's instruction to pay off the old mortgages and to deliver the new bond and mortgage constituted the broker the agent of the defendant, and consequently a defalcation occurring thereafter and incident to the broker's last employment must be borne by the defendant.

But in Figley v. Bradshaw, 35 Neb. 337, the intermediary who effected the loan was held to be the agent of the lender at the time the misappropriation occurred. Here B applied to C for a loan, B was to a give a mortgage on premises which were already subject to liens. The lender gave C a draft, made payable to B, and instructed C to see that the liens were released. B endorsed the draft and left it in C's possession who said that he was to satisfy the liens out of the same. C cashed the draft and absconded with the proceeds. *Held*, that the loss fell on the lenders.

[58] See Spooner v. Thompson, 48 Vt. 259.

[59] Kirklin v. Atlas Sav. & L. Ass'n, 107 Ga. 313; Frye v. Menkins, 15 Ill. 339; Fitch v. Steam Mill Co., 80 Me. 34; Mohrfeld v. Bldg. Ass'n, 194 Pa. 488.

Where the principal, after receiving knowledge, voluntarily retains the money borrowed on his account, though he may not have had knowledge at the time he received it, this will ordinarily be evidence of a ratification. See Fitch v. Steam Mill Co., *supra;* Bank of Lakin v. National Bank of Commerce, 57 Kan. 183 (the general rule formulated by the court in this case is too wide); Willis v. St. Paul Sanitation Co., 53 Minn. 370; Perkins v. Boothby, 71 Me. 91; McDermott v. Jackson, 97 Wis. 64; Collins v. Cooper, 65 Tex. 460. See also, Calnan Constr. Co. v. Brown, 110 Iowa, 37.

Knowledge is essential. Thompson v. Laboringman's Merc. & Mfg. Co., 60 W. Va. 42, 6 L. R. A. (N. S.) 311; Swindell v. Latham, 145 N. C. 144, 122 Am. St. R. 430.

[60] See *ante*, § 437.

Where no authority or ratification can be shown, any recovery which may be had must be based on *quasi*-contractual principles, or upon some theory of equitable subrogation to the rights of those whose valid claims against the principal have been discharged with the lender's money.[61]

XI.

OF AGENT AUTHORIZED TO LEND MONEY.

§ 1031. When authority exists.—The authority of an agent to lend money for his principal may, like many others already considered, be conferred expressly, or arise by implication from the conduct of the principal or an established course of dealing. It would also, in many cases, be an incident to the authority of an agent given general authority to manage a business in which the loaning of money was a regular and customary occurrence.

An unauthorized loan may, of course, be subsequently ratified, and the ratification may be effected in a great variety of ways, as for example, by knowingly accepting and retaining the proceeds of a loan.[62]

§ 1032. What execution authorized.—Like the agent to borrow, the agent authorized to lend may be, and often is, limited with respect of the amount of the loan, the rate of interest, the kind of security, or the particular person; and limitations of this sort where they are known, or where the borrower is charged with notice of them, would be binding upon the borrower, unless the lender should waive them.

But where no such limitations are imposed, or where (what is the same thing so far as the borrower is concerned), the agent is held out as having general authority to lend, the principal would be bound by the acts of the agent in fixing the amount, the time, the rate of interest, and the like, in selecting the borrower and in agreeing upon the

[61] Thus in Bannatyne v. MacIver, [1906] 1 K. B. 103, 2 Br. Rul. Cas. 735, it is said by Romer L. J.: "Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority, though it turns out that his act has not been authorized or ratified or adopted by the principal, then, although the principal cannot be sued at law, yet in equity to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal." Citing *In re* Wrexham, etc., Ry. Co., [1899] 1 Ch. 440.

See also, Reversion Fund & Ins. Co. v. Maison Cosway, [1913] 1 K. B. 364, where Bannatyne v. MacIver, is explained and applied.

[62] See First Nat. Bank v. Oberne, 121 Ill. 25.

form of security, subject, in all of these cases, to the limitation of what is ordinary and reasonable in such cases.[63]

§ 1033. Authority to take usurious interest.—An agent authorized to loan money is presumed to be authorized to loan for lawful interest only, and he can therefore have no implied authority to stipulate for usurious interest, or for bonuses or commissions which with the interest stipulated for will make the interest usurious. If in such a case the agent does stipulate for usurious interest under the guise of commissions or otherwise, the principal who has not authorized it, and who is ignorant of it, and who has not participated in the act or ratified it, cannot be affected by the unlawful act of his agent.[64]

§ 1034. Authority to receive payment.—As has been seen in an earlier section,[65] authority to receive payment of either principal or interest, does not arise from the mere fact that the person who received the payment had been agent to negotiate the loan, or from the fact that the money was payable at his office; but where in addition to the fact that he negotiated the loan, it appears that the principal has also entrusted him with the possession of the securities, an appearance of authority will arise which will continue as long as such possession continues. Other situations have also been there considered.[66]

§ 1035. Authority to extend time or change terms.—An agent authorized merely to make a loan of money, would ordinarily have no implied authority to afterwards extend the time, or otherwise change the terms or conditions of the loan.[67] It may appear, however, that

[63] Where an agent of a building and loan association in making a loan agrees that, if a person who already has a first mortgage upon the property, will agree to make his mortgage second, the company will see that all the money which it loans will be used in making improvements upon the land, and he does so, the company is bound. Wayne Build. & L. Ass'n v. Moats, 149 Ind. 123.

So where the agent of the lender agrees that if the borrower, instead of paying off an existing mortgage and giving a new one for the entire amount borrowed, will consent to the assignment of the existing mortgage and the execution of a new one for the difference only, the lender upon receiving the assignment of the first mortgage will release a portion of the land covered by it, the lender is bound by the agreement. Gross v. Milligan, 176 Mass. 566.

[64] See Franzen v. Hammond, 136 Wis. 239, 128 Am. St. R. 1079, 19 L. R. A. (N. S.) 399; and many other cases cited *post*, Book IV, Chapter V, *Liability of Principal for Criminal and Penal Acts of his Agent.*

[65] See *ante*, § 934.

An authority given to reloan money already loaned would imply authority to receive payment of the first loan. Wales v. Mower, 44 Colo. 146, 96 Pac. 971.

[66] See *ante*, § 935.

[67] See Garth v. Runner (Ky.), 121 S. W. 681, where a mere loan agent was held to have no implied authority to release liens or accept new securities in substitution for those agreed upon and received.

his authority over the whole subject has been made so general as reasonably to warrant the inference of such an authority [68] or he may be so held out as possessing it as to estop the principal from denying it.

§ 1036. No authority to loan to himself.—Like other agents, the agent to loan has no implied authority to loan to himself either directly or indirectly, without the principal's full knowledge and consent,[69] and if he does so the principal may repudiate the transaction or affirm at his option.

§ 1037. Authority to purchase securities.—It has been held, that authority to loan his principal's money does not authorize the agent to purchase a promissory note; [70] but if the note were one of the kind upon which the agent would have been justified in loaning the money it is difficult to see any serious objection to it.

XII.

OF AGENT AUTHORIZED TO BIND PRINCIPAL AS SURETY.

§ 1038. When authority exists.—Authority to bind the principal as surety upon the obligation of a third person is, like certain others already considered, a dangerous one which ought not lightly to be inferred. The act is usually one done for accommodation merely, outside of the scope of the principal's business, for which he receives no consideration, and which subjects him to risk for the acts and faults of others over whom he has no control. In a few states, as has been seen,[71] statutes expressly require such an authority to be conferred by

[68] Hurd v. Marple, 2 Ill. App. 402. See also, Moore v. Gould, 151 Cal. 728, where authority to renew or extend was found to exist under a broad power of attorney authorizing the agent to do any kind of business for the principal.

[69] See Keyser v. Adair, 127 Mo. App. 62. Here an agent authorized to loan money desired to borrow it for himself and his father; he made out a note leaving the name of the payee in blank; he and his father signed it; he then went to defendant and others and induced him and them to sign it as sureties upon his representation that the loan was to be for the benefit of a certain well known firm for whom defendant had acted as surety before; then he filled in the name of his principal as the payee and delivered the note to him telling him that the loan was being made to the persons who were really the sureties, and the principal advanced the money upon this understanding. The note not being paid, the principal sued; the defendant, one of the sureties, defended upon the ground that the misrepresentations made to him as to the real borrower were the misrepresentations of plaintiff's agent. *Held*, that when the agent undertook to borrow this money for himself and his father, his agency for the plaintiff ceased, and that defendant could not defend upon the grounds stated.

[70] Silvers v. Hess, 47 Mo. App. 507.

[71] See *ante*, § 225.

writing;[72] but, in the absence of such a statute, parol authority is sufficient.[73] And even the parol authority need not be express: it may be conferred by conduct, or be inferred from circumstances,[74] though, as has been suggested, the inference should not be drawn unless the circumstances clearly and fairly warrant it.

§ 1039. Authority strictly construed.—Powers of attorney to sign one's name as surety to obligations are properly subjected to a strict interpretation. As said in one case,[75] "the agent can do nothing which he is not expressly authorized to do by the instrument which is the exclusive source of his authority to act at all." If he is authorized to sign at a given time, or for one purpose, or for a stated amount, or for a particular person, he cannot bind his principal by signing at another time, or for a different purpose, person, or amount.[76] If he is authorized to sign an obligation with certain conditions, he cannot bind the principal where the conditions are different. Where he is authorized to sign upon one occasion, the authority is exhausted with its execution and cannot be treated as a continuing authority.[77]

Where a power of attorney authorized the execution, for an executor, of "the bond required by the court," but the bond as executed contained also some provisions not required by the law, it was held

[72] As in Kentucky. See, Ky. Stat. 1899, § 482. Simpson v. Commonwealth, 89 Ky. 412; Dickson v. Luman, 93 Ky. 614; Wilson v. Linville, 96 Ky. 50; Ragan v. Chenault, 78 Ky. 545.

[73] Banister v. Wallace, 14 Tex. Civ. App. 452.

[74] See Miller v. Farmers' State Bank, — Ind. App. —, 100 N. E. 119.

[75] Stuart v. Commonwealth, 91 Va. 152.

[76] Stovall v. Commonwealth, 84 Va. 246 (authority to sign bond for $25,000, bond for $40,000 not binding); Dugan v. Champion, etc., Co., 105 Ky. 821 (authority to sign bond for $6,000, bond for $8,667 not binding); Lovett v. Sullivan, 189 Mass. 535; authority to sign a guaranty of payment of X's bills during X's minority will not authorize execution of a guaranty to continue until cancelled by the guarantor.

In Redd v. Commonwealth, 85 Va. 648, a man who had been elected county treasurer was required to give a bond. A number of persons gave powers of attorney to sign their names as his sureties. These powers were unconditional and unambiguous. He did not qualify under the election, and a vacancy ensued. He was apointed to fill this vacancy, and these powers of attorney were used in making his bond to fill the vacancy. *Held*, that the sureties could not show that they intended the powers of attorney to be used only in making the bond under the election.

A power of attorney executed September 23, 1894, authorizing the execution of a bail bond for appearance at January term, 1894, held to be a clerical error and to authorize a bond for the January term, 1895. Commonwealth v. Perkins, 17 Ky. L. R. 542, 32 S. W. 134.

[77] Stuart v. Commonwealth, *supra*.

that these extra provisions, which were severable, could be disregarded and the bond held valid as an execution of the power.[78]

XIII.

OF AGENT AUTHORIZED TO EMPLOY.

§ 1040. What here included.—The general questions of the delegation of authority by agents and their power to appoint subagents, have already been considered in another place.[79] The general question also of the agent's authority, not to delegate his own authority, but to employ other agents and servants for his principal, which is an entirely different one, has also been somewhat considered in the same chapter.[80] A few general rules upon the subject seem appropriate in this place, and will be given.

§ 1041. When authority exists.—Authority to employ agents and servants for the principal may, of course, be expressly conferred, or may arise by implication as a usual or necessary incident of some other authority conferred.[81] Thus, as has been already seen, an agent to sell, may often employ a broker;[82] an agent to collect, has often implied authority to employ an attorney;[83] the general manager of a business placed in complete charge thereof would ordinarily have implied authority to employ the necessary help;[84] and the foreman of a shop or farm may have such a general authority over its conduct as to authorize him to do the same.[85] Even where there was no precedent

[78] Yost v. Ramey, 103 Va. 117.

[79] See *ante*, § 304, *et seq.*

[80] See *ante*, § 334, *et seq.*

But neither evidence of authority to make a particular contract for the digging of a well nor evidence of a general authority as manager to enter into such contracts is sufficient to prove authority in the agent to dig the well himself, or to employ workmen to do it. Mundis v. Emig, 171 Pa. St. 417.

The employment of a person to collect the rents of a building does not give him authority to employ an engineer to take charge of the engine in such building. Crozier v. Reins, 4 Ill. App. 564.

In Nielsen v. Northeastern Co., 40 Wash. 194, an agent authorized to solicit prospectors to engage in the service of the principal was held to have no authority to make binding contracts of employment.

In Murphy v. Knights of Columbus Bldg. Co., 155 Mo. App. 649, the defendant company, being desirous of building, appointed a real estate committee with R as chairman, and instructed them "to go out and find an available site." R employed the plaintiffs (real estate brokers) who found for the company a satisfactory site. *Held* that R had implied authority to employ the plaintiffs.

[82] See *ante*, § 316.

[83] See *ante*, § 316.

[84] See *ante*, § 988.

[85] The mere fact that one is "foreman" of a gang of men does not establish his authority to employ such men. Bonnell v. State, 64 Ind. 498; Langston v. Postal Tel. Co., 6 Ga. App. 833.

authority, an employment may, of course, be made good by subsequent ratification,[86] or the principal by his conduct may estop himself from denying its existence.[87]

§ 1042. ——— As a general rule, however, it is entirely clear that one agent or servant has, from his mere position as such, no implied authority whatever to employ other agents or servants on his principal's account.[88] What servants or agents the principal shall have (for and to whom he is to assume responsibility), how and when they shall be selected, upon what terms and subject to what conditions, limitations or control they shall operate, and the like, are questions of the greatest importance, which the principal must ordinarily have the right to determine for himself. Unless it can be shown, therefore, that the principal has expressly or by proper implication given the authority to some one else, it must be deemed to reside in him alone.

Neither does the mere fact of some sudden emergency or exigency ordinarily alter the rule. The principal or master is usually the one to whom the emergency shall be reported and who shall decide how it shall be met.[89] If he is where he cannot be communicated with, either at all or in time to act, a narrow authority, limited by the exigency, may be recognized.[90]

This latter doctrine more readily operates where the agent or servant who undertakes to employ is one charged with some degree of

[86] For evidence held insufficient to show authority or ratification, see Findlay v. Hildenbrand, 17 Idaho, 403, 29 L. R. A. (N. S.) 400.

[87] See Haluptzok v. Great Northern Ry. Co., 55 Minn. 446, 26 L. R. A. 739; Pardridge v. La Pries, 84 Ill. 51; Spencer Lumber Co. v. Marsh, 99 Ark. 358; Trollinger v. Fleer, 157 N. Car. 81.

[88] See *ante*, § 334, *et seq.* In the absence of an emergency, at any rate, the conductor of a freight train has no implied authority to employ assistants upon the train. St. Louis, etc., Ry. Co. v. Jones, 96 Ark. 558, 37 L. R. A. (N. S.) 418.

A railroad station agent has no implied authority to employ persons to guard the depot and other property there of the company. Lipscomb v. Houston, etc., Ry. Co., 95 Tex. 5, 93 Am. St. R. 804, 55 L. R. A. 869.

A physician engaged to attend an injured employee has no implied authority to employ assistants. Bond v. Hurd, 31 Mont. 314, 3 Ann. Cas. 566.

[89] Gwilliam v. Twist, [1895] 2 Q. B. 84.

[90] See Aga v. Harbach, 127 Iowa, 144, 109 Am. St. R. 377; Marks v. Rochester R. Co., 146 N. Y. 181; Goff v. Toledo, etc., R. Co., 28 Ill. App. 529; East Line, etc., R. Co. v. Scott, 71 Tex. 703, 10 Am. St. R. 804; Johnson v. Ashland Water Co., 71 Wis. 553, 5 Am. St. R. 243.

For the liability of the master for the negligence of a stranger assisting a servant, see *post*, Book IV, Chap. V.

management or control, and to whom some measure of discretion in dealing with emergencies may fairly be imputed.[91]

§ 1043. What employment authorized.—The authority of the agent to employ, may be either general or special. Where his authority is general, or apparently general, he may bind his principal by contract within the range of what is usual and reasonable in such cases.[92] In deciding upon the quality or the quantity of the help to be employed, his range would be determined by the apparent, rather than by the actual need, where these were different. In fixing the duration of the employment he may agree for such a length of time as would, "under all the circumstances, be reasonable, considering the nature of the business, the season of the year in which it is usually prosecuted, and the length of time it is likely to take to complete the work." [93] In fix-

[91] Conductor of a train may in an emergency employ a brakeman, fireman and the like. Georgia Pac. Ry. Co. v. Probst, 85 Ala. 203; Sloan v. Central Iowa Ry. Co., 62 Iowa, 728; Fox v. Chicago, etc., Ry. Co., 86 Iowa, 368, 17 L. R. A. 289.

[92] In Farrington v. Hayes, 65 Vt. 153, defendant telegraphed his agent, "Employ Farrington and Post. Letter will follow." The agent employed F and B in accordance with the telegram, not knowing of any restriction in the letter, but showed F and B the telegram. The letter when it arrived contained instruction not to employ F and B unless they would do the work for $500. The agent never showed the letter to F and B, and they did work worth $1,720. *Held*, that the authority conferred by the telegram was absolute; that F and B were entitled to the reasonable value of their services; and that the statement that, "letter will follow" did not put them upon inquiry as to the agent's authority.

A special and temporary authority to employ men to work at a particular place (*e. g.* in a certain town) does not justify the employment of men to work at a different place (*e. g.*, in another town or city). Williams v. Kerrick, 105 Minn. 254.

In Beaucage v. Mercer, 206 Mass. 492, 138 Am. St. R. 401, it is said: "If, for instance, the authority real and apparent of Eagen [the agent who employed] was limited to the selection of only the necessary number of men, and he selected more, then the surplus men could not be regarded as the servants of the defendant; but if Eagen was empowered to send as many men as he thought necessary and acting under such authority he sent such men as he thought necessary but more than in fact were necessary, or if he was empowered to send as many men as he pleased and sent more than were necessary, in either case all the men so sent would be the servants of the defendant whether or not they were in fact needed."

[93] Drohan v. Merrill & Ring Lumber Co., 75 Minn. 251, where an employment for three winter months of a blacksmith and "handy man" in a lumber camp was held to be reasonable.

In World's Columbian Exposition v. Richards, 57 Ill. App. 601, an employment for the six months that the exposition was to remain open was held justified.

In Williams v. Getty, 31 Pa. 461, 72 Am. Dec. 757, it is said, "If it were such a business as it was apparent would last but six months, a contract for a year doubtless would not be binding on the principal, be-

ing the rate of compensation, where no other terms were prescribed, he would be governed by the market or customary rate or if none, by a reasonable rate.[94]

XIV.

OF AGENT AUTHORIZED TO SHIP GOODS.

§ 1044. How authority arises.—The authority of an agent to ship goods, like that of other agents already considered, may be conferred expressly, or it may result from conduct or an established course of dealing.[95] An unauthorized shipment may also be rendered valid by a subsequent ratification.[96]

cause the party employed would be acting in bad faith, in undertaking when it was apparent he would not be needed; and besides it would be equally apparent that such a contract was not necessary to the accomplishment of the object. So, if the business were such as would apparently last for months, an employment for one or more months would seem to all to be covered by the agent's implied authority, and would bind."

In Cohen v. Goldstein, 128 N. Y. Supp. 69 an agent with authority to hire was held to have power to hire for one year.

In Laming v. Peters Shoe Co., 71 Mo. App. 646, a hiring for one year was sustained.

In Roche v. Pennington, 90 Wis. 107, a general agent's undertaking, upon hiring an employee for a year, to take the risk of the employe's competency was sustained.

In Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242, an agreement by the superintendent to give the employee an interest in the business was held not to be within his power.

[94] Cross v. R. R. Co., 141 Mo. 132. In the Ala. Great South. R. Co. v. Hill, 76 Ala. 303, it was said, "Power to employ an agent or servant, if there be no restrictive words, includes the authority to make a complete express contract, definite as to the amount of wages, as upon all other terms."

In Opinion of Justices, 72 N. H. 601, it was said, "Authority to employ agents and other persons necessarily implies power to contract with them for their compensation according to the method usual in matters of the kind."

Authority to employ would justify fixing a fair compensation, but not an agreement that the principal would also pay what was then owing to the employee by his former employer. Ricker Nat. Bank v. Stone, 21 Okla. 838. See also Holloway v. Stephens, 1 Hun (N. Y.), 380, 2 Thomp. & Cook (N. Y.), 562; where an extravagant contract was held unauthorized.

[95] See Hix v. Eastern S. S. Co., 107 Me. 357. *No authority to ship.*—The mere employment of a teamster to haul goods to a warehouse does not authorize him to ship them and take a shipping receipt therefor. Zorn v. Livesley, 44 Or. 501. So where a teamster was directed to take goods to a wharf, but not directed to ship them. Seller v. Steamship Pacific, 1 Or. 409, Fed. Cas. No. 12,644.

Written authority to an agent to represent his principal "in weighing my cattle" at a certain place in pursuance of a contract of sale, does not authorize him to ship them to another town to be weighed. Mann v. Dublin Cotton-Oil Co., 92 Tex. 377.

[96] Nelson v. Hudson R. R. Co., 48

Where the principal directs an agent to ship goods to some particular place, and no other method of transportation is provided for or contemplated, and there is a public carrier over whose line such goods would naturally and reasonably be transported, the direction to ship them would ordinarily be construed as a direction to ship them by such carrier.

Where there were several such carriers, the agent would doubtless bind his principal by a reasonable choice of one.

§ 1045. How authority to be exercised—Agreeing upon terms of shipment.—It would be entirely competent for the principal to direct the agent in the choice of a carrier, and as to the terms and conditions of the contract of carriage. Such directions would of course be binding on the agent, and upon all third persons charged with notice of them.[97] An agent, however, authorized to ship, and not known to be subject to any limitations, would have apparent authority to select the carrier and agree upon the terms and conditions of carriage, subject to the limitation of what is usual and reasonable in such cases.

§ 1046. ——— Agreements limiting liability of carrier.—Thus, it has been held in many cases that an agent, entrusted with the possession of goods and authorized to ship them, and being the only person on the ground with whom any contract which it is proper to make may be made, has apparent authority to do whatever is necessary and usual in such cases; and he may therefore bind his principal by his agreements respecting the ordinary terms and conditions of the carriage, and by his execution and delivery or acceptance of the cus-

N. Y. 498; Russell v. Erie R. Co., 70 N. J. L. 808, 67 L. R. A. 433, 1 Am. & E. Ann. Cas. 672.

[97] Where the principal in person had made an oral contract with the agent of an express company for the transportation and delivery of horses within a certain definite time, and later sent the horses by agent to be delivered to this agent of the carrier, he is not bound by a shipping receipt taken by his agent which, without the knowledge or consent of the principal, contained a clause exempting the carrier from liability for loss caused by delay. Waldron v. Fargo, 170 N. Y. 130. See also, Atchison, etc., R. Co. v. Watson, 71 Kan. 696.

So an agent merely sent to ship goods has no apparent authority to ship upon different terms from those indicated by the principal's written directions which the agent brings with him. Russell v. Erie R. Co., 70 N. J. L. 808, 1 Am. & E. Ann. Cas. 672, 67 L. R. A. 433.

In Willborn v. Southern Ry. Co., 6 Ga. App. 151, an agent, authorized to carry goods to the railroad and load them, made a contract limiting the carrier's liability; the agent of the carrier knew that the person presenting the goods was not the shipper, but an agent. *Held*, that the shipper was not bound by the special contract.

tomary documents, including such releases of the carrier's liability as it is lawful and customary for the carrier to give or receive.[98]

[98] California Powder Works v. Atlantic, etc., R. Co., 113 Cal. 329, 36 L. R. A. 648; Atchison, etc., Ry. Co. v. Baldwin, — Colo. —, 128 Pac. 449; Ill. Cent. R. Co. v. Jonte, 13 Ill. App. 424; Brown v. L. & N. Ry. Co., 86 Ill. App. 140; Wabash R. Co. v. Curtis, 134 Ill. App. 409 (but see Merchants' Desp. Transp. Co. v. Joesting, 89 Ill. 152; Plaff v. Pacific Exp. Co., 159 Ill. App. 493, 251 Ill. 243); Adams Express Co. v. Byers, — Ind. —, 95 N. E. 513; Adams Exp. Co. v. Carnahan, 29 Ind. App. 606, 94 Am. St. R. 279; Hill v. Boston, etc., R. R. Co., 144 Mass. 284; Peirce v. American Exp. Co., 210 Mass. 383; Nelson v. Hudson River R. R. Co., 48 N. Y. 498; Skelton v. Transp. Co., 59 N. Y. 258; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438; Zimmer v. New York, etc., R. Co., 137 N. Y. 460; Donovan v. Standard Oil Co., 155 N. Y. 112; Root v. New York & N. H. R. Co., 76 Hun (N. Y.), 23; Smith v. Robinson Bros., 88 Hun (N. Y.), 148; Jones v. New York L. E. & W. R. R. Co., 3 N. Y. App. Div. 341; Knapp v. Wells, Fargo & Co., 134 N. Y. App. Div. 712; Addoms v. Weir, 56 N. Y. Misc. 487 (and cases cited); Smith Meat Co. v. Oregon Ry., 59 Ore. 206; Ryan v. M. K. & T. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589; Missouri Pac. Ry. Co. v. International, etc., Ins. Co., 84 Tex. 149; Head v. Pacific Express Co., — Tex. Civ. App. —, 126 S. W. 682; Oregon Short Line Ry. Co. v. Blyth, 19 Wyo. 410; Aldridge v. Gt. Western Ry. Co., 15 Com. B. (N. S.) 582. [In the similar case of shipments by the seller of goods, see McElvain v. St. Louis, etc., Ry. Co., 151 Mo. App. 126; Lewis v. Imhof, 138 Mo. App. 370.]

In Brunner v. Platt, 50 N. Y. Misc. 571, plaintiff requested an express company to send to his house and obtain and transport a suitcase. The agent called at the house, obtained the suitcase from the maid, who paid the charges, and accepted a receipt containing a clause limiting liability. *Held* that the maid was an agent to ship, within the rule. On very similar facts, it was held in Wright v. Fargo, 59 N. Y. Misc. 416, that although the maid was the agent, her mere acceptance of the receipt left with her, in the absence of any reliance upon the receipt by the principal, did not make a binding contract with the principal which would preclude a right to sue upon the carrier's common-law liability. In Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575, the agent who delivered the goods and accepted the receipt was the shipper's wife. In Missouri, etc., Ry. Co. v. Patrick, 114 Fed. 632, 75 C. C. A. 434, the wife delivered the goods, and it was held that she acted as the agent of her husband and bound him by the release, although there was evidence that she could not read and did not appreciate the terms included in the receipt. There was also evidence here of ratification and acceptance of a reduced rate given in consideration of the release.

In Oregon, etc., Ry. Co. v. Blyth, 19 Wyo. 410, where household goods had been left with a storage company for shipment, the court said, "It is not contended . . . that the storage company was not the agent of Mr. Blyth for the shipment of these goods; and in fact, no such contention could be sustained under the evidence. In such case, where the owner of goods directs his agent to ship the same without further directions or restrictions, the law implies authority in the agent to make a reasonable contract with the carrier limiting the carrier's liability." So in Addoms v. Weir, 56 N. Y. Misc. 487, where the plaintiff told the bell-boy at her hotel to take a package to Adams Express and he

§ 1047. ——— But such an agent would have no implied authority to change contracts of shipment already made by his principal,[99]

[99] Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438; Atchison, etc., Ry. Co. v. Watson, 71 Kan. 696; Northwest Transp. Co. v. McKenzie, 25 Can. Sup. Ct. 38; Wilson v. Canadian Devel. Co., 38 Can. Sup. Ct. 432.

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took a receipt limiting liability where no value was declared, it was held that he had been, by her act, constituted her agent for all purposes necessary to the shipment, and that she could not base an action upon the receipt for her goods without being bound by the contract stated in the receipt.

In Hix v. Eastern Steamship Co., 107 Me. 357, where the plaintiff had been a shipper of horses for many years and had several times accepted bills of lading signed in his name by the agent, it was *held* that he had held out the agent as having authority to bind him by the special contract embodied in the bill of lading and that he knew or ought to have known the terms of that contract.

An agent of a non-resident firm, in buying cotton and shipping it to his principal, may make any lawful and ordinary contract of shipment, and hence may agree that the carrier shall have the benefit of insurance on the goods. Missouri Pac. Ry. Co. v. International, etc., Ins. Co., 84 Tex. 149.

Shipment by truckman or drayman.—Where a drayman, whose regular duty it was to haul gunpowder to a depot for shipment, had also authority to ship it for the company to its destination, he may bind the principal by signing a shipping order limiting the liability of the carrier against loss by fire. California Powder Works v. Atlantic, etc., R. Co., 113 Cal. 329, 36 L. R. A. 648.

Compare Benson v. Oregon Short L. R. Co., 35 Utah, 241, 136 Am. St. R. 1052, 19 Ann. Cas. 803, *post.*

Plaintiff purchased a mirror, directing the seller to deliver it to defendant for transportation. Seller sent it by a cartman to defendant's depot. Defendant's agent refused to receive the mirror unless the cartman would sign a contract releasing liability for breakage. The cartman signed the contract, but on condition that defendant would not ship it until the next day, and then it should be returned if seller requested. The cartman made known the facts to the seller and delivered to him a duplicate contract. No dissent or request to return having been made by the latter, the mirror was shipped and was broken in transitu. *Held*, that the seller was authorized to make the contract on behalf of plaintiff, that there was a complete ratification by him of the cartman's acts, and that the contract made was valid and binding upon plaintiff. Nelson v. Hudson River R. Co., 48 N. Y. 498.

Part of the apparent conflict in these cases arises out of the question whether the mere acceptance of the receipt or release by shipper himself or by such drayman or truckman with authority to ship is binding as a special contract, limiting liability in the absence of any evidence of express assent. Such cases as Cohen v. U. S. Express Co., 81 N. J. L. 355; Hill v. Adams Express Co., 80 N. J. L. 604; Lansing v. N. Y. Central, etc., R. R. Co., 52 Misc. 334; Atlantic C. L. R. R. Co. v. Dexter, 50 Fla. 180, 111 Am. St. R. 116; seem to turn upon this question. In Hill v. Adams Express Co., 77 N. J. L. 19, the supreme court argued against the authority of the truckman but that case was reversed in the Court of Errors, 78 N. J. L. 333, though this court declined to pass

and the carrier could not rely upon the contract where he knew, from previous dealings with the principal, of limitations upon the agent's

upon this particular question since they found no evidence that the truckman was authorized to ship. In the final disposition of the case, in —— N. J. L. ——, 81 Atl. 859, the case is put upon the question of assent to the terms.

In Hailparn v. Joy Steamship Co., 50 N. Y. Misc. 566, the plaintiff told the truckman to deliver the goods to the defendant for shipment and get a receipt for them. The truckman took a bill of lading, giving his own name as "owner or shipper," and, at the request of the carrier's agent who knew that he was a "mere truckman," signed a release. The court held that there was no authority to bind the plaintiff by such a release.

In Benson v. Oregon Short Line R. Co., 35 Utah, 241, 136 Am. St. R. 1052, 19 A. & E. Ann. Cas. 803, the owner had employed a drayman to pack and ship the goods, and the drayman had made a contract limiting liability. *Held*, that the owner was not bound. The cases which it chiefly relies upon,—Nelson v. Hudson R. R. Co., 48 N. Y. 498, cited *ante;* Seller v. Steamship Pacific, 1 Or. 409, Fed. Cas. No. 12,644, also cited *ante;* and Russell v. Erie R. Co., 70 N. J. L. 808, 67 L. R. A. 433, 1 A. & E. Ann. Cas. 672, cited *post*, seem clearly distinguishable.

Rule in Illinois.—In Illinois, notwithstanding some conflict in the cases, it seems to be the rule that limitations upon the carrier's common-law liability can only be made when the shipper clearly assents to them; and that consequently, if the goods are shipped by an agent, his actual authority to assent to the limitations must be shown; it will not be inferred merely from his authority to ship. In the absence of any proof to the contrary, the presumption would be that he is to preserve the common-law liability, and not to waive it. See Merchants Despatch Transp. Co. v. Joesting, 89 Ill. 152; Plaff v. Pacific Express Co., 159 Ill. App. 493, 251 Ill. 243. Compare Illinois Cent. R. Co. v. Jonte, 13 Ill. App. 424; Brown v. Louisville, etc., R. Co., 36 Ill. App. 140; Wabash R. Co. v. Curtis, 134 Ill. App. 409.

Contract by initial carrier with connecting carrier.—Where goods are delivered to the first of a series of carriers, without a special contract, the initial carrier has no implied authority to put a limited valuation upon the goods when delivering them to the connecting carrier. Adams Express Co. v. Byers, 176 Ind. ——, 95 N. E. 513.

Authority of agent sent along with the goods.—A principal in an interior town in Illinois, who desired to ship property, including some horses, to a town in Minnesota, arranged for a through rate, but took a shipping receipt only to Chicago, at which place the property was to be transferred to another road. He sent an agent in charge of the property, and gave him money to pay freight from Chicago to destination. At Chicago, this agent made a contract with the second carrier, which contained a clause requiring claims for damages to be presented within 30 days. *Held*, that this contract bound the principal. Armstrong v. Chicago, etc., Ry. Co., 53 Minn. 183.

So, in a similar case, an agent sent in charge of a carload of hogs was held to bind his principal by a contract limiting the carrier's liability made at a connecting point upon the way. Squire v. New York, etc., R. Co., 98 Mass. 239, 93 Am. Dec. 162. But see Gulf, C. & S. F. Ry. Co. v. White (Tex. Civ. App.), 32 S. W. 322. But not so, where the person sent along is evidently a mere attendant, and the principal has already made on oral contract in the

authority [1] or where the contract which the agent makes is obviously at variance with the instructions which he brings with him or with the terms of a contract prepared by the principal and sent by him with the goods to be executed by the carrier.[2]

XV.

OF AGENT AUTHORIZED TO CARE FOR PROPERTY.

§ 1048. Nature and extent of authority.—The authority of an agent authorized to care for property may, according to the circumstances, range from that of general manager to that of a mere bailee. Where the agent is merely a custodian or caretaker his authority to bind the principal by contract is very limited.[3] "It is confined, at the most, to what is immediately and imperatively necessary for the protection of the premises;" and would not justify the making of extensive repairs and *a fortiori* general alterations and improvements.[4] So, authority to an agent "to take good care of the property, and give [the principal] notice of any lien," does not justify the agent in employing another person to bid in the property at a sale upon a distress warrant in such wise as to bind the principal to receive the property and pay the bid.[5] Authority to care for property will not justify selling or otherwise disposing of it [6] and the like.

matter. Atchison, etc., Ry. Co. v. Watson, 71 Kan. 696.

[1] Waldron v. Fargo, 170 N. Y. 130.

[2] Russell v. Erie R. Co., 70 N. J. L. 808, 67 L. R. A. 433, 1 Am. & E. Ann. Cas. 672, where the agent brought with him a shipping order already made out by his principal for execution by the carrier.

[3] An 18 year old daughter of a farmer, left in charge of his farm for a few hours, is not thereby authorized to resist by force an entry upon a part of the farm which has been legally condemned for public use. East Jersey Water Co. v. Slingerland, 58 N. J. L. 411.

[4] It seems that a caretaker in charge of a city house has no implied authority to order repairs made to it beyond such as are immediately and imperatively necessary for its protection; and is not impliedly authorized to order extensive plumbing repairs, as a consequence of a leak in the pipes, where turning off the water would have prevented any damage. Hill v. Coates, 34 Misc. (N. Y.) 535.

[5] Brisbane v. Adams, 3 N. Y. 129.

[6] McGraw v. O'Neil, 123 Mo. App. 691.

A porter in a garage has no implied authority to receive for safekeeping the sample case of a person who stored his car at the garage. Chesley v. Woods Co., 147 Ill. App. 588.

A person employed to care for and drive a race horse has no implied authority to receive a purse won by the horse. Snow v. Wathen, 112 N. Y. Supp. (App. Div.) 41.

A person sent to draw from the barrels and bring to his employer a few bottles of whiskey; the barrels being stored on the employer's premises, has no implied authority to deliver the barrels of whiskey to a person searching for whiskey unlawfully kept. Nash v. Noble, 46 Tex. Civ. App. 369.

As to liability of employer for false imprisonment or malicious

XVI.

OF AGENTS AUTHORIZED TO REPRESENT INSURERS.

§ 1049. Purpose of this subdivision.—It is the purpose of this subdivision to discuss briefly the construction of the authority of the agents who are appointed to represent those persons or companies who are engaged in the business of insuring others against the consequences of death, fire, accident, and other casualties. These agents are known, in popular language, as insurance agents. Although persons who desire insurance may appoint agents to represent them in obtaining it, and although such agents might be called insurance agents, they are not the ones popularly designated by that term, nor are they the ones who are here to be considered.

There is also a class of professional agents who make a business of procuring or furnishing insurance for their clients, as they may happen to be employed, but who are not the regularly appointed agents of any particular insurer. They are insurance brokers, and the questions concerning them will be dealt with in a later chapter on Brokers.[7] The discussion here, as has been stated, is confined to the agents who regularly and exclusively act for those who are to furnish the insurance.

In this country, unlike some others, the insurance business is almost, if not quite wholly in the hands of incorporated companies, organized under local laws, and extending their business frequently over wide areas and having their agents in localities far removed from the place in which the company may be located and have its chief office and officers.

By reason of the fact that the company is thus often so far away, and the local agent is the only representative of it which the insured sees or deals with, the local agent takes on, in the minds of those who deal with him, a representative character which is not possessed by agents who operate in many other fields.

The insurance business has also a characteristic not possessed by any other, in the fact that it is usually not until after a loss has happened and it is entirely too late to restore the parties to their original position, that questions arise between the parties. To deny effect at that time, is, therefore, not only to greatly disappoint expectations, but to do so only when the opportunity for making new or more satisfac-

prosecution by caretakers, see Daniel v. Atlantic Coast Line R. Co., 136 N. Car. 517, 67 L. R. A. 455, 1 Ann. Cas. 718; Thomas v. Canadian Pacific Ry. Co., 14 Ont. L. R. 55, 8 Ann. Cas. 324; and cases cited *post*, Book IV, Chapter V.

[7] See *post*, Book V. BROKERS.

tory arrangements is forever gone. The possibility of escaping responsibility for a loss incurred seems naturally to tempt the insurer to insist upon every technicality in its favor, and to make the most of every possible defence; and companies have often filled their policies with more or less obscure and narrow conditions which only come to the actual knowledge of the insured when they are urged after loss as a ground for escaping responsibility.

The making of contracts of insurance is also peculiar in this, that the average person acts without competent professional advice. If he were buying the property, he would have legal assistance, but in insuring the same property he trusts to his own judgment and the assurances which he receives from the agent of the opposite party.

As the result of these and other reasons which might be mentioned, there has developed a popular prejudice against defences by insurance companies, and a tendency on the part of courts to protect the insured wherever possible, which have tended to make the law respecting insurance agents a distinct branch of the law of agency. Doctrines which usually prevail are here often ignored, and rules of construction are here often extended, until it sometimes seems to be the fact that insurance litigation marks the vanishing point of many of the established principles of agency.

The whole question is very much in need of a thorough revision, but the field has now become so great and the number of cases to be dealt with is so enormous that it can not be undertaken here. All that will be here attempted is a brief statement of the more important rules which prevail upon the subject. No attempt to cite all of the cases will be made.

§ 1050. Classification of agents.—There is in the insurance business a variety of agents having some particular function to perform and deriving their special name from that function:—thus there is the appraiser, the adjuster, the medical examiner, etc., but these are not here to be considered. Apart from these, insurance agents as a whole may be roughly divided into two classes: 1. Issuing agents; 2. Soliciting agents. It is the scope of the authority of these agents that will be considered here.

1. The issuing agent, usually of a fire or casualty company, is an agent who is given express authority to accept risks, agree upon the terms of insurance, and carry them into effect by issuing and renewing policies. They are usually furnished with blank policies by the insurance company and are authorized to fill them up and deliver them without further preliminary consent on the part of the company. Of

such agents there are two degrees determined by the geographical limits of their authority,—the local agent, representing the company within a limited territory, and the so-called general, district, or division agent representing the company over a large territory and often having supervisory and appointive powers over the local agents within his territory.

2. The soliciting agent, often called a special agent, usually of a life insurance company, is an agent who usually has no authority to make a binding contract, but who merely solicits applications for insurance and forwards them to be passed upon at the office of his company. In addition he often countersigns the policy if issued, delivers it and collects the premium. Of such agents there are also two kinds—the general and the local, bearing the same relation to each other as the corresponding issuing agents.

§ 1051. How relationship is created.—Insurance agents are usually appointed by a written commission, but it is not necessary that they be so appointed, and the relationship of principal and agent in this case, as in others, may be created in various ways other than by specific appointment. Thus the relationship may be actually created by the course of dealing between the principal and the alleged agent;[8] it may be made to appear by the agent's being held out to the public as such;[9] or its effect may be obtained by the acceptance and ratification of his acts by the principal.[10] The statutory standard form of policy adopted in many of the states puts some limitations upon this rule, by provisions, not always uniform, that, for certain purposes at least, the agent must be authorized by writing.[11]

§ 1052. Whose agent he is.—The insurance broker, as is pointed out elsewhere,[12] is ordinarily the agent of the insured. The discussion here is confined to the authority of the admitted agent of the company.

[8] **National Mutual Church Ins. Co. v. Trustee of M. E. Church, 105 Ill. App. 143; Hamilton v. Home Ins. Co., 94 Mo. 353; Rahr v. Manchester Fire Assur. Co., 93 Wis. 355.**

[9] **Slater v. Capital Ins. Co., 89 Iowa, 628, 23 L. R. A. 181; Mannheim Ins. Co. v. Chipman, 124 Fed. 950; Hardin v. Alexandria Ins. Co., 90 Va. 413. See also, Dickerman v. Quincy Mutual Fire Ins. Co., 67 Vt. 609.**

[10] **Keith v. Globe Ins. Co., 52 Ill. 518, 4 Am. Rep. 624; The Indiana Ins. Co. v. Hartwell, 123 Ind. 177; McArthur v. Home Life Ass'n, 73 Iowa, 336, 5 Am. St. Rep. 684; Packard v. Dorchester Mutual Fire Ins. Co., 77 Me. 144.**

[11] **See Gazzam v. German Un. F. Ins. Co., 155 N. Car. 330, Ann. Cas. 1912 C. 362; Armstrong v. Western Manufac. Inv. Co., 95 Mich. 139; Burgeois v. Northwestern Nat. Ins. Co., 86 Wis. 606; Parker v. Rochester Ins. Co., 162 Mass. 479; Wood v. American F. Ins. Co., 149 N. Y. 382, 52 Am. St. Rep. 733.**

[12] **See *post*, Book V, Chap. III on Brokers.**

As such he cannot, in accordance with the ordinary rules of loyalty, become the agent of the insured also without the company's consent. Insurance companies have frequently attempted by provisions in their applications or policies, to make their soliciting agent the agent of the insured in all that he does to secure the application, but, by the weight of authority, as will be seen hereafter, such provisions are usually held to be ineffective.[13]

Statutes in several states expressly declare that one who solicits applications, makes contracts, collects premiums, etc., for insurance in a given company shall *prima facie* be deemed to be the agent of that company.[14]

§ 1053. What kind of agent he is.—The issuing agent is almost universally held, so far as the nature and extent of his authority are concerned, to be a general agent of the company,[15] and as such to have authority to bind it by any act within the usual and ordinary scope of such an authority, even though the particular act may be in violation of a limitation upon that authority not brought home to the person dealing with him.[16] This is true whether the issuing agent be local or

[13] See *post*, § 1071.

[14] See *post*, § 1071.

[15] German American Ins. Co. v. Hyman, 42 Colo. 156, 16 L. R. A. (N. S.) 77; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. Rep. 121; German Fire Ins. Co. v. Columbia Encaustic Tile Co., 15 Ind. App. 623; Miller v. Phoenix Ins. Co., 27 Iowa, 203, 1 Am. Rep. 262; Richard v. Springfield F. & M. Ins. Co., 114 La. 794, 108 Am. St. Rep. 359, 69 L. R. A. 278; Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499; Post v. Aetna Ins. Co., 43 Barb. (N. Y.) 351; Goode v. Georgia Home Ins. Co., 92 Va. 392, 53 Am. St. Rep. 817, 30 L. R. A. 842.

But see Lohnes v. The Insurance Company of North America, 121 Mass. 439; Ruthven v. American Fire Ins. Co., 92 Iowa, 316.

[16] "An agent authorized to issue policies of insurance and consummate the contract, binds his principal by any act, agreement, representation or waiver within the ordinary scope and limit of insurance business which is not known by the assured to be beyond the authority granted to the agent." American Central Ins. Co. v. M'Lanathan, 11 Kan. 533; Aetna Life Ins. Co. v. Fallow, 110 Tenn. 720.

Thus the agent's authority to bind the company is not restricted by unknown limitations that the agent is not to insure beyond a certain amount. Hartford F. Ins. Co. v. Farrish, 73 Ill. 166; unknown limitations or instructions not to insure the particular property or character of property, Howard Ins. Co. v. Owen's Admr'x, 94 Ky. 197; Hicks v. British Am. Assur. Co., 13 N. Y. App. Div. 444; unknown instructions not to insure mortgage interests, Woodbury Savings Bank v. Charter Oak, etc., Ins. Co., 31 Conn. 517; unknown limitations that the agent is not to write special risks for the present, Ruggles v. Am. Cent. Ins. Co., 114 N. Y. 415, 11 Am. St. Rep. 674; unknown instructions not to issue insurance on stocks of merchandise in the hands of married women, Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. Rep. 51; un-

general, as those terms are used in insurance, the only difference in their authority being the territorial limits within which they are authorized to act.[17]

So, too, the soliciting agent is held to have general powers within the scope of his somewhat narrow authority.[18]

§ 1054. Authority to appoint sub-agents.—Certain agents of insurance companies, particularly those having general charge of a large territory, are usually expressly authorized to appoint sub-agents.[19] And where an agent is given authority to represent a company in a territory so large that he obviously cannot perform his duties in person, it is held that he is impliedly authorized to appoint sub-agents.[20]

The majority of cases have, however, taken even a broader view, and the decided weight of authority, following an early New York case,[21] though contrary to what would naturally be expected to be held in such cases,[22] seems to be that the business of an insurance agent,

known limitations as to the form of renewals and renewal receipts, McCullough v. Hartford F. Ins. Co., 2 Pa. Super. 233; secret instructions not to issue an accident policy until approved by the home office, American Employers' Liability Ins. Co., 68 Fed. 873. See also, Franklin F. Ins. Co. v. Bradford, 201 Pa. 32, 88 Am. St. Rep. 770, 55 L. R. A. 408.

[17] Farnum v. Phoenix Ins. Co., 83 Cal. 246, 17 Am. St. Rep. 233; Richard v. Springfield Fire & Marine Ins. Co., 114 La. 794, 108 Am. St. Rep. 359, 69 L. R. A. 278.

[18] "It is not establishing a harsh or unreasonable rule in reference to insurance companies, to hold that their agents, authorized 'to take applications for insurance' are acting within the scope of their authority in everything which they do which may be necessary to complete such applications." Rowley v. The Empire Ins. Co., 36 N. Y. 550; Coombs v. Hannibal Savings and Ins. Co., 43 Mo. 148.

See also, Wright's Admr. v. Northwestern Mutual Life Ins. Co., 91 Ky. 208; Otte v. Hartford Life Ins. Co., 88 Minn. 423, 97 Am. St. Rep. 532. And in Illinois the soliciting agent has been held to be a general agent with power to waive forfeitures and conditions in the policy. Continental Casualty Co. v. Johnson, 119 Ill. App. 93; London Guaranty & Accident Co. v. Hartman, 122 Ill. App. 315; John Hancock Mutual Life Ins. Co. v. Schlink, 175 Ill. 284.

[19] Penn. Mutual Life Ins. Co. v. Ornauer, 39 Colo. 498; Langdon v. Mutual Life Ins. Co., 14 Fed. 272; Otte v. Hartford Life Ins. Co., 88 Minn. 423, 97 Am. St. Rep. 532; Hamilton v. Home Insurance Co., 94 Mo. 353.

[20] "The power delegated to the agent in express terms, being such as to require the services of subagents, carries with it the power to appoint subagents whatever the nature of the service in respect of being in itself a personal confidence may be." Insurance Company of North America v. Thornton, 130 Ala. 222, 89 Am. St. Rep. 30, 55 L. R. A. 547; Mutual Life Insurance Company of New York v. Herron, 79 Miss. 381. See also, Gore v. Canada Life Assur. Co., 119 Mich. 136.

[21] Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566.

[22] See *ante*, 307. See also, § 317.

either issuing or soliciting, is not of such a discretionary or personal nature that it cannot be delegated.[23] It is said to be a matter of common knowledge, of which the company is, of course, aware, that the insurance business is carried on by agents largely through subordinates; that it cannot properly be carried on in any other way, and that therefore the ordinary local but so-called general agent may, as a matter of implied consent, appoint sub-agents and subordinates whose statements,[24] acts,[25] knowledge,[26] or receipt of notice,[27] within the ordinary course of the business and within the scope of the general agent's authority, will bind the company. And this is true even in the face of a provision in the policy that only persons appointed in a specified manner shall be deemed to be agents of the company.[28]

But a special agent, such as an adjuster, appointed by reason of his personal skill and fitness, cannot, it is held, appoint a sub-agent whose acts will bind the company.[29]

§ 1055. Authority to make oral contracts.—Since, in the absence of a statute to the contrary, there is no requirement that contracts of insurance shall be in writing, a general agent, with authority to himself issue a policy, may, it is held, make either a valid oral contract of

[23] London & Lancashire Fire Ins. Co. v. Gerteison, 106 Ky. 815; Phoenix Ins. Co. v. Spiers, 87 Ky. 285; Bodine v. Exchange Fire Ins. Co., *supra;* Aetna Life Ins. Co. v. Fallow, 110 Tenn. 720.

Contra. Waldman v. North British Mercantile Ins. Co., 91 Ala. 170, 24 Am. St. Rep. 883; McClure v. Mississippi Valley Ins. Co., 4 Mo. App. 148. See also, Home Fire Ins. Co. v. Garbacz, 48 Neb. 827.

[24] Eclectic Life Ins. Co. v. Fahrenkrug, 68 Ill. 463; International Trust Co. v. Norwich Union Fire Insurance Society, 71 Fed. 81.

[25] Manufacturers' & Merchants' Mutual Ins. Co. v. Armstrong, 45 Ill. App. 217; German Fire Ins. Co. v. Columbia Encaustic Tile Co., 15 Ind. App. 623; Pelican Assurance Company of New York v. Schildknecht, 128 Ky. 351; Mutual Life Insurance Company of New York v. Herron, 79 Miss. 381; Bodine v. Exchange Fire Ins. Co., *supra;* Kuney v. The Amazon Ins. Co., 86 Hun (N. Y.), 66; Massachusetts Life Ins. Co. v. Eshelman, 30 Ohio St. 647; Aetna Life Ins. Co. v. Fallow, 110 Tenn. 720; Deitz v. Providence Washington Ins. Co., 33 W. Va. 526, 25 Am. St. Rep. 908.

[26] London & Lancashire Fire Ins. Co. v. Gerteisen, 106 Ky. 815; Steele v. German Ins. Co., 93 Mich. 81, 18 L. R. A. 85; Bergeron v. Pamlico Insurance and Banking Co., 111 N. Car. 45; McGonigle v. Susquehanna Fire Ins. Co., 168 Pa. 1; Harding v. Norwich Union Fire Ins. Co., 10 S. D. 64. See also, Prudential Fire Ins. Co. v. Alley, 104 Va. 356.

[27] Arff v. Star Fire Ins. Co., 125 N. Y. 57, 21 Am. St. Rep. 721, 10 L. R. A. 609.

[28] German Fire Ins. Co. v. Encaustic Tile Co., 15 Ind. App. 623; Arff v. Star Fire Ins. Co., *supra.*

[29] Albers v. Phoenix Ins. Co., 68 Mo. App. 543; Ruthven v. American Fire Ins. Co., 92 Iowa, 316.

present insurance,[80] certainly a temporary and provisional one, or an oral contract to issue a policy.[81]

But a mere soliciting agent, not being authorized to make binding contracts of any kind, has no such authority.[82]

§ 1056. Authority to renew.—The ordinary issuing or general agent is usually given express authority to renew insurance, but even without such specific grant, he is held to have authority to renew a policy already issued,[83] and this he may do orally as well as in writing,[84] and

[80] Insurance Company of North America v. Thornton, 130 Ala. 222, 89 Am. St. Rep. 30, 55 L. R. A. 547; Commercial Union Assur. Co. v. State, 113 Ind. 331; Baker v. Commercial Union Assur. Co., 162 Mass. 358; Hicks v. British America Assur. Co., 162 N. Y. 284, 48 L. R. A. 424; Newark Machine Co. v. Kenton Ins. Co., 50 Ohio St. 549, 22 L. R. A. 768; Stickley v. Mobile Ins. Co., 37 S. Car. 56; Relief Fire Ins. Co. v. Shaw, 94 U. S. 574, 24 L. Ed. 291; Mathers v. Union Mutual Accident Ass'n, 78 Wis. 588, 11 L. R. A. 83; (mutual company) Loomis v. Jefferson County Patrons Fire Relief Ass'n, 92 N. Y. App. Div. 601; (by sub-agent) Pelican Assurance Co. of N. Y. v. Schildknecht, 128 Ky. 351; (of renewal) Baubie v. Aetna Ins. Co., 2 Dill. 156; Squire v. Hanover Fire Ins. Co., 162 N. Y. 552, 76 Am. St. Rep. 349.

[81] Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.), 448, 77 Am. Dec. 419; Ellis v. Albany City Fire Ins. Co., 50 N. Y. 402, 10 Am. Rep. 495; Rhodes v. Railway Passenger Ins. Co., 5 Lans. (N. Y.) 71; (to issue renewal policy) Brown v. Home Ins. Co., 82 Kan. 442; Post v. Aetna Ins. Co., 43 Barb. (N. Y.) 351; McCabe v. Aetna Ins. Co., 9 N. D. 19, 47 L. R. A. 641. *Contra*, Underwood v. Pennsylvania Fire Ins. Co., 134 N. Y. Supp. 105 (not under statutory standard policy). See Benner v. Fire Association of Philadelphia, 229 Pa. 75, 140 Am. St. Rep. 706; (where the particular statute under which the company was incorporated was held not to permit it); Caldwell v. Virginia Fire & Marine Ins. Co., 124 Tenn. 593 (where the insured was charged with notice from former dealings that the agent's authority was confined to issuing policies upon the company's printed blanks).

[82] O'Brien v. New Zealand Ins. Co., 108 Cal. 227; Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64; Embree v. German Ins. Co., 62 Mo. App. 132; Allen v. St. Lawrence County Farmers' Ins. Co., 88 Hun (N. Y.), 461; Haden v. Farmers' & Mechanics' Fire Ass'n, 80 Va. 683.

See also, Security Fire Insurance Company of New York v. Kentucky Marine & Fire Insurance Co., 7 Bush (Ky.), 81, 3 Am. Rep. 301; Starr v. Mutual Life Ins. Co., 41 Wash. 228; Baldwin v. Connecticut Mut. L. Ins. Co., 182 Mass. 389.

And an oral contract between the insured and the agent to keep the insurance on the property renewed which practically makes the agent the agent of the insured also, will not be binding upon the company. Ramspeck v. Pattillo, 104 Ga. 772, 42 L. R. A. 197; Shank v. Glen Falls Ins. Co., 4 N. Y. App. Div. 516.

[83] Post v. Aetna Ins. Co., 43 Barb. (N. Y.) 351; Franklin F. Ins. Co. v. Massey, 33 Pa. 221.

See also, Benner v. Fire Ass'n, 229 Pa. 75, 140 Am. St. Rep. 706; International Trust Co. v. Norwich Union Fire Insurance Society, 71 Fed. 81; Carroll v. Charter Oak Ins. Co., 38 Barb. (N. Y.) 402; McCullough v. Hartford Ins. Co., 2 Pa. Super. Ct. 233.

[84] See *ante*, § 1055.

where he is authorized to renew in a prescribed manner, he will bind the company by a renewal, though made in a manner not authorized by the company, if the fact of the variance is not known to the insured.[35] But a mere soliciting agent has no authority to renew.[36]

§ 1057. Authority to alter or waive terms—In general.—Two questions closely related, but in fact distinct, stand out as the most important in this general topic. The first of these is the extent of the authority of the agent to alter the printed policy, or waive a condition or provision of it, either at the time of, or after its issuance. Indissolubly bound up with this is the second, namely, the extent to which the principal will be estopped from enforcing a provision of the policy or will be held to have waived a forfeiture by reason of the imputation to it of the knowledge of its agent. Upon these two questions the cases are so numerous, and the results reached by the courts so extremely varied, that it is impossible here to attempt a classification which will include them all, or to state a principle which will explain their divergent results.[37] In the following sections, therefore, will be taken up only the larger groups into which they naturally fall.

§ 1058. Authority to alter policy or strike out a provision therein—At the time of issuance.—A general agent with authority to himself issue the policy, may, at the time he issues it, strike out of it or add to it such provisions and conditions, of the sort ordinarily left open to negotiation, as he and the assured may agree upon.[38] This is often spoken of as a case of waiver, but it would seem incorrectly so, since waiver presupposes the existence of an obligation which in this case is yet to be created.[39] It might more simply and properly be stated that since he has the authority to make the contract of insurance, he has authority to make it in the ordinary form, and may therefore embody

[35] Western Home Ins. Co. v. Hogue, 41 Kan. 524.

[36] Pacific Mutual Life Ins. Co. v. Carter, 92 Ark. 378.

[37] "Upon this subject of the power of agents to waive conditions imposing on the party insured duties proper for the protection of the insuring company, there is a world of decisions, and they are a wilderness of conflicting cases, and to attempt anything like a review of them in detail would be only to grope and wander in that wilderness, and in the end lead to bewilderment." Brannon, J., in Maupin v. Scottish Union & National Ins. Co., 53 W. Va. 557.

[38] Gloucester Mfg. Co. v. Howard F. Ins. Co., 71 Mass. 497, 66 Am. Dec. 376 (clause added); Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612 (clause erased).

[39] Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. Rep. 121; (United Fireman's Ins. Co. v. Thomas, 82 Fed. 406, 47 L. R. A. 450; affirmed on rehearing, 92 Fed. 127, 47 L. R. A. 455).

in it or leave out of it such provisions of the sort in question as the parties may agree upon.[40]

But a mere soliciting agent has no such authority, nor can it be said to be within his apparent authority, since the assured knows that the agent does not himself issue the policy.[41]

§ 1059. Parol waivers at time of issuance.—A far more difficult question is that of the authority of the agent to make a so-called parol waiver at the time he issues the policy. The main difficulty, and the cause of the irreconcilable conflict among the authorities, is, not the extent of the agent's authority, but the question whether the so-called Parol Evidence Rule, or some express limitation in the contract itself prevents the introduction of proof of this contemporaneous oral waiver.

So far as the simple question of the authority of the agent is concerned, it would seem clear that an agent with general authority to make the contract, and with ample authority to make it wholly oral if he sees fit, may make it partly written and partly oral by eliminating or waiving a condition of the written policy by an oral agreement.[42]

The general nature and extent of the Parol Evidence Rule will not be discussed here. It is sufficient to say here that upon one ground or another most courts, as will be seen, have usually refused to give it effect.[43]

§ 1060. ——— Waiving prepayment of premium.—One of the cases most frequently arising is that of the authority of the agent to waive the payment of the premium at the time of the delivery of the policy. The ordinary fire insurance policy in use in the United States does not expressly provide that the policy shall not become operative until the premium is paid in cash,[44] but life insurance policies and some others usually do so provide. With reference to the latter, it is fre-

[40] In American Cent. Ins. Co. v. McLanathan, 11 Kan. 533, Brewer, J., lays down the rule, "That an agent authorized to issue policies of insurance, and consummate the contract, binds his principal by any act, agreement, representation or waiver, within the ordinary scope and limit of insurance business, which is not known by the assured to be beyond the authority granted to the agent."

[41] London Guaranty & Accident Co. v. Missouri & Illinois Coal Co., 103 Mo. App. 530.

But see Continental Casualty Co. v. Johnson, 119 Ill. App. 93; London Guaranty & Accident Co. v. Hartman, 122 Ill. App. 315.

[42] Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. Rep. 121; Peoria M. & F. Ins. Co. v. Hall, 12 Mich. 202; Berry v. American Central Ins. Co., 132 N. Y. 49, 28 Am. St. Rep. 548; Murphy v. Royal Ins. Co., 52 La. Ann. 775.

But see Gillum v. Fire Ass'n, 106 Mo. App. 673.

[43] See *post*, §§ 1062, 1063.

[44] See Kollitz v. Equitable Mut. F. Ins. Co., 92 Minn. 234.

quently said that an agent having general authority and authorized to deliver the policy may waive this provision and give at least a short term of credit.[45] In most of the cases, however, wherein the authority to give credit has been sustained, the money has in fact been ultimately received; or there has been actual authority, or a course of dealing, or evidence of ratification; or the arrangement between the company and the agent has been such that the company charged the premium to the agent and looked to him for it, giving him at least tacit permission to trust the insured at his own risk.[46] In a late case in New York, it is held that there can be no such valid waiver in the face of an express provision in the application to the contrary.[47]

[45] See Boehen v. Williamsburgh Ins. Co., 35 N. Y. 131, 90 Am. Dec. 787; Church v. Lafayette Fire Ins. Co., 66 N. Y. 222; Mississippi Valley L. Ins. Co. v. Neyland, 72 Ky. 430; N. Y. Life Ins. Co. v. McGowan, 18 Kan. 300.

In Triple Link, etc., Ass'n v. Williams, 121 Ala. 138, 77 Am. St. Rep. 34, it was held that the soliciting agent bound the company by accepting less than the known amount of the first payment.

[46] See United States L. Ins. Co. v. Lesser, 126 Ala. 568; Farnum v. Phoenix Ins. Co., 83 Cal. 246, 17 Am. St. Rep. 233; Jurgens v. N. Y. Life Ins. Co., 114 Cal. 161; Sheldon v. Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565; Mechanics, etc., Ins. Co. v. Mutual R. E. Ass'n, 98 Ga. 262; Young v. Hartford Fire Ins. Co., 45 Iowa, 377, 24 Am. Rep. 784; Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Long v. Ins. Co., 137 Pa. 335, 21 Am. St. Rep. 879; Cole v. Union Central Life Ins. Co., 22 Wash. 26, 47 L. R. A. 201.

[47] Russell v. Prudential Ins. Co., 176 N. Y. 178, 98 Am. St. Rep. 656.

[48] See Mississippi Valley L. Ins. Co. v. Neyland, 72 Ky. 430; New York L. Ins. Co. v. McGowan, 18 Kan. 300; Mutual L. Ins. Co. v. Logan, 31 C. C. A. 172, 87 Fed. 637; Kilborn v. Prudential Ins. Co., 99 Minn. 176, seems to go as far as any case. There a life insurance agent took notes payable to his own order for the amount of the first premium at the time of receiving the application. He forwarded the application but not the notes to the home office, where the application was accepted, and the policy issued, and sent to the state agents for delivery. On the following day and before the delivery of the policy to the insured, he was killed. The state agents thereupon returned the policy to the home office and refused to receive the notes which the soliciting agent had taken. These notes were never collected or paid. Nevertheless, the beneficiary was allowed to recover upon the policy. The policy contained no provision that the first premium should be paid in cash only. It was held that the agent had apparent authority to give a short term of credit and to take a note for it.

In National Life Ins. Co. v. Tweddell, 22 Ky. L. Rep. 881, 58 S. W. 699, the authority to take a note was upheld, the court saying that it was not only within the apparent scope of his authority but the company had frequently permitted him to do the same thing.

In Carson v. Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584, the agent had taken a note with an endorser, but had had the note discounted at the bank and actually obtained the money upon it.

It is frequently said, and sometimes held, that such an agent may take a note in payment of the premium, though such a holding is contrary to the general rules of agency except under the most general authority or some special circumstances of custom, recognition, or the like, and the better considered cases so limit it.[48] It has also been said that the agent may accept the assured as his personal debtor, becoming himself liable to the company; but it would seem that this could not be true unless the company had expressly or impliedly consented to it.[49] It has also been said that he may accept his own debt in payment, but this also seems unsound without the consent of the company,[50] except to the extent to which the first premium may, under his contract with the company actually belong to the agent.[51]

In Provident Savings L. Ins. Soc. v. Oliver, 22 Tex. Civ. App. 8, the agent had on several occasions given credit or taken notes with the knowledge and approval of the general agent of the company.

In Michigan Mut. L. Ins. Co. v. Hall, 60 Ill. App. 159, the note had been taken with the understanding that, if it was not accepted by the company, it would be returned. It was not returned, and the agent discounted it and obtained the money upon it.

In Pennsylvania Casualty Co. v. Bacon, 67 C. C. A. 497, 133 Fed. 907, it was said that, "The cases in the federal courts sanctioning this ruling were those in which it appeared that the instructions of the company to its general agents were, in substance, that it would hold them personally responsible for such premiums (Miller v. Life Ins. Co., 12 Wall. 285, 20 L. Ed. 398; Smith v. Provident Saving Society, 31 U. S. App. 163, 65 Fed. 765, 13 C. C. A. 284), or where it appeared that it was the practice of the company to charge the premium to the agent at the time of delivering to him the premium receipt (Fidelity Co. v. Getty's Administrators, 39 U. S. App. 599, 80 Fed. 497, 25 C. C. A. 593".)

In Imbrie v. Manhattan L. Ins. Co., 178 Pa. 6, where the agent accepted notes and the company had some knowledge of the arrangement which was contrary to rule, it was held there was evidence of ratification.

In Jurgens v. N. Y. Life Ins. Co., 114 Cal. 161, where the company's solicitor took a note and discounted it and remitted the amount of the premium, less his commissions in cash, to the state agent, this was not in violation of a provision that no agent shall have authority to give credit. Similarly in Jacobs v. Omaha Life Ass'n, 146 Mo. 523, where a rule required the first premium to be in cash, and discounting the note and remittance of proceeds in due course by company's agent was held compliance with the rule. To same effect: Krause v. Equitable L. Assur. Society, 99 Mich. 461.

In Mutual L. Ins. Co. v. Abbey, 76 Ark. 328, it was held that a mere local solicitor might not accept a note, but that the state agent might authorize it to be done. See also, Dunham v. Morse, 158 Mass. 132, 35 Am. St. Rep. 473.

[49] See Lebanon Mut. Ins. Co. v. Hoover, 113 Pa. 591, 57 Am. Rep. 511.

[50] See Tomsecek v. Travelers' Ins. Co., 113 Wis. 114, 90 Am. St. Rep. 846, 57 L. R. A. 455; Hoffman v. Hancock Mut. L. Ins. Co., 92 U. S. 161, 23 L. Ed. 539.

[51] Home Ins. Co. v. Gilman, 112 Ind. 7 (here the agent actually accounted to the company for the

§ 1061. Implied waiver at time of issuance.—Where a general agent, having full authority to make the contract of insurance, and being subject to no known restrictions in that regard, issues a policy with knowledge of an existing breach of one of its conditions, which, if insisted upon, would render it void *ab initio,* it is held that the agent has impliedly waived the condition, since he must be conclusively presumed to have intended to make a valid agreement.[52]

§ 1062. Restrictions on authority to waive.—Insurance companies have quite generally attempted to avoid the results of waiver by inserting either in the application, or the policy, or in both, restrictions upon the authority of the agent to alter or waive any of the conditions or provisions of the policy or a restriction upon the manner of the alteration. In passing upon the validity and effect of such provisions, many courts have gone very far in their efforts to protect the assured and prevent a forfeiture. Where the restriction is contained in the application, it is held that the assured having notice of this limitation on the agent's authority is bound by it;[53] but where the provision is contained solely in the policy, many of the state courts have held it ineffectual on one or more of the following grounds: (1) that by its terms the restriction applies only to the right of an agent to waive or alter the terms of a completed contract and does not affect its formation;[54] (2) that at the time the policy is delivered and becomes a bind-

money); Pythian Life Ass'n v. Preston, 47 Neb. 374 (here the agent was entitled to the first payment as his commission).

In Hancock Mut. L. Ins. Co. v. Schlink, 175 Ill. 284, an agreement with the agent to turn the first premium upon his own debt to the extent of his interest in it was implied.

In Wooddy v. Old Dominion Ins. Co., 31 Grat. (Va.) 362, 31 Am. Rep. 732, such an arrangement was upheld upon the ground that, under the circumstances, it amounted merely to paying the money to the agent, and his immediately returning it to the insured.

[52] Phoenix Ins. Co. v. Flemming, 65 Ark. 54, 67 Am. St. Rep. 900, 39 L. R. A. 789; American Central Ins. Co. v. M'Lanathan, 11 Kan. 533; Milwaukee Mechanics' Ins. Co. v. Brown, 3 Kan. App. 225; Leisen v. St. Paul Fire & Marine Ins. Co., 20 N. D. 316, 30 L. R. A. (N. S.) 539; Hibernia Ins. Co. v. Malevinsky, 6 Tex. Civ. App. 81; Wood v. American Fire Ins. Co., 149 N. Y. 382, 52 Am. St. Rep. 733. See also, Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. 434.

[53] New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. Ed. 934; Russell v. Prudential Ins. Co., 176 N. Y. 178, 98 Am. St. Rep. 656; Weidert v. State Ins. Co., 19 Oreg. 261, 20 Am. St. Rep. 809; Chase v. Hamilton Ins. Co., 20 N. Y. 52. See also, Cole v. Union Cent. L. Ins. Co., 22 Wash. 26, 47 L. R. A. 201.

[54] "A waiver is the voluntary yielding up by a party of some existing right, but until the contract is consummated, the company has no rights which are susceptible of waiver, nor can any condition be properly said to be modified or stricken from a policy until there is a policy, that

ing contract, the assured has no notice of this limitation and it therefore is unavailing in the face of the agent's ostensible authority to waive;[55] (3) that the agent, having complete authority to waive provisions, may waive the very provision limiting the mode or manner of waiver;[56] (4) that since a corporation can only act through agents, and since it has undoubted power to alter its policy,—a provision that such alteration or waiver cannot be made by any agent is void.[57] In a number of these cases, the principles announced are confessedly peculiar to insurance contracts.[58]

§ 1063. ——— On the other hand, courts of the highest authority have upheld such restrictions,[59] and the conclusion that a principal may not, by a restriction brought to the notice of the other party, limit the

is, until after the terms of the contract have been agreed upon and the policy issued. Clearly the clause in question was intended as a limitation upon the powers of agents to waive or modify the terms of a policy after it had been issued, and not upon their power to agree upon and settle the terms of the policy prior to its issue." Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. Rep. 121; Farnum v. Phoenix Ins. Co., 83 Cal. 246, 17 Am. St. Rep. 233; Rickey v. German Guarantee Ins. Co., 79 Mo. App. 485; Crouse v. Hartford Fire Ins. Co., 79 Mich. 249; Wood v. American Fire Ins. Co., 149 N. Y. 382, 52 Am. St. Rep. 733; Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499; United Fireman's Ins. Co. v. Thomas, 82 Fed. 406, 47 L. R. A. 455; Johnson v. Aetna Ins. Co., 123 Ga. 404, 107 Am. St. Rep. 92; Medley v. German Alliance Ins. Co., 55 W. Va. 342, 2 Ann. Cas. 99.

[55] Young v. Hartford F. Ins. Co., 45 Iowa, 377, 24 Am. Rep. 784; Crouse v. Hartford F. Ins. Co., 79 Mich. 249; Cole v. Union Central L. Ins. Co., 22 Wash. 26, 47 L. R. A. 201.

[56] United States Life Ins. Co. v. Lesser, 126 Ala. 568; Young v. Hartford Fire Ins. Co., 45 Iowa, 377, 24 Am. Rep. 784; Orient Ins. Co. v. McKnight, 197 Ill. 190; German-American Ins. Co. v. Humphrey, 62 Ark. 348, 54 Am. St. Rep. 297; Western Assur. Co. v. Williams, 94 Ga. 128; Hartford Fire Ins. Co. v. Landfare, 63 Neb. 559.

[57] Farnum v. Phoenix Ins. Co., 83 Cal. 246, 17 Am. St. Rep. 233; Long Island Ins. Co. v. Great Western Manufacturing Co., 2 Kan. App. 377; Wilkins v. State Ins. Co. 43 Minn. 177; Home Ins. Co. v. Gibson, 72 Miss. 58.

[58] See, for example, Chismore v. Anchor Fire Ins. Co., 131 Iowa, 180; Spalding v. New Hampshire Fire Ins. Co., 71 N. H. 441; German Ins. Co. v. Shader, 68 Neb. 1, 60 L. R. A. 918; Welch v. Fire Association, 120 Wis. 456.

[59] Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 46 L. Ed. 213; Liverpool, London & Globe Ins. Co. v. Richardson Lumber Co., 11 Okla. 585; Maupin v. Scottish Union & National Ins. Co., 53 W. Va. 557; Curtin v. Phoenix Ins. Co., 78 Cal. 619; Fidelity, etc., Co. v. Fresno Flume Co., 161 Cal. 466, 37 L. R. A. (N. S.) 822; Porter v. United States Life Ins. Co., 160 Mass. 183; Kyte v. Commercial Union Ins. Co., 144 Mass. 43; Wolf v. Dwelling House Ins. Co., 75 Mo. App. 337; Reese v. Fidelity Mutual Life Ass'n, 111 Ga. 482.

authority of his agent, or that an agent may waive the limitation known to rest upon his authority, is contrary to the fundamental principles of agency. The supreme court of the United States, particularly, has taken a very decided position upon the question. In its leading case,[60] it is said: "That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

Many of the state courts, however, have expressly refused to adopt this view or to follow the lead of the United States supreme court.[61]

[60] Northern Assur. Co. v. Grand View Bldg. Ass'n, *supra*.

[61] See, for example, the elaborate discussion in Peoples' F. Ins. Ass'n v. Goyne, 79 Ark. 315, 9 Ann. Cas. 373, 16 L. R. A. (N. S.) 1180. Also, Grand View Bldg. Ass'n v. Northern Assur. Co., 73 Neb. 149; Orient Ins. Co. v. McKnight, 197 Ill. 190; Chismore v. Anchor F. Ins. Co., 131 Iowa. 180.

§ 1064. Waivers by agent after issuance—Authority to waive forfeiture.—It is a well settled principle of agency, that the grant of general authority to make a contract does not necessarily include the right to subsequently alter its terms, and there seems to be no reason for a different rule in the case of an insurance agent. Nevertheless it is ordinarily held that a general issuing agent, in the absence of any restriction upon his authority brought home to the assured, may waive a condition in the policy subsequent to its issuance;[62] or, as is more commonly the case, may waive the forfeiture resulting from the breach of a condition, either expressly[63] or by treating the contract as still in existence.[64] And he may correct the policy,[65] or, if it is an open policy, alter its terms.[66]

But a mere soliciting agent, having no authority to make the contract, would ordinarily have no such authority.[67]

§ 1065. ——— Express restrictions on the authority.—It would seem that a provision in the policy expressly restricting the authority of the agent to waive a provision should be binding on the assured as to any condition arising subsequent to its issuance, since after the delivery of the policy the assured must be held to have knowledge of its contents, and such has been the holding of the better considered cases.[68]

[62] Continental F. Ins. Co. v. Brooks, 131 Ala. 614; Carrugi v. The Atlantic Fire Ins. Co., 40 Ga. 135, 2 Am. Rep. 567; Viele v. The Germania Ins. Co., 26 Iowa, 9, 96 Am. Dec. 83; Manufacturers' and Merchants' Mutual Ins. Co. v. Armstrong, 45 Ill. App. 217; German Ins. Co. v. Gray, 43 Kan. 497, 19 Am. St. Rep. 150, 8 L. R. A. 70; Pechner v. Phoenix Ins. Co., 65 N. Y. 195; Fire Association of Philadelphia v. Masterson (Tex. Civ. App.), 83 S. W. 49. See Phenix Ins. Co. v. Hart, 149 Ill. 513.

Contra: Kyte v. Commercial Union Assur. Co., 144 Mass. 43.

[63] Richard v. Springfield Fire & Marine Ins. Co., 114 La. 794, 108 Am. St. Rep. 359, 69 L. R. A. 278; Aetna Life Ins. Co. v. Fallow, 110 Tenn. 720; Miner v. Phoenix Ins. Co., 27 Wis. 693, 9 Am. Rep. 497; Walsh v. Aetna L. Ins. Co., 30 Iowa, 133, 6 Am. Rep. 664; Geib v. International Ins. Co., 1 Dil. 443, 10 Fed. Cas. p. 157.

[64] German American Ins. Co. v. Hyman, 42 Colo, 156, 16 L. R. A. (N. S.) 77; Viele v. The Germania Ins. Co., 26 Iowa, 9, 96 Am. Dec. 83; New England Mutual Life Ins. Co. v. Springgate, 129 Ky. 627, 19 L. R. A. (N. S.) 227; Carroll v. Charter Oak Ins. Co., 40 Barb. (N. Y.) 292.

[65] Tayler v. State Ins. Co., 98 Iowa, 521, 60 Am. St. Rep. 210.

[66] Kennebec Co. v. Augusta Insurance & Banking Co., 6 Gray, 204; Day v. The Mechanics' & Traders' Ins. Co., 88 Mo. 325, 57 Am. Rep. 416.

[67] Mutual Life Ins. Co. v. Abbey, 76 Ark. 328; Rockford Ins. Co. v. Boirum, 40 Ill. App. 129; Heath v. Springfield Fire Ins. Co., 58 N. H. 414; Duluth National Bank v. Knoxville Fire Ins. Co., 85 Tenn. 76, 4 Am. St. Rep. 937.

[68] Lippman v. Aetna Ins. Co., 120 Ga. 247; Kirkman v. Farmers' Ins. Co., 90 Iowa, 457, 48 Am. St. Rep. 454; Burlington Ins. Co. v. Gibbons, 43 Kan. 15, 19 Am. St. Rep. 118; Kyte

Many courts have, however, escaped this result by holding that the knowledge of the agent is imputed to the company, and therefore the company itself is estopped to assert, or is held to have waived, the forfeiture.[69]

§ 1066. Knowledge of agent imputed to principal—In general.—The doctrine of imputed knowledge, more fully considered in a later chapter,[70] has been carried to its furthest extreme in insurance cases, and it is the general rule, applied in a vast number of cases, that knowledge of facts relative to the insurance, acquired by the agent while acting within the scope of his authority and during the course of his employment, will be imputed to the principal, either to form the basis for a waiver or to support an estoppel, whether such knowledge is acquired prior to, contemporaneously with, or subsequent to the issuance of the policy, as the case may happen to be.[71]

v. Commercial Union Assur. Co., 144 Mass. 43; Collins v. Metropolitan Life Ins. Co., 32 Mont. 329, 108 Am. St. Rep. 578; McElroy v. Metropolitan Life Ins. Co., 84 Neb. 866, 23 L. R. A. (N. S.) 968; Merserau v. Phoenix Life Ins. Co., 66 N. Y. 274; Hankins v. Rockford Ins. Co., 70 Wis. 1; Carey v. German American Ins. Co., 84 Wis. 80, 36 Am. St. Rep. 907, 20 L. R. A. 267 (standard policy); Black v. Atlantic Home Ins. Co., 148 N. Car. 169, 21 L. R. A. (N. S.) 578.

Contra: Carrugi v. The Atlantic Fire Ins. Co., 40 Ga. 135, 2 Am. Rep. 567; Orient Ins. Co. v. McKnight, 197 Ill. 190; German Ins. Co. v. Gray, 43 Kan. 497, 19 Am. St. Rep. 150, 8 L. R. A. 70; Arkell v. Commerce Ins. Co., 7 Hun, 455; Fire Association of Philadelphia v. Masterson (Tex. Civ. App.), 83 S. W. 49; Aetna Life Ins. Co. v. Fallow, 110 Tenn. 720; American Ins. Co. v. Gallatin, 48 Wis. 36; Springfield Steam Laundry Co. v. Traders' Ins. Co., 151 Mo. 90, 74 Am. St. Rep. 521; Beebe v. Ohio Farmers' Ins. Co., 93 Mich. 514, 32 Am. St. Rep. 519, 18 L. R. A. 481 (compare Sutherland v. Eureka F. Ins. Co., 110 Mich. 668); Wilson v. Commercial Union Assur. Co., 51 S. Car. 540.

[69] See *post*, § 1070.

[70] See *post*, § 1802 *et seq.*

[71] Phoenix Ins. Co. v. Copeland, 90 Ala. 386; Fishbeck v. Phenix Ins. Co., 54 Cal. 422; Lumberman's Mutual Ins. Co. v. Bell, 166 Ill. 400, 57 Am. St. Rep. 140; Born v. Home Ins. Co., 120 Iowa, 299; Germania Ins. Co. v. Ashby, 112 Ky. 803, 99 Am. St. Rep. 295; Aetna, etc., Ins. Co. v. Olmstead, 21 Mich. 246, 4 Am. Rep. 483; Gristock v. Royal Ins. Co., 84 Mich. 161, s. c., 87 Mich. 428; Rivara v. Queen's Ins. Co., 62 Miss. 720; Pelkington v. Nat'l Ins. Co., 55 Mo. 172; Hartford Fire Ins. Co. v. Landfare, 63 Neb. 559; Forward v. Continental Ins. Co., 142 N. Y. 382, 25 L. R. A. 637; Insurance Co. v. Williams, 39 Ohio St. 584, 48 Am. Rep. 474; People's Ins. Co. v. Spencer, 53 Pa. 353, 91 Am. Dec. 217; American Central Ins. Co. v. McCrea, 8 Lea (Tenn.), 513, 41 Am. Rep. 647; Carrigan v. Lycoming F. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687; Manhattan F. Ins. Co. v. Weill, 28 Gratt. (Va.) 389, 26 Am. Rep. 364; Staats v. Pioneer Ins. Ass'n, 55 Wash. 51; May v. Buckeye Mut. Ins. Co., 25 Wis. 291, 3 Am. Rep. 76; Gans v. St. Paul, etc., Ins. Co., 43 Wis. 108, 28 Am. Rep. 535; Bowden v. London, etc., Assur. Co., [1892] 2 Q. B. D. 534.

§ 1067. ——— **Existing facts affecting the risk.**—When the true state of facts affecting the risk is known to the issuing agent at the time he issues the policy, it is quite generally held that the assured will not be precluded from enforcing the policy by reason of such a fact violating a provision of the policy. The courts have reached this result on one or both of two totally distinct lines of reasoning, viz. (1) that already considered, namely, that the agent who issued a policy with knowledge of the violation of one of its provisions must be held to have waived such provision;[72] or, if that view fails, then (2) the one now here in question, that the company itself is estopped to insist upon, or is held to have waived, a right of forfeiture by reason of a fact of which it is thus deemed to have had full knowledge at the time it issued the policy.[73]

In order to sustain this conclusion, it is held that the provisions in the policy limiting waivers do not affect the power of the company to waive,—either upon the ground that the company cannot so limit its power,[74] or that the provision was not intended to apply to the company itself,[75] or that, being for the benefit of the company, it may

[72] See *ante*, § 1061.

[73] *Encumbrances.*—Phoenix Ins. Co. v. Copeland, 86 Ala. 551, 4 L. R. A. 848; German-American Ins. Co. v. Yeagley, 163 Ind. 651, 2 Ann. Cas. 275; Gristock v. Royal Ins. Co., 84 Mich. 161; Renier v. Dwelling House Ins. Co., 74 Wis. 89; West v. Norwich Union Fire Ins. Society, 10 Utah, 442.

Occupation by Tenant.—Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 117 Am. St. Rep. 382, 9 Ann. Cas. 91, 3 L. R. A. (N. S.) 966; Gandy v. Orient Ins. Co., 52 S. Car. 224.

Prior Insurance.—Strauss v. Phenix Ins. Co., 9 Colo. App. 386; McElroy v. British American Assur. Co., 36 C. C. A. 615, 94 Fed. 990; Bennett v. Council Bluffs Ins. Co., 70 Iowa, 600; Hornthal v. Western Ins. Co., 88 N. C. 71; Hibernia Ins. Co. v. Malevinsky, 6 Tex. Civ. App. 81.

Interest of insured.—Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499; Wisotzkey v. Niagara Fire Ins. Co., 112 App. Div. 599; aff'd 189 N. Y. 532; Pope v. Glen Falls Ins. Co., 130 Ala. 356; Rhode Island Underwriters Ass'n v. Monarch, 98 Ky. 305; Crescent Ins. Co. v. Camp, 71 Tex. 503.

Vacancy of premises.—Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 288; Haight v. Continental Ins. Co., 92 N. Y. 51; Wilson v. Commercial Union Assur. Co., 51 S. Car. 540, 60 Am. St. Rep. 700.

Leased ground.—Springfield Fire & Marine Ins. Co. v. Price, 132 Ga. 687; Home Ins. Co. v. Stone River National Bank, 88 Tenn. 369; Welch v. Fire Ass'n, 120 Wis. 456.

Dangerous agencies on the property.—Reaper City Ins. Co. v. Jones, 62 Ill. 458. See also, Improved Match Co. v. Michigan Mutual Fire Ins. Co., 122 Mich. 256; German Ins. Co. v. Shader, 68 Neb. 1, 60 L. R. A. 918; Worachek v. New Denmark Mutual Home Fire Ins. Co., 102 Wis. 81.

[74] Rhode Island Underwriters Ass'n v. Monarch, 98 Ky. 305.

[75] Gandy v. Orient Ins. Co., 52 S. Car. 224; Hibernia Ins. Co. v. Malevinsky, 6 Tex. Civ. App. 81.

waive it,[76] or that it would be fraudulent to allow the company to take advantage of it.[77] It is also necessary, to sustain many of the cases, to hold that there may be an actual waiver by the company based upon imputed knowledge which never in fact came to any one except the local agent. It is also necessary to sustain the estoppel spoken of in many of the cases, to treat, as a representation by the company, the very act of the agent which the terms of the policy deny his authority to perform.[78]

The same cases, however, which deny the authority of the agent to make a waiver in the face of an express limitation, would doubtless also refuse to accomplish the same result by holding the company estopped upon the basis of imputed knowledge.[79] This, however, is not a question of agency at all.

§ 1068. ——— The same rule which has been thus applied to the knowledge of the issuing agent has, by the same courts, been applied to the soliciting agent; and it is held that the knowledge of a soliciting agent of a fact regarding the risk solicited by him which violates a condition of the policy will be imputed to the company, and will raise an estoppel which will prevent the company from asserting a forfeiture on the ground of such violation.[80]

[76] Aetna Life Ins. Co. v. Frierson, 51 C. C. A. 424, 114 Fed. 56; Barnard v. National Fire Ins. Co., 38 Mo. App. 106; Williams v. Niagara Fire Ins. Co., 50 Iowa, 561; Carroll v. Charter Oak Ins. Co., 38 Barb. (N. Y.) 402; King v. Council Bluffs Ins. Co., 72 Iowa, 310; American Ins. Co. v. Yeagley, 163 Ind. 651.

[77] Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617 (practically overruled, however, in Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 46 L. Ed. 213); Wagner v. Westchester Fire Ins. Co., 92 Tex. 549; Wisotzkey v. Niagara Fire Ins. Co., 112 App. Div. 599; aff'd 189 N. Y. 532; Grabbs v. Farmers' Mutual Fire Ins. Ass'n, 125 N. C. 389.

[78] A striking illustration may be seen in Gandy v. Orient Ins. Co., 52 S. Car. 224. In many of the cases, the alleged estoppel seems to be nothing more than the mere refusal of the court to enforce what seems to it to be an inequitable defense; and they justify the comment of the court of appeal of Ontario, in Shannon v. Gore, etc., Ins. Co., 2 Ont. App. 396. "It is much easier to say, in the general terms used in some of the decisions in the United States upon which the plaintiff relies, that insurance companies ought not to be allowed to set up such a defence, than to define with precision the legal principles upon which this kind of estoppel is founded."

[79] See Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 46 L. Ed. 213.

[80] London & Lancashire Fire Ins. Co. v. Gerteison, 106 Ky. 815; Bergeron v. Pamlico Insurance & Banking Co., 111 N. Car. 45; McGonigle v. Susquehanna Fire Ins. Co., 168 Pa. 1; Harding v. Norwich Union Fire Ins. Co., 10 S. D. 64; Beebe v. Ohio Farmers' Ins. Co., 93 Mich. 514, 32 Am. St. Rep. 519, 18 L. R. A. 481; Lyon v. Insurance Co., 6 Dak.

And the delivery of a life insurance policy by a soliciting agent, authorized to solicit applications, collect premiums and deliver policies, will, it is held, operate to estop the company from enforcing a forfeiture for the violation of a condition precedent when the agent, at the time of such delivery, had knowledge of the violation.[81]

§ 1069. ——— **Misstatements in application.**—So it is held that knowledge by an agent who actually issues the policy that a statement in the application is false, prevents the company from taking advantage of a provision that such statements shall be considered warranties, and that the policy shall be void if any of them are false.[82]

§ 1070. **Subsequent grounds of forfeiture.**—And a general agent's knowledge of a cause of forfeiture, arising subsequent to the issuance of the policy, and respecting insurance concerning which he is still acting as the company's agent, is usually imputed to the company, so that if it thereafter treats the policy as in existence, it will be held either to have waived the forfeiture or to be estopped to enforce it.[83] By the weight of authority the same rule is applied in the case of a soliciting agent.[84]

§ 1071. ——— **Express restriction.**—Insurance companies frequently attempt to avoid the results of this rule by inserting provisions

67; Forward v. Continental Ins. Co., 142 N. Y. 382, 25 L. R. A. 637; St. Clara Female Academy v. Northwestern National Ins. Co., 98 Wis. 257, 67 Am. St. Rep. 805.

[81] McGurk v. Metropolitan Life Ins. Co., 56 Conn. 528, 1 L. R. A. 563; John Hancock Mutual Life Ins. Co. v. Schlink, 175 Ill. 284; Northwestern Life Ass'n v. Findley, 29 Tex. Civ. App. 494.

[82] Beebe v. Ohio Farmers' Ins. Co., 93 Mich. 514, 32 Am. St. Rep. 519, 18 L. R. A. 481; Michigan Shingle Co. v. State Investment Ins. Co., 94 Mich. 389, 22 L. R. A. 319.

[83] Arnold v. American Ins. Co., 148 Cal. 660, 25 L. R. A. (N. S.) 6; Phenix Ins. Co. v. Grove, 215 Ill. 299, 25 L. R. A. (N. S.) 1; Phoenix Ins. Co. v. Spiers, 87 Ky. 285; Bigelow v. Granite State Ins. Co., 94 Me. 39; Lamberton v. Connecticut Fire Ins. Co., 39 Minn. 129, 1 L. R. A. 222; Hamilton v. Home Ins. Co., 94 Mo. 353. See also, Metropolitan Life Ins. Co. v. Sullivan, 112 Ill. App. 500. In Bigelow v. Granite State Ins. Co., *supra*, it is said that the rule is not affected by the existence of the statutory standard form of policy.

[84] Germania L. Ins. Co. v. Koehler, 168 Ill. 293, 61 Am. St. Rep. 108; Metropolitan L. Ins. Co. v. Sullivan, 112 Ill. App. 500; Walsh v. Aetna L. Ins. Co., 30 Iowa. 133, 6 Am. Rep. 664; Germania Ins. Co. v. Rudwig, 80 Ky. 223; Schmidt v. Charter Oak L. Ins. Co., 2 Mo. App. 339. See also, McGurk v. Metropolitan L. Ins. Co., 56 Conn. 528, 1 L. R. A. 563; Northwestern Mut. L. Ins. Co. v. Amerman, 119 Ill. 329, 59 Am. Rep. 799; Lorie v. Conn. Mut. L. Ins. Co., 15 Fed. Cas. 891.

Contra: Where the agent's entire authority with reference to that insurance ended when the policy was issued. American Ins. Co. v. Walston, 111 Ill. App. 133; Dickinson County v. Mississippi Valley Ins. Co., 41 Iowa, 286.

in their policy or application that the agent shall be the agent of the assured in all that he does in making out the application, or procuring the insurance. The most common of these is as follows: "It is a part of this contract that any person other then the assured who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured named in this policy and not of this company under any circumstances whatever, or in any transactions relating to this insurance." Such provisions have, however, been quite generally held ineffective.[85] Statutes in several states expressly declare that a person who solicits applications, makes contracts, collects premiums, etc., shall *prima facie* be deemed to be the agent of the company whatever the policy or the application may say about it.[86]

§ 1072. ——— Limitations on rule.—In accordance with the usual rule in regard to imputing the knowledge of the agent to his principal [87] the insurance company in any of the before mentioned situations will

[85] Commercial Ins. Co. v. Ives, 56 Ill. 402; Rogers v. The Phenix Insurance Co. of Brooklyn, 121 Ind. 570; Kausal v. Minnesota Farmers' Mutual Fire Ins. Ass'n, 31 Minn. 17, 47 Am. Rep. 776; Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521; Columbia Ins. Co. v. Cooper, 50 Pa. 331; Kister v. Lebanon Mutual Ins. Co., 128 Pa. 553, 15 Am. St. Rep. 696, 5 L. R. A. 646. See also, North British & Mercantile Ins. Co. v. Crutchfield, 108 Ind. 518; Grace v. American Central Ins. Co., 109 U. S. 278, 27 L. Ed. 932.

Contra: Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451.

[86] Such statutes have been passed in Ala., Ga., Conn., Iowa, Me., Mass., Minn., Miss., Mo., Neb., N. H., N. D., Ohio, Tex., Vt., Wis.

Thus the Wisconsin statute provides that every person "who solicits insurance on behalf of any insurance corporation or person desiring insurance of any kind, or transmits an application for a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, or advertises to do any such thing, shall be held to be an agent of such corporation to all intents and purposes, unless it can be shown that he receives no compensation for such services."

A somewhat different type of statute, not materially different in effect, prevails in several states. As to the construction of such statutes, see United Fireman's Ins. Co. v. Thomas, 34 C. C. A. 240, 92 Fed. 127; Noble v. Mitchell, 100 Ala. 519, 25 L. R. A. 238; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. Rep. 121; Hancock L. Ins. Co. v. Schlink, 175 Ill. 284; People v. Insurance Exchange, 126 Ill. 466; St. Paul F. & M. Ins. Co. v. Shaver, 76 Iowa, 282; Wood v. Fireman's Ins. Co., 126 Mass. 316; Pollock v. German F. Ins. Co., 127 Mich. 460; Bankers L. Ins. Co. v. Robbins, 55 Neb. 117; Schomer v. Insurance Co., 50 Wis. 575; Hankins v. Insurance Co., 70 Wis. 1; Davis Lumber Co. v. Hartford F. Ins. Co., 95 Wis. 226; Costello v. Insurance Co., 133 Wis. 350; Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304.

[87] See *post*, § 1848 *et seq.*

not be bound by the knowledge of its agent if it is acquired when transacting other business and not sufficiently close in time to justify the inference that he had it in mind;[88] or by his false statement if it is the result of collusion between him and the assured, to defraud the company.[89]

§ 1073. Misconduct of agent in taking application.—Closely affiliated and often confused with the question discussed in the preceding sections is the further question of the effect of the misconduct of the soliciting agent in the taking of the application. Here it is held that if the agent leads the applicant to make a false statement, or permits him to set forth in the application statements of fact which the agent knows to be false, the company is estopped to take advantage of their falsity;[90] *a fortiori,* if facts are correctly stated to the agent and they are by him incorrectly inserted in the application either wilfully or negligently, the company cannot take advantage of such incorrectness;[91] if the agent fills out the application from his own knowledge or from knowledge acquired from persons other then the applicant, the

[88] Stennett v. Pennsylvania F. Ins. Co., 68 Iowa, 674; St. Paul F. & M. Ins. Co. v. Parsons, 47 Minn. 352; Trenton v. Pothen, 46 Minn. 298, 24 Am. St. Rep. 225; Union Bank v. German Ins. Co., 18 C. C. A. 203, 71 Fed. 473. See also, Supreme Council v. Green, 71 Md. 263; Sanders v. Cooper, 115 N. Y. 279, 12 Am. St. Rep. 801, 5 L. R. A. 638.

[89] Ryan v. World L. Ins. Co., 41 Conn. 168, 19 Am. Rep. 490.

[90] Phoenix Ins. Co. v. Copeland, 86 Ala. 551, 4 L. R. A. 848; Dwelling House Ins. Co. v. Brodie, 52 Ark. 11, 4 L. R. A. 458; National Fire Ins. Co. v. Duncan, 44 Colo. 472, 20 L. R. A. (N. S.) 340; Stone v. Hawkeye Ins. Co., 68 Iowa, 737, 56 Am. Rep. 870; Mutual Benefit Life Ins. Co. v. Daviess, 87 Ky. 541; Follett v. United States Mutual Accident Ass'n, 110 N. C. 377, 28 Am. St. Rep. 693, 15 L. R. A. 668; Mullin v. Vermont Mutual Fire Ins. Co., 58 Vt. 113.

Contra: That the knowledge of the agent will not alter the rule if there be no actual fraud on the applicant. Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 13 L. R. A. (N. S.) 866; McCoy v. Metropolitan L. Ins. Co., 133 Mass. 82; Dimick v. Metropolitan L. Ins. Co., 69 N. J. L. 384; Clemens v. Supreme Council, 131 N. Y. 485; Pottsville Mutual Fire Ins. Co. v. Fromm, 100 Pa. 347.

[91] Creed v. Sun Fire Office of London, 101 Ala. 522, 46 Am. St. Rep. 134, 23 L. R. A. 177; Merchants' Mutual Fire Ins. Co. v. Harris, 51 Colo. 95; Phoenix Ins. Co. v. Stark, 120 Ind. 444; Taylor v. Anchor Mutual Fire Ins. Co., 116 Iowa, 625, 93 Am. St. Rep. 261, 57 L. R. A. 328; Continental Ins. Co. v. Pearce, 39 Kan. 396, 7 Am. St. Rep. 557; Wright v. Northwestern Mutual Life Ins. Co., 91 Ky. 208; Steele v. German Ins. Co., 93 Mich. 81, 18 L. R. A. 85; Chase v. People's Fire Ins. Co., 14 Hun (N. Y.), 456; Sternaman v. Metropolitan Life Ins. Co., 170 N. Y. 13, 88 Am. St. Rep. 625, 57 L. R. A. 318; American Life Ins. Co. v. Mahon, 56 Miss. 180; Kister v. Lebanon Mutual Ins. Co., 128 Pa. 553, 15 Am. St. Rep. 696, 5 L. R. A. 646. See also, New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. Ed. 984; Farmers' Ins. Co. v. Williams, 39 Ohio St. 584, 48 Am. Rep. 474.

company is bound by his answers;[92] if the agent draws his own conclusions from the information furnished him by the applicant and inserts such conclusions in the application the company cannot question their correctness;[93] if the agent suppresses the application filled out by the applicant and substitutes an entirely spurious one, the company cannot escape liability.[94]

Restrictions in the policy of the sort referred to in § 1071 above have constantly been appealed to in these cases, but they have generally been held to be ineffective to change the result.

§ 1074. Authority to waive proof or notice of loss.—While there is some conflict among the cases, the weight of authority seems to be that a general insurance agent, with full authority to issue policies, make contracts and collect premiums may waive proof or notice of loss, either expressly,[95] or by implication;[96] as may also any agent with express authority to adjust the loss.[97]

[92] People's Fire Ins. Co. v. Goyne, 79 Ark. 315, 9 Ann. Cas. 873, 16 L. R. A. (N. S.) 1180; Menk v. Home Ins. Co., 76 Cal. 50; Germania Fire Ins. Co. v. Hick, 125 Ill. 361, 8 Am. St. Rep. 384; Roe v. National Life Ins. Ass'n, 137 Iowa, 696, 17 L. R. A. (N. S.) 1144; Thomas v. Hartford Fire Ins. Co., 20 Mo. App. 150; Insurance Co. v. Wilkinson, 80 U. S. (13 Wall.) 222, 20 L. Ed. 617; Dunbar v. Phenix Ins. Co., 72 Wis. 492.

[93] Hough v. City Fire Ins. Co., 29 Conn. 10, 70 Am. Dec. 581; Miller v. Phoenix Mutual Life Ins. Co., 107 N. Y. 292; Langdon v. Union Mutual Life Ins. Co., 14 Fed. 273; Mutual Benefit Life Ins. Co. v. Robison, 58 Fed. 723, 22 L. R. A. 325; Continental Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. Ed. 341.

Conclusion as to title.—Duncan v. National Mutual Fire Ins. Co., 44 Colo. 472, 20 L. R. A. (N. S.) 340; Key v. Des Moines Ins. Co., 77 Iowa, 174; Phenix Ins. Co. v. Stocks, 149 Ill. 319; Western Assur. Co. v. Rector, 85 Ky. 294; Combs v. Hannibal Savings & Ins. Co., 43 Mo. 148, 97 Am. Dec. 383; Burson v. Philadelphia Fire Ass'n, 136 Pa. 267, 20 Am. St. Rep. 919; Home Ins. Co. v. Hancock, 106 Tenn. 513, 52 L. R. A. 665.

[94] Massachusetts Life Ins. Co. v. Eshelman, 30 Ohio St. 647.

[95] Indian River State Bank v. Hartford Fire Ins. Co., 46 Fla. 283; Phenix Ins. Co. v. Munger, 49 Kan. 178, 33 Am. St. Rep. 360; Phenix Ins. Co. v. Bowdre, 67 Miss. 620, 19 Am. St. Rep. 326; Nickell v. Phoenix Ins. Co., 144 Mo. 420; Perry v. Mechanics' Mutual Ins. Co., 11 Fed. 478; Snyder v. Dwelling House Ins. Co., 59 N. J. L. 544, 59 Am. St. Rep. 625.

Contra: Burlington Ins. Co. v. Kennerly, 60 Ark. 532; Lohnes v. Insurance Co. of N. A., 121 Mass. 439; Knudson v. Hekla Fire Ins. Co., 75 Wis. 198. See also, Smith v. Niagara Ins. Co., 60 Vt. 682, 6 Am. St. Rep. 144, 1 L. R. A. 216.

[96] Indian River State Bank v. Hartford Fire Ins. Co., 46 Fla. 283; Phenix Ins. Co. v. Searles, 100 Ga. 97; Citizens' Ins. Co. v. Stoddard, 99 Ill. App. 469; Commercial Union Assur. Co. v. State, 118 Ind. 331.

Contra: Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 56 Am. St. Rep. 485, 30 L. R. A. 346; Hicks v. British Am. Ins. Co., 162 N. Y. 284, 48 L. R. A. 424.

[97] Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 117 Am. St. Rep. 382, 9 Ann. Cas. 91, 8 L. R. A. (N.

issue policies upon property which he owns individually,[12] or which belongs to a partnership of which he is a member,[13] or to a corporation of which he is an officer or director,[14] or in which he is interested as agent.[15]

[12] Salene v. Queen City Ins. Co., 59 Oreg. 297, 35 L. R. A. (N. S.) 438; Zimmerman v. Dwelling House Ins. Co., 110 Mich. 399, 33 L. R. A. 698; Bentley v. Columbia Ins. Co., 17 N. Y. 421.

[13] Glen Falls Ins. Co. v. Hopkins, 16 Ill. App. 220; Ritt v. Washington Marine & Fire Ins. Co., 41 Barb. (N. Y.) 353.

[14] Arispe Mercantile Co. v. Capital Ins. Co., 133 Iowa, 272, 12 Ann. Cas. 93, 9 L. R. A. (N. S.) 1084; Greenwood Ice & Coal Co. v. Georgia Home Ins. Co., 72 Miss. 46. See, Arispe Mercantile Co. v. Queen Ins. Co., 141 Iowa, 607, 133 Am. St. Rep. 180.

[15] British American Assur. Co. v. Cooper, 6 Colo. App. 25; Utica Ins. Co. v. Toledo Ins. Co., 17 Barb. (N. Y.) 132. See also, Wildberger v. Hartford Fire Ins. Co., 72 Miss. 338, 48 Am. St. Rep. 553, 28 L. R. A. 220.

BOOK III.

OF THE EXECUTION OF THE AUTHORITY.

CHAPTER I

IN GENERAL

§ 1079. Purpose of Book III.
1080. Primary purpose to bind principal and not agent.
1081. Must act within scope of authority.
1082. Necessity of proper Execution.
1083. How question determined.
1084. Execution within, and exceeding authority.
1085. Slight Deviation does not invalidate.
1086. When separable, authorized part may stand.
1087. When execution lacks essential elements.
1088. Summary of the Rules.
1089. Should act in Name of the principal.

§ 1079. Purpose of Book III.—In the preceding chapters it has been seen how authority may be conferred upon an agent, and by what standards the nature and extent of the authority so conferred are to be determined.

It is the purpose of Book III to ascertain in what manner the authority so conferred and so construed is to be executed. In what is said upon this subject, it is to be borne in mind that the authority of the agent to perform the given act is assumed to be established, and that the only question is as to the mode and sufficiency of the execution of it.

§ 1080. Primary purpose to bind principal and not agent.—It is the primary purpose of the creation of an agency to authorize the agent to act for and in behalf of the principal. It is, therefore, the primary duty of the agent in executing the authority to so act as to secure to the principal the benefits to be derived from the performance, and to impose upon him the responsibilities arising therefrom. In other words, it is the primary function of the agent to bind the principal, and not himself, to third persons, and likewise to bind such third persons to the principal and not to himself.

§ 1081. Agent must act within the scope of his authority.—The act of the agent, whether he be general or special, within the limits of his authority is binding upon the principal; his act beyond those limits, binds himself only, or no one. Hence arises the fundamental necessity that not only the extent, but the manner, of the execution be such as the authority conferred will warrant, and no other. Where precise and exact limits have been fixed, the performance of the agent should be kept scrupulously within them. When those limits have not so been fixed, it is still imperative that the reasonable and usual limits in such cases be determined, and that the manner and extent of the execution be made to conform to them.

§ 1082. Necessity of proper execution.—It is obvious, therefore, that attention to the proper execution of the authority is highly important, not only as respects the principal himself, but the agent also. Thus the agent in the attempted execution of the authority, may do, (*a*) exactly what he was authorized to do, or (*b*) more than he was authorized to do, or (*c*) less than he was directed to do, and the result of his performance may be that—

1. He will bind his principal only, or
2. He will bind himself only, or
3. His attempted execution will be wholly void;

whereas the first result was the only one contemplated by the parties at the time of the creation of the agency.

§ 1083. How question determined.—In determining the results of an attempted performance, four questions arise:

1. What authority did the agent possess?
2. Is the act assumed to be done by virtue of it, in reality within its scope?
3. Who was intended to be bound? and
4. Who as a matter of fact is bound?

The first two of these questions must be largely determined by the principles laid down in the preceding chapters. The last two are yet to be considered.

§ 1084. Execution within, and exceeding authority.—Where the agent keeps strictly within the limits of his authority, the only question that will arise will be as to the mode of execution,—whether it is such as to bind the principal, or the agent, or neither.

Where, however, the agent exceeds those limits, the question will depend somewhat upon the degree of excess. "It is evident," as is observed by a learned writer, "to anyone who considers the matter, that the variance between the act done by the agent and the act author-

ized by the principal, may range through every degree of difference. The variance may be infinitesimal, or it may be so great as to make an absolute departure from the authority conferred. To determine the exact point between those two extremes at which a variance becomes substantial and material often gives rise to difficult questions. The result in each case must depend upon the circumstances of the particular case." [1]

§ 1085. Slight deviation does not invalidate.—No inflexible rule can be laid down by which to determine when the act as performed exceeds the limits of the act as authorized. But keeping in mind the fundamental principle to which reference has so frequently been made, that the authority conferred includes incidental authority to employ all the usual modes and means of accomplishing the ends and purposes of the agency, it may be said that a slight deviation from the course of his duty will not vitiate his act, if the variation be immaterial and circumstantial only, and does not in substance exceed the limits fixed.[2]

§ 1086. When separable, authorized part may stand.—Although the agent may have exceeded his authority, yet if the act be separable, it may stand so far as it is authorized.[3] "When a man," says Lord

[1] Evans' Agency, 168.

[2] Huntley v. Mathias, 90 N. C. 101, 47 Am. Rep. 516; Parker v. Kett, 1 Salk. 95. "Authorities by letter of attorney," says Holt, C. J., in this case, "are either general or special; thus a letter of attorney may be to sue in *omnibus causis motis et movendis*, or to defend a particular suit. Sir Philip Sidney, when he went to travel, gave a letter of attorney to Sir Thomas Walsingham to act and sell all his lands, and all his goods and chattels; and this was held good. Where the authority is particular the party must pursue it; if the act varies from it, he departs from his authority, and what he does is void; but that must be intended of a variance not in circumstances, but of a variance material and substantial, as where the person, the thing, or the date is mistaken."

[3] Drumright v. Philpot, 16 Ga. 424, 60 Am. Dec. 738; Vanada v. Hopkins, Minn. 538; Stowell v. Eldred, 39 Wis. 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Dickerman v. Ashton, 21 614; Evans v. Wells, 22 Wend. (N. Y.) 341; Crozier v. Carr, 11 Tex. 376; Moore v. Thompson, 32 Me. 497; Jesup v. City Bank, 14 Wis. 331.

In Commonwealth v. Hawkins, 83 Ky. 246, in an action on a sheriff's bond, against the sureties, the bond included a covenant to indemnify former sureties on a former bond, and a covenant to indemnify the state for the sheriff's collection of revenue. It was held that, even though the agent who executed the bond had no authority to make the former covenant, yet, if there was authority for the latter covenant, it was separable and valid.

In Guaranty Trust Co. v. Koehler, 195 Fed. 669, the defendants were sued on a contract of guaranty executed by an agent. The authority of the agent extended to the guaranteeing of the repayment of $22,500 and interest, but not to the guaranteeing of the payment of interest on another amount of $40,000. The agent executed the contract, making both guarantees. *Held*, that the con-

Coke, "doth that which he is authorized to do and more, there it is good for that which is warranted, and void for the rest." [4] So if the excess be merely superfluous it may be disregarded. Thus if an agent authorized to enter into a contract not under seal, executes it under seal, yet if the contract would be good without the seal, the seal may usually be disregarded and the contract be allowed to stand as written evidence of a simple contract.[5]

So if an agent in making an authorized sale, adds unauthorized covenants, the purchaser may enforce so much of the contract as conforms to the authority, or, at his option, may refuse to abide by the contract at all, if the principal repudiates the unauthorized covenants.[6]

On the other hand, where the act done is a single, entire and inseparable one, it cannot stand unless it can be deemed to be authorized as it was done.[7]

§ 1087. When execution lacks essential elements.—Where, however, the execution is defective by reason of the absence of some element essential to a complete performance, the principal is not bound. "Regularly," says Lord Coke, "it is true, that where a man doth less than the commandment or authority committed unto him, there (the commandment or authority being not pursued) the act is void." [8]

tract was valid as to the $22,500 guarantee, though the other guarantee was unauthorized.

[4] Coke, Lit. 258*a*.

[5] Morrow v. Higgins, 29 Ala. 448; Baum v. Dubois, 43 Penn. St. 260; Long v. Hartwell, 34 N. J. L. 116; Dutton v. Warschauer, 21 Cal. 609; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Wood v. Auburn, etc., R. R. Co., 8 N. Y. 160; Thomas v. Joslin, 30 Minn. 388. See *post*, § 1098.

[6] Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Smith v. Tracy, 36 N. Y. 79.

In Kane v. Sholars, 41 Tex. Civ. App. 154, where an agent, authorized by a power of attorney to convey by a quitclaim deed, gave a deed of special warranty, the deed was held valid to the extent of the agent's authority.

In Gillespy v. Hollingsworth, —— Ala. ——, 53 So. 987, where an agent to convey signed the deed "S. E. Jones, Att'y in fact for Jas. Gillespy," instead of signing in the name of Gillespy, the grantor, it was held that, though the deed was void at law, it created an equitable interest in the grantee.

[7] Where an agent was authorized to sign an obligation of insurance to the extent of £100, and signed for £150, and it was urged that the obligation was enforceable to the extent of the £100, Martin, B., said: "As to the last point, I think it scarcely arguable. This is an entire and indivisible contract to pay £150, and it is not valid, because the broker had authority only to make a contract to the extent of £100." Baines v. Ewing, 4 H. & C. 511, s. c. L. R. 1 Ex. 320. Cases involving the same point, in the case of negotiable instruments, are referred to in Chapter III following.

[8] Coke, Lit. 258*a*. See also Olyphant v. McNair, 41 Barb. (N. Y.) 446; Marland v. Stanwood, 101 Mass. 470.

§ 1088. Summary of the rules.—Where there is a complete execution of the authority and something *ex abundanti* is added which was not authorized, there the execution is good and the excess only is void; but where there is not a complete execution of the authority, or where the boundaries between the execution and the excess are not distinguishable, the whole must be held bad.[9]

§ 1089. Agent should act in name of principal.—It is also a general rule, subject to certain exceptions to be hereafter noticed, that the act of the agent should purport to be what it is intended to be,—the act of the principal,—and should be performed in his name by the agent as such.[10] Where the character in which, and the person for whom, the act is done, are clearly expressed and understood at the time, many of the difficult questions, hereafter to be noted, which arise where these matters are left uncertain or ambiguous, will be avoided.

[9] Alexander v. Alexander, 2 Ves. Sr. 640; Thomas v. Joslin, 30 Minn. 388.

[10] White v. Cuyler, 6 T. R. 176; Brinley v. Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; Hale v. Woods, 10 N. H. 470, 34 Am. Dec. 176; Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Clealand v. Walker, 11 Ala. 1058, 46 Am. Dec. 238; Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

CHAPTER II

OF THE EXECUTION OF SEALED INSTRUMENTS

§ 1090. Purpose of this chapter.
1091. The questions involved.
1092. Rules may differ with class of instrument.
1093. Deed by agent must purport to be made and sealed in the name of the principal.
1094. —— Exceptions—Powers exercisable in name of donee of power.
1095. —— Rule different in Texas.
1096. —— Rule changed by statute in a few states.
1097. —— Effect of statutes abolishing seals or making them unnecessary.
1098. —— How where instrument valid without a seal.
1099. Instrument may bind neither principal nor agent.
1100. —— Or be simply inoperative as conveyance — Agent's liability on covenants—Estoppel.
1101. Whose deed is a given deed—How question determined.
1102. Not enough to make deed the principal's that the agent is described as such.
1103, 1104. Not principal's deed where agent appears as grantor and signer.
1105. —— Agent named as grantor but deed signed in name of principal.
1106, 1107. —— Agent purporting to act "as agent for" or "in behalf of" the principal.
1108–1110. —— Deed naming principal as grantor but signed by agent personally.
1111, 1112. —— Mere descriptive words will not change personal grants or covenants.
1113. Distinction in case of public agents.
1114. Whether necessary that deed should purport to be executed by an agent.
1115–1117. —— Further of this rule.
1118. —— How in reason.
1119. Parol evidence not admissible to discharge agent.

§ 1090. Purpose of this chapter.—The manner of the execution of instruments under seal, such as deeds, bonds and other solemn writings, is of so much importance and has been so frequently discussed, as to merit the more extended treatment, which it is the purpose of this chapter to devote to it. The word "deed" herein is used to describe all instruments under seal, and not merely conveyances of land.

It is to be observed that the question here is not how authority to execute sealed instruments is to be conferred, but how such an authority is to be executed. It is assumed that the agent was authorized to bind his principal, but the question is, has he done so.

§ 1091. The questions involved.—The purpose which the parties have in mind in the execution of any of the instruments which are here involved, must undoubtedly be that the instrument shall have effect as an act in law. In order that it shall have the effect which the parties desire, it is essential that they shall know how such documents are actually dealt with in the legal world; for in no other way can they know how to frame the one in question in such form that it shall be given the effect in the legal world which they so desire. By the legal world, in this connection, must usually be meant the courts in their efforts to determine and enforce the rights of parties under instruments of this sort. It is therefore essential to know how the courts will read, or construe, or interpret the document, in order that that effect may then be given to it. In other words, it is essential that the parties shall know, either actually or constructively, how the courts interpret documents of this sort, in order that they may so frame the one in question that it shall be interpreted as they desire. The first question then will be, how are such instruments as this interpreted by the courts.

A second question will be, is the interpretation to be ascertained entirely from the document itself, or from the document in the light of its surrounding facts; or, if it appears that the rules of interpretation seem likely to lead to an unsatisfactory result, may resort be had to parol evidence to show what in this instance was actually meant.

§ 1092. Rules may differ with class of instrument.—It is entirely possible, and will in fact be found to be the case, that the rules of law affecting the questions here suggested will differ with the differing classes of instruments which the law recognizes; and that a different history, origin, purpose or theory respecting one class will lead to distinctions, important in fact, but which might otherwise, perhaps, have been thought of no real significance. This is strikingly illustrated in the cases which are here under consideration. Sealed instruments, negotiable instruments, and ordinary simple contracts in writing have each their peculiar rules, some of which perhaps make distinctions without a real and substantial difference, but which must nevertheless be taken into account. The instrument under seal, which is the subject of the present chapter, is peculiarly subject to special rules which must now be considered.

§ 1093. Deed by agent must purport to be made and sealed in the name of the principal.—It is a general rule in the law of agency that in order to bind the principal by a deed executed by an agent, the deed must upon its face purport to be made, signed and sealed in the

name of the principal. If, on the contrary, though the agent describes himself as "agent," or though he add the word "agent" to his name, the words of grant, covenant and the like, purport upon the face of the instrument to be his, and the seal purports to be his seal, the deed will bind the agent if any one and not the principal.[11]

So, in order to enable the principal to enforce the obligation against the other party, the same rule must be observed. For it is well settled by the strict rules of the common law, that no person can sue or be sued upon an instrument under seal unless he be named therein as a party to the same, and has also signed and sealed it.[12]

The rules, moreover, hereafter to be considered,[13] which enable an undisclosed principal to sue or be sued upon a contract made by his agent, have, as will be seen, no application to instruments under seal.[14]

The general rule, however, while well settled, is highly technical in its nature, being founded upon the common-law theories of the effect of a seal, and like other rules based purely upon these theories, has encountered a strong tendency in recent cases to make the mere presence of a seal subordinate to the evident intention of the parties.[15]

§ 1094. ——— Exceptions—Powers exercisable in name of donee of power.—There are, however, several well settled exceptions to the rule that a power must be exercised in the name of the principal.

[11] Stinchfield v Little, 1 Greenl. (Me.) 231, 10 Am. Dec. 65; Stone v. Wood, 7 Cow. (N. Y.) 452, 17 Am. Dec. 529; Lutz v. Linthicum, 8 Pet. (U. S.) 165, 8 L. Ed. 904; Fullam v. West Brookfield, 9 Allen (Mass.), 1; Townsend v. Corning, 23 Wend. (N. Y.) 435, aff'd 4 Hill (N. Y.), 351; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Grubbs v. Wiley, 17 Miss. 29; Hopkins v. Mehaffy, 11 S. & R. (Penn.) 126; Webster v. Brown, 2 Rich. (S. C.) N. S. 428; Echols v. Cheney, 28 Cal. 157; Morrison v. Bowman, 29 Cal. 337; City of Providence v. Miller, 11 R. I. 272, 23 Am. Rep. 453; Elwell v. Shaw, 16 Mass 42, 8 Am. Dec. 126; Brinley v. Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; Combe's Case, 9 Co. 76; Fowler v. Shearer, 7 Mass. 14; Carter v. Chaudron, 21 Ala. 72; Gillespy v. Hollingsworth, 169 Ala. 602; Bogart v. De Bussy, 6 Johns (N. Y.) 94; Martin v. Flowers, Leigh (Va.), 158; Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665, and see cases cited in following sections.

[12] Buffalo Catholic Institute v. Bitter, 87 N. Y. 250; Klein v. Mechanics' Bank, 145 N. Y. App. Div. 615; Porter v. Baldwin, 139 N. Y. App. Div. 278; McColgan v. Katz, 29 N. Y. Misc. 136; Loeb v. Barris, 50 N. J. L. 382; Harms v. McCormick, 132 Ill. 104; Van Dyke v. Van Dyke, 123 Ga. 686. See also Potter v. Bassett, 35 Mo. App. 417.

[13] See *post*, *Undisclosed Principal*.

[14] Lenney v. Finley, 118 Ga. 718; Badger Silver Mining Co. v. Drake, 31 C. C. A. 378, 88 Fed. 48; Farrar v. Lee, 10 N. Y. App. Div. 130; Benham v. Emery, 46 Hun (N. Y.), 156; Equitable Life Assur. Soc. v. Smith, 25 Ill. App. 471.

[15] See remarks of Henry, J., in McClure v. Herring, 70 Mo. 18, 35 Am. Rep. 404.

Thus in a leading case [16] in Massachusetts (where the general rule has been most strictly applied), it is said by Wells, J.: "When the power merely authorizes the donee to execute a deed in the name of the donor, or as his attorney, it must be so executed; and the deed of sale will then be the deed of the donor of the power and not of the donee. But a power may be given to be executed by the deed of the donee, as well as it may by his will. This was formerly the more common mode.[17] When such is the case, the deed of sale not only may, but must, be executed under the hand and seal of the donee of the power. If the power be given in the alternative, as is often the case, the deed of sale may be executed in either form. In the present case [that of the execution of a power of sale under a mortgage], the power is 'to make, execute and deliver to the purchaser or purchasers thereof all necessary conveyances for the purpose of vesting in such purchaser or purchasers the premises so sold in fee simple absolute.' This is not a mere power of attorney to execute a deed in the name of the mortgagor; though the deed might not perhaps have been invalid if it had been executed in that manner; but it is a full power of sale and conveyance, which may properly be executed, as it was in this case, by the deed of the mortgagee, reciting the power, and signed and sealed with her own name and proper seal."

Cases of statutory or official powers may fall within the same rule. So also, as has been seen, cases of powers "coupled with an interest" have often been said to be those in which the power is capable of being exercised in the name of the donee. Cases of powers, properly executed, and expressly authorizing the donee to make the conveyance in his own name, may be within the same class. A few cases carry the rule still further, and sustain deeds made by the agent where they clearly show an intent to convey for the principal, though they are inartificial in form.[18]

§ 1095. ——— Rule different in Texas.—A different rule from that first stated seems to prevail in Texas. There, it is held not to be

[16] Cranston v. Crane, 97 Mass. 459, 93 Am. Dec. 106.

See "Survival of Powers as Unaffected by Statutes" by Professor A. M. Kales, 6 Illinois Law Review, 447.

[17] Citing 1 Sugden on Powers (7th ed.), 286.

[18] In Hubbard v. Swofford Bros. Dry Goods Co., 209 Mo. 495, 123 Am. St. R. 488, there is a *dictum* to the effect that, in case of a power to sell and convey, a conveyance made by the donee indicating that he makes it in execution of the power is a valid execution of the power though made in the name of the donee. See also Donovan v. Welch, 11 N. Dak. 118.

essential that the agent shall refer to his power, and he may make the deed in his own name.[19] "If the grantor has no estate in the land which can pass by the deed, but has a power to convey the title of another, his act will be referred to his power because the purchaser will be supposed to have bought in reliance on it." So it is held, that, if the attorney refers to one power which is invalid but he has another valid power not referred to, he will be presumed to have acted under the latter.[20] Whether, when he acts without reference to his power, he is to be deemed to be acting in pursuance of it, or independently of it and on his own account, seems to be a question of fact to be determined in view of all the circumstances of the case.[21]

§ 1096. ——— Rule changed by statute in a few states.—In a few of the states, the general rule has been changed by statutes which in substance provide that the fact that the attorney is named as the grantor, or that he signs instead of the principal, shall not prevent the taking effect of the deed as the deed of the principal, where that appears to have been the intention of the parties.[22]

[19] Thus in Trinity County Lumber Co. v. Pinckard, 4 Tex. Civ. App. 671, it is said, "The execution of a power by the attorney in his own name is at common law invalid; but that rule does not now, nor did it obtain in this state when the act in question was passed. Under the law of this state a power may be executed by the attorney without reference to his authority. Our law, in this particular at least, dispenses with the technical requirements of the common law, and if the attorney has the power to convey, the conveyance is binding upon the principal, and conveys his title, though the conveyance be made without reference to him. Hough v. Hill, 47 Tex. 148; Rogers v. Bracken, 15 Tex. 564; Link v. Page, 72 Tex. 592." See also Hill v. Conrad, 91 Tex. 341; Pool v. Foster (Tex. Civ. App), 49 S. W. 923; Rye v. Petroleum Co., 42 Tex. Civ. App. 185; Neill v. Kleiber, 51 Tex. Civ. App. 552.

[20] Hough v. Hill, *supra;* Link v. Page, *supra.*

[21] Thus in Hill v. Conrad, *supra*, where the agent in making the conveyance declared himself to be the owner, and referred to a conveyance to himself, it was held that his deed could not be sustained as an execution of the power.

[22] *Maine* [1883] p. 605, § 15.—Deeds and contracts, executed by an authorized agent of a person or a corporation in the name of his principal, or in his own name for his principal are in law the deeds and contracts of such principal.

Mississippi (Code § 194).—Conveyances of land or contracts relating thereto, executed by an attorney in fact for his principal, and duly acknowledged or proved, shall have the same force and effect as if executed and acknowledged by the principal; and where a conveyance by an attorney is in execution of letters of attorney, it shall pass the interest of the principal though not formally executed in his name; but in all such cases the attorney must have been appointed by some writing duly executed by the principal.

Ohio (R. S. § 4110).—No deed of real estate executed by any person acting for another, under a power of

§ 1097. ——— Effect of statutes abolishing seals or making them unnecessary.—In several of the states, moreover, the rules affecting sealed instruments generally have been more or less modified by statute. Thus in Minnesota, where the statute provides that "the use of private seals on written contracts is hereby abolished, and the addition

attorney duly executed, acknowledged and recorded, shall be held to be invalid or defective because he is named therein, as such attorney, as the grantor instead of his principal; nor because his name, as such attorney, is subscribed thereto, instead of the name of the principal; nor because the certificate of acknowledgment, instead of setting forth that the deed was acknowledged by the principal, by his attorney, sets forth that it was acknowledged by the person who executed it, as such attorney; but all such deeds so executed shall be as valid and effectual, in all respects, within the authority conferred by such powers of attorney, as if they had been executed by the principals of such attorneys, in their own proper persons.

Pennsylvania (Purdon's Dig. of Stat. 13th ed. p. 376 § 8).—Whenever any deed of conveyance or other instrument of writing has been heretofore executed or acknowledged, or both under any power sufficiently authorizing the same, which power shall have been recited in said deed or other instrument, shall have been informally executed by an attorney, in his own name, reciting his authority, instead of being executed in the name of the principal or principals, such deed or instrument shall be taken to be of the same validity and effect as if executed in the name and behalf of the principal or principals, as a party or parties thereunto.

Rhode Island (Gen. Laws [1909] p. 878 § 17).—The donee of a power of attorney may under and within the authority of the power if he think fit, execute or do any assurance, instrument, or thing in and with his own name and signature, and, where sealing is required, with his own seal; and every assurance, instrument, and thing so executed and done, shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power, in the name and with the signature or signatures and seal of the donor thereof.

Tennessee (Shan. Code § 3679).—Instruments in relation to real or personal property, executed by an agent or attorney, may be signed by such agent or attorney for his principal, or by writing the name of the principal by him as agent or attorney, or by simply writing his own name or his principal's name, if the instrument on its face shows the character in which it is intended to be executed. See McCreary v. McCorkle (Tenn. Ch.), 54 S. W. 53.

Virginia (Code § 2416).—If, in a deed made by one as attorney in fact for another, the words of conveyance or the signature be in the name of the attorney, it shall be as much the principal's deed as if the words of conveyance or the signature were in the name of the principal by the attorney, if it be manifest on the face of the deed that it should be construed to be that of the principal to give effect to its intent.

West Virginia (ch. 71 § 3).—If in a deed made by one as attorney in fact for another, the words of conveyance or the signature be in the name of the attorney, it shall be as much the principal's deed as if the words of conveyance or the signature were in the name of the principal by the attorney, if it be manifest on the face of the deed that it should be construed to be that of the principal to give effect to its intent.

of a private seal to an instrument in writing shall not affect its character in any respect," it was held that all the differences theretofore existing in the law between sealed and unsealed instruments were abolished, and that, notwithstanding the presence of a seal, an undisclosed principal could be charged upon parol evidence of his existence.[23]

On the other hand, in Texas, where the statute declares that no private seal shall be necessary to the validity of any contract, bond or conveyance, "nor shall the addition or omission of a seal or scroll in any way affect the force and effect of the same," it was held, that this statute had not changed the rule.[24]

§ 1098. ——— How where instrument valid without a seal.—Whether the rule excluding parol evidence to charge the real principal, should apply where the contract, though happening to be under seal, was not one to whose validity a seal was essential, is a question upon which the authorities are not entirely uniform. It is held in some cases that the evidence is as admissible under such circumstances as though no seal were in fact attached;[25] but in other cases it is held that the rule of exclusion applies, unless the interest of the principal appears upon the face of the contract, or unless, perhaps, the principal has ratified it and accepted the benefits of it.[26]

The question will be more full considered in a later section.[27]

§ 1099. Instrument may bind neither principal nor agent.—It does not necessarily follow, of course, that either the principal or the

The English Conveyancing Act of 1881, § 46, provides that "The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof."

[23] Streeter v. Janu, 90 Minn. 393. To same effect is Gibbs v. Dickson, 38 Ark. 107.

[24] Sanger v. Warren, 91 Tex. 472, 66 Am. St. R. 913. See also Jones v. Morris, 61 Ala. 518.

[25] Woolsey v. Henke, 125 Wis. 134; Stowell v. Eldred, 39 Wis. 614; Kirschbon v. Bonzel, 67 Wis. 178; Northern Nat. Bank v. Lewis, 78 Wis. 475; Lancaster v. Knickerbocker Ice Co., 153 Pa. 427; Wagoner v. Watts, 44 N. J. L. 126, aff'd 45 N. J. L. 184.

[26] Stanton v. Granger, 125 N. Y. App. Div. 174, affirmed without opinion, 193 N. Y. 656; Smith v. Pierce, 45 N. Y. App. Div. 628; Schaefer v. Henkel, 75 N. Y. 378; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Simson v. New York, etc., R. Co., 51 N. Y. Super. 419; Lenney v. Finley, 118 Ga. 718; Van Dyke v. Van Dyke, 123 Ga. 686. Compare Rand v. Moulton, 72 N. Y. App. Div. 236.

[27] See *post*, Book IV, Chap. V.

agent must always be bound upon the instrument. It may be so executed that neither will be bound. Thus, if the covenants are clearly the covenants of the principal, but the agent signs in his own name, and appends his own seal, neither the principal nor the agent will ordinarily be liable upon the instrument: the principal, because he has not signed, and the agent, because he has not covenanted.[28] For similar reasons, the reverse of the situation will be subject to the same rule, that is, where the grants and covenants are clearly those of the agent only but the signature and seal are those of the principal.[29] In general, as will be seen hereafter,[30] the agent cannot be liable upon the instrument itself unless it contains apt words to bind him personally; though in many cases, as will be seen, he will be liable upon an express or implied warranty of authority.

Courts have, however, in several cases declared that, *ut res magis valeat, quam pereat,* they would, where the principal could not be held, lean towards a construction which would make the agent personally liable.[31]

§ 1100. ——— Or be simply inoperative as conveyance—Agent's liability on covenants — Estoppel.—The instrument may also in many cases be simply inoperative, as a conveyance. Thus, where the agent undertakes in his own name to convey or lease that which clearly belongs to his principal, the conveyance or lease will be of no effect as such, and will not support the agreement of the other party to pay the purchase price or rent therein provided for.[32] Where, however, the covenant, though made by the agent, is that the principal will convey, such a covenant is valid and furnishes a good consideration for the agreement of the opposite party to pay.[33]

[28] Whitford v. Laidler, 94 N. Y. 145, 46 Am. Rep. 131; Bellas v. Hays, 5 S. & R. (Pa.) 427, 9 Am. Dec. 385; Hopkins v. Mehaffy, 11 S. & R. (Pa.) 126; Neufeld v. Beidler, 37 Ill. App. 34; Abbey v. Chase, 6 Cush. (Mass.) 54; Ellis v. Pulsifer, 4 Allen (Mass.), 165; Townsend v. Corning, 23 Wend. (N. Y.) 435, aff'd 4 Hill, 351; Morrison v. Bowman, 29 Cal. 337.

[29] Steele v. McElroy, 1 Sneed (Tenn.), 341.

But compare cases cited in § 1105, *post.*

[30] See *post,* Book IV, Chapter III.

[31] See Hall v. Cockrell, 28 Ala. 507.

[32] First Baptist Church v. Harper, 191 Mass. 196; Murray v. Armstrong, 11 Mo. 209; Potter v. Bassett, 35 Mo. App. 417; Bogart v. De Bussy, 6 Johns. (N. Y.) 94; Frontin v. Small, 2 Ld. Ray. 1418; Jones v. Morris, 61 Ala. 518; Fisher v. Salmon, 1 Cal. 413, 54 Am. Dec. 297; Echols v. Cheney, 28 Cal. 157; Casey v. Lucas, 2 Bush (Ky.), 57; Fowler v. Shearer, 7 Mass. 14; Elwell v. Shaw, 16 Mass. 42, 8 Am. Dec. 126; Holmes v. Carman, 1 Freem. Ch. (Miss.) 408; Locke v. Alexander, 2 Hawks (9 N. C.), 155, 11 Am. Dec. 750.

[33] Spencer v. Field, 10 Wend. (N. Y.) 87, distinguishing Bogart v. De Bussy, *supra,* and Frontin v. Small, *supra.*

But, though the instrument may be invalid as a conveyance, the agent may be liable upon any of the covenants contained in it, which may subsist without a transfer of the title.[34]

The agent's personal covenant in such a case may, it is held, operate by way of estoppel to prevent the agent's setting up a subsequently acquired title to the same premises;[35] but he is not estopped by covenants made in the principal's name.[36]

Returning now to the ordinary case of a deed, bond or other similar instrument executed by the agent and to the question of whose deed it is to be deemed to be—

§ 1101. Whose deed is a given deed—How question determined.—In determining whether a given deed is the deed of the principal, regard may be had, *First*, to the party named as grantor. Is the deed stated to be made by the principal or by some other person? *Secondly*, to the granting clause. Is the principal or the agent the person who purports to make the grant? *Thirdly*, to the covenants, if any. Are these the covenants of the principal? *Fourthly*, to the testimonium clause. Who is it who is to set his name and seal in testimony of the grant? Is it the principal or the agent? And *Fifthly*, to the signature and seal. Whose signature and seal are these? Are they those of the principal or of the agent?[37]

[34] Lutz v. Linthicum, 33 U. S. (8 Pet.) 165, 8 L. Ed. 904; Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169; Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 803.

But see Locke v. Alexander, 2 Hawks (N. C.), 155, 11 Am. Dec. 750.

[35] North v. Henneberry, 44 Wis. 306; Heard v. Hall, 16 Pick. (Mass.) 457.

[36] Kern v. Chalfant, 7 Minn. 487; Smith v. Penny, 44 Cal. 161.

[37] *Whose seal is it.*—Where the body of a deed appeared to be the grant of a corporation, and the deed was signed by the trustees, whose names were followed by scrolls, it was held that the scrolls or seals so used should be deemed to be the seal of the corporation, inasmuch as they had not been denominated the seals of the signees, and since this view was consonant with the general tenor of the instrument. Reynolds Heirs v. Trustees of Glasgow Academy (1837), 6 Dana (Ky.), 37. And so in Hopkins v. Mehaffy (1824), 11 S. & R. (Pa.) 126, it was held that an agent was not bound where he had signed and sealed the instrument, since, as the court said, the sealing was as president and in behalf of the corporation. And in Montgomery v. Dorion (1834), 7 N. H. 475, an instrument was upheld, against the principals, to which the agent had put his hand and seal. The court said: "This seems tantamount to putting his hand and seal to the deed for them, which is sufficient."

On the contrary, it was held in Savings Bank v. Davis (1830), 8 Conn. 191, that a deed, executed by an agent, to be valid must be sealed with the corporate seal, and none other would suffice; the court regrets the inconvenience of such a rule but yields to unbroken precedents, citing: King v. North Duffield, 3 M. &

If upon such an analysis the deed does not upon its face purport to be the deed of the principal, made, signed, sealed and delivered in his name and as his deed, it cannot take effect as such.

§ 1102. Not enough to make deed the principal's that the agent is described as such.—It is not enough merely that the agent was in fact authorized to make the deed, if he has not acted in the name of the principal. Nor is it ordinarily sufficient that he describes himself in the deed as acting by virtue of a power of attorney or otherwise, or for or in behalf, or as attorney, of the principal, or as a committee, or as trustee of a corporation, etc.; for these expressions are usually but *descriptio personæ*, and if, in fact, he has acted in his own name and set his own hand and seal, the causes of action thereon accrue to and against him personally and not to or against the principal, despite these recitals.[38]

But at the same time, no set form of words is necessary. The deed must be in the name, and purport to be the act and deed, of the principal; but whether such is the purport of the instrument, must be de-

S. 247; Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Bank of Columbia v. Patterson's Adm'rs, 7 Cranch (U. S.), 299, 3 L. Ed. 351; Damon v. Granby, 2 Pick. (Mass.) 345; Stinchfield v. Little, 1 Greenl. (Me.) 231, 10 Am. Dec. 65; Taft v. Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280.

[38] Stinchfield v. Little, 1 Greenl. (Me.) 231, 10 Am. Dec. 65; Fowler v. Shearer, 7 Mass. 14; Tippets v. Walker, 4 Mass. 595; Tucker v. Bass, 5 Mass. 164; Taft v. Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; Lutz v. Linthicum, 8 Pet. (U. S.) 165, 8 L. Ed. 904; Fullam v. West Brookfield, 9 Allen (Mass.), 1; Duval v. Craig, 2 Wheat. (U. S.) 45, 4 L. Ed. 180; Deming v. Bullitt, 1 Blackf. (Ind.) 241; White v. Skinner, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381; Quigley v. DeHaas, 82 Pa. 267; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Henricus v. Englert, 137 N. Y. 488; Kiersted v. Orange, etc., R. R. Co., 69 N. Y. 343, 25 Am. Rep. 199; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; First Church v. Harper, 191 Mass. 196; Endsley v. Strock, 50 Mo. 508; Jones v. Morris, 61 Ala. 518; Banks v. Sharp, 6 J. J. Marsh. (Ky.) 180; Locke v. Alexander, 2 Hawk. (N. C.) 155, 11 Am. Dec. 750; Scott v. McAlpin, 4 N. C. 587, N. C. Term Rep. 155, 7 Am. Dec. 703; Bellas v. Hays, 5 Serg. & R. (Penn.) 427, 9 Am. Dec. 385; Fisher v. Salmon, 1 Cal. 413, 54 Am. Dec. 297; Welsh v. Usher, 2 Hill Ch. (S. C.) 167, 29 Am. Dec. 63; Buffalo Catholic Institute v. Bitter, 87 N. Y. 250; Willis v. Bellamy, 52 N. Y. Super. Ct. 373; Sheridan v. Pease, 93 Ill. App. 219; Home Library Ass'n v. Witherow, 50 Ill. App. 117; Jackson v. Roberts, 95 Ky. 410; De Belran v. Gola, 64 Md. 262.

See also Cadell v. Allen, 99 N. Car. 542. Although the signature in this case sufficiently purported to be that of the principal the terms of the deed all read, "C., attorney for L." The court said: "He—not his principal—purported to convey the title, and, as a consequence, no title passed, for he had none to convey. The deed should, by its effective terms of conveyance, be and purport to be that of the principal, executed by his attorney, and to convey the estate of the principal."

termined from its general tenor, and not from any particular clause. Such construction must be given, in this as well as in other questions arising on conveyances, as shall make every part of the instrument operative as far as possible; and when the intention of the parties can be discovered, such intention should be carried into effect, if it can be done consistently with the rules of law.[39]

Thus in a leading English case, it is said by Grose, J.: "There is no particular form of words required to be used, provided the act be in the name of the principal, for where is the difference between signing J B by M W, his attorney, which must be admitted to be good, and M W for J B? In either case, the act of sealing and delivering is done in the name of the principal and by his authority. Whether the attorney put his name first or last cannot affect the validity of the act done."[40] The particular illustration used here, however, is not a very happy one; because, as will be seen,[41] the form "M W for J B" is not always free from difficulty.

§ 1103. Not principal's deed where agent appears as grantor and signer.—Neither can the deed ordinarily be deemed to be the deed of the principal where the agent is the one who is named as the grantor or maker, and he is also the one who signs and seals it. Thus where a deed was executed by an agent in the following form, "Know all men, etc., that I, Josiah Little, of, etc., by virtue of a vote of the Pejebscot Proprietors, passed, etc., authorizing and appointing me to give and execute deeds for and in behalf of said proprietors, for and in consideration of the sum of thirty-seven pounds to me in hand paid by Thomas Stinchfield, of, etc., the receipt whereof I do hereby acknowledge, have given, granted, released, conveyed and confirmed unto him, the said Thomas Stinchfield, his heirs and assigns, two hundred acres, etc. To have and to hold, etc., hereby covenanting in behalf of said proprietors, their respective heirs, executors and administrators, to and with the said T. S., his heirs and assigns, to warrant, confirm and defend him and them in the possession of the said granted premises, against the lawful claims of all persons whatsoever. In testimony that this in-

[39] Hale v. Woods, 10 N. H. 470, 34 Am. Dec. 176; Jackson v. Blodget, 16 Johns. (N. Y.) 172; Bridge v. Wellington, 1 Mass. 219; Davis v. Hayden, 9 Mass. 514; Hatch v. Dwight, 17 Mass. 289, 9 Am. Dec. 147; Magill v. Hinsdale, 6 Conn. 464 *a*, 16 Am. Dec. 70; Hovey v. Magill, 2 Conn. 680.

[40] Wilks v. Back, 2 East, 142. See the criticism on this language of Grose J., by David Hoffman, Esq. in 3 American Jurist, at p. 82 *et seq.*

[41] See Dolan v. Alley, 153 Mass. 380; King v. Handy, 2 Ill. App. 212; Offutt v. Ayers, 7 T. B. Mon. (Ky.) 356; Dawson v. Cotton, 26 Ala. 591.

strument shall be forever hereafter acknowledged by the said proprietors as their act and deed and be held good and valid by them, I, the said Josiah Little, by virtue of the aforesaid vote, do hereby set my hand and seal this day, etc." Signed "Josiah Little, Seal," it was held to be the deed of Josiah Little and that he, and not the Pejebscot Proprietors, was liable upon the covenants.[42]

So where Jonathan Elwell executed to Joshua Elwell a power of attorney to convey the lands in question, and the latter, purporting to act in pursuance of it, executed a deed of the land, in which, after reciting the power, he proceeded: "Now know ye that I, the said Joshua, by virtue of the power aforesaid, in consideration, etc., do hereby bargain, grant, sell and convey unto the said (grantees) to have and to hold, etc., and I do covenant with the said (grantees) that I am duly empowered to make the grant and conveyance aforesaid; that the said Jonathan at the time of executing said power was, and now is, lawfully seized of the premises, and that he will warrant and defend the same, etc. In testimony whereof, I have hereunto set the name and seal of the said Jonathan this day, etc.," and signed "Joshua Elwell" and seal, the deed was held not be the deed of Jonathan.[43]

§ 1104. ——— The same rules were applied in an early case in Massachusetts, although the facts were different, and the case might well have been deemed to fall within a different class later to be considered. Here one of two deeds which purported to be made by "New England Silk Company, a corporation, by Christopher Colt, Jun., their treasurer," was attested: "In witness whereof, I, the said Christopher Colt, Jun., in behalf of said company, and as their treasurer, have hereunto set my hand and seal," was signed and sealed "Christopher Colt, Jun., treasurer, New England Silk Company," and the acknowledgment was to the effect that "Christopher Colt, Jun., treasurer, etc., acknowledged the above instrument to be his free act and deed," and the other deed was like the fist except that Colt was therein described as "treasurer of New England Silk Company, and duly authorized for that purpose," the court held each of them to be inoperative to convey the title of the Silk Company. In both of these deeds, as will be noticed, the principal was properly named as grantor but they were signed and sealed by the agent in his own name. "Both of these deeds," said Judge Metcalf, "were executed by C. Colt, Jun., in his own name, were sealed with his seal, and were acknowledged by him as his acts and

[42] Stinchfield v. Little (1821), 1 Greenl. (Me.) 231, 10 Am. Dec. 65.

[43] Elwell v. Shaw (1819), 16 Mass. 42, 8 Am. Dec. 126.

deeds. In one of them, it is true, he declared that he acted in behalf of the company, and as their treasurer; and in the other he declared himself to be their treasurer, and to be duly authorized for the purpose of executing it. But this was not enough. He should have executed the deeds in the name of the company. He should also have affixed to them the seal of the company, and have acknowledged them to be the deeds of the company." [44]

§ 1105. ——— Agent named as grantor but deed signed in name of principal.—Where, however, although the agent was named in the instrument as the party, the deed was properly signed in the name of the principal, it has been given effect as the deed of the principal, and not of the agent.[45] In this case a lease was made commencing as follows: "This indenture, made this 17th day of April, A. D. 1869, between Daniel R. Brant, of the city of Chicago, party of the first part, and Edward F. Lawrence, president of the Northwestern Distilling Company, of the same place, party of the second part." Throughout the lease the parties were spoken of as persons and the covenants were personal covenants, and the instrument concluded as follows: "In testimony whereof, the said parties have hereunto set their hands and seals the day and year first above written. D. R. Brant. [Seal.] Northwestern Distilling Co. [Seal.] By Edward Lawrence, President."

§ 1106. ——— Agent purporting to act "as" agent "for" or "in behalf of" the principal.—Where the agent has expressly declared that he was acting as such and for or in behalf of a described princi-

[44] Brinley v. Mann (1848), 2 Cush. (Mass.) 337, 48 Am. Dec. 669.

Compare Haven v. Adams, 4 Allen (Mass.), 80.

Where a deed was in form the deed of Stephen Smith [the principal] from the beginning to the end of the *testimonium* clause, but was signed "Stephen Henry Smith, attorney in fact of Stephen Smith," it was held not to be the deed of Stephen Smith. Morrison v. Bowman, 29 Cal. 337.

[45] Northwestern Distilling Co. v. Brant (1873), 69 Ill. 658, 18 Am. Rep. 631. See also to the same effect: Shanks v. Lancaster (1848), 5 Gratt. (Va.) 110, 50 Am. Dec. 108; Butterfield v. Beall (1851), 3 Ind. 203.

Compare Hancock v. Younker, 83 Ill. 208; Cadell v. Allen, 99 N. Car. 542.

But where an agreement for the building of large rooms ran between "G. M. S. on the one part, and S. M. M., D. S. H., A. R. D., committee for Union Chapter No. 18, and W. S. S., S. S. G., N. K., committee for Jackson Lodge No. 68;" and "the before named committee on behalf of said Chapter and Lodge obligate themselves to pay" and was signed "G. M. S., [L. S.]; Union Chapter No. 18, [L. S.] by S. M. M., D. S. H., A. R. D., committee; Jackson Lodge, No. 68, [L. S.] by W. S. S., L. S. G., N. K., committee," it was held that the agreement was between G. M. S. and the members of the committees personally and that the latter might therefore sue for its breach. Steele v. McElroy, 1 Sneed (Tenn.), 341.

pal, the deed has in many cases been given effect as such. Thus where a manufacturing company by vote had authorized one Arthur W. Magill to make a deed of the real estate of the company, and he, in pursuance of the authority, executed a deed, of which the granting part was as follows: "Arthur W. Magill, agent for the Middletown Manufacturing Company, being empowered by vote," etc., "for and in behalf of said company," etc., "do give, grant," etc., the covenant being: "I do hereby covenant for and in behalf of the said company," etc., "that said Middletown Manufacturing Company is well seized," etc., "and I do also bind the said Middletown Manufacturing Company to warrant and defend," etc., and the conclusion being as follows: "In witness whereof, I have hereto, for and in behalf of said Middletown Manufacturing Company, set my hand and seal at Middletown, this 29th day of March, A. D. 1817. Arthur W. Magill [L. S.], agent for the Middletown Manufacturing Company," it was held that this was the deed of the company and not of the agent.[46]

And again, where the terms of the conveyance were: "I, Daniel King, as well for myself as attorney for Zachariah King, do for myself and the said Zachariah, remise, release and forever quit-claim" the premises, "together with all the estate, right, title, interest, use, property, claim and demand whatsoever, of me, the said Daniel, and said Zachariah, which we now have, or heretofore had at any time, in said premises. And we, the said Daniel and Zachariah, do hereby, for ourselves, our heirs and executors, covenant that the premises are free of all incumbrance and that the grantee may quietly enjoy the same without any claim or hindrance from us or any one claiming under us, or either of us. In witness whereof, we the said Daniel for himself and as attorney aforesaid, have hereunto set our hands and seals," etc., and signed "Daniel King" and "Daniel King, attorney for Zachariah King, being duly authorized as appears of record," with seals affixed to each signature, it was held that the grant conveyed the title of both.[47]

§ 1107. ——— So where the deed of the land of T and S, his wife, was drawn as follows: "I, H, for myself, and as attorney for T and S, by their letters of attorney under their hands and seals, in consideration, etc., to us paid by L, do sell and convey to L, etc. And we the said T and S do covenant, etc. In witness whereof, I, H, in my own right have hereunto set my hand and seal, and as attorney for said

[46] Magill v. Hinsdale (1827), 6 Conn. 464 *a*, 16 Am. Dec. 70.

[47] Hale v. Woods (1839), 10 N. H. 470, 34 Am. Dec. 176; citing Wilks v. Back (1802), 2 East, 142, and Montgomery v. Dorion (1835), 7 N. H. 475.

T and S have hereunto set their hands and seals," and was signed "H. [L. S.] T. [L. S.] S. [L. S.] By H, their attorney in fact," it was held that the deed was that of T and his wife S, and not of the agent H.[48]

But where A gave to his wife B a power of attorney to execute a deed of land and she made the deed in the following form: "Know ye that I, B, of, etc., as attorney to A, of, etc., in consideration, etc., have granted, etc. In witness whereof I have hereunto set my hand and seal. B. [Seal]," the court held that it was not the deed of A.[49]

§ 1108. ——— Deed naming principal as grantor but signed by agent personally.—Much clearer than any of the preceding cases are those in which the principal is named as the grantor or maker, though the agent then signs as agent. Thus where a lease purporting to be made by Mussey, was signed "John Hammond for B. B. Mussey, [Seal]" it was held that it was well executed as the lease of Mussey. Said the court: "The defendant does not deny Hammond's authority, but takes the ground that the lease is not the deed of Mussey but of Hammond. And the common learning is relied on, to wit, that when a deed is executed by attorney, it must be the act of the principal, done and executed in the principal's name. The only question is, What is an execution of a deed, by an attorney, in the name of the principal? We understand the execution of a deed to be the signing, sealing and delivering of it. These must be done in the name of the principal by the hand of the attorney. When the signing and sealing are in the name of the principal, the delivery will be presumed to have been so,

[48] McClure v. Herring (1879), 70 Mo. 18, 35 Am. Rep. 404; Hubbard v. Swafford Bros. Dry Goods Co., 209 Mo. 495, 123 Am. St. R. 488. To like effect see Donovan v. Welch, 11 N. D. 113 (a fully considered case though seals are abolished in that state); Mulford v. Rowland, 45 Colo. 172; Shanks v. Lancaster (1848), 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

In the last case, the court said: "It is a sufficient execution of a deed by an attorney in fact for his principal, if he signs the name of the principal with a seal annexed, stating it to be done by him as attorney for the principal; as if he signs his own name with a seal annexed, stating it to be for the principal." See also, Bryan v. Stump, 8 Gratt. 241, 56 Am. Dec. 139.

In Hubbard v. Swofford Bros. Dry Goods Co., *supra*, the deed was made "between J. W. S. as agent for C. H., and M. H.," of the first part and the grantee. It closed: "In testimony whereof the said J. W. S. as agent for C. H. and M. H. * * * has hereunto set his hand and seal," and was signed "J. W. S. Atty. for C. H." The court said that "one would have to yield his common sense interpretation of this deed to a very narrow technical interpretation of it in order to reach the conclusion that it was intended otherwise than as the deed of H."

See also, Collins v. Hammock, 59 Ala. 443 (a bond).

[49] Fowler v. Shearer (1810), 7 Mass. 14.

unless the contrary is proved. But however clearly the body of the deed may show an intent that it shall be the act of the principal, yet unless it is executed by his attorney for him, it is not his deed, but the deed of the attorney or of no one.[50] The most usual and approved form of executing a deed by attorney is by his writing the name of the principal and adding 'by A B his attorney' or 'by his attorney A B.' But this is not the only form of execution which will make the deed the act of the principal. In Wilks v. Back,[51] M. Wilks, attorney for J. Browne, executed a deed for himself and Browne in this form: 'Mathias Wilks' [Seal]; 'For James Browne, Mathias Wilks' [Seal]. The court of King's bench decided that the deed was well executed in the name of Browne. This decision has never been overruled, but has always been regarded as rightly made." [52]

§ 1109. ——— So where the operative clauses of a deed were in the name of the corporation "by William Wallace, their agent," and the covenants were in the name of the corporation, but the signature was "William Wallace, Agent for the Flower Brook Manufacturing Company," the court held that the deed must be considered the deed of the corporation.[53]

And where a contract under seal was made "between the C. I. Co. party of the first part by J. S. B. agent, and J. K. B. and E. C. B. parties of the second part;" the stipulations in the contract purporting to be between "the said party of the first part" and "the said parties of the second part," no names being given, and concluded, "In witness

[50] Lessee of Clarke v. Courtney (1831), 5 Pet. (U. S.) 319, 350, 8 L. Ed. 140.

[51] 2 East, 142.

[52] Mussey v. Scott (1851), 7 Cush. (Mass.) 215, 54 Am. Dec. 719, citing Wilburn v. Larkin (1832), 3 Blackf. (Ind.) 55; Hunter v. Miller (1846), 6 B. Mon. (Ky.) 612. And to the same effect are, Shanks v. Lancester (1848), 5 Gratt. (Va.) 110, 50 Am. Dec. 108; Abbey v. Chase (1850), 6 Cush. (Mass.) 54; Tucker Mfg. Co. v. Fairbanks (1867), 98 Mass. 101.

Brinley v. Mann (1848), 2 Cush. (Mass.) 337, 48 Am. Dec. 669 cited in an earlier section seems opposed, and is undoubtedly too extreme. Compare Haven v. Adams (1862), 4 Allen (Mass.), 80.

[53] McDaniels v. Flower Brook Mfg. Co. (1850), 22 Vt. 274; see also Martin v. Almond (1857), 25 Mo. 313, and Carter v. Chaudron, 21 Ala. 72, where throughout the body of the deed it purported to be between the principal and the third party, but was signed, "S. H. G. [Seal] Attorney in fact for J. K.," it was *held*, that the deed was well executed as the deed of J. K., the principal.

So in Sapp v. Cline, 131 Ga. 433, a deed given by an administrator which purported to be made by S. "administrator," etc., and in the *testimonium* clause recited that it was signed by S. "administrator;" but was signed by S. merely, was held to pass the property of the estate therein described of which S. was administrator. To same effect is Hart v. Lewis, 130 Ga. 504.

whereof the parties have hereunto affixed their hands and seals," and was signed "J. S. B. Agent [L. s.], J. K. B. [L. s.], E. C. B. [L. s.]," it was held to be the deed of the company.[54]

So where a deed reading, "Know all men by these presents that the West Kansas Land Company, by Solomon Houck, President, and Theodore S. Case, Secretary, * * * has granted," etc., was signed "Solomon Houck, President [Seal], Theodore S. Case, Sect'y [Seal], W. K. Land Co. [Seal]," it was held to be the deed of the company.[55]

§ 1110. ——— In the cases cited in the two preceding sections it will be noticed that the respective instruments purported to be made by and in the name of the principal. But where a bond beginning "I promise to pay," etc., and not mentioning any obligor's name, was signed, "Witness my hand and seal, H. S. Lucas, [Seal] for Charles Callender," the supreme court of North Carolina held Lucas personally responsible.[56] And so where a bond was signed "Thomas Dix, acting for James Dix," Chief Justice Ruffin said it was "unquestionably the bond of Thomas and not of James. The former seals it and he speaks in it throughout, and the latter not at all."[57] But the same judge in passing upon the liability of a party to a deed says: "It is not material in what form the deed be signed, whether A B by C D or C D for A B *provided it appears in the deed,* and by the execution that it is the deed of the principal."[58]

§ 1111. ——— **Mere descriptive words will not change personal grants or covenants.**—Where however the grants or covenants are clearly personal, the mere addition of the word "agent," "trustee," etc., will not, as has been stated, change their character.

Thus where a bond was executed by certain persons, who signed and sealed the same as individuals, but added "Trustees of the Baptist Society of the Town of Richfield," the court said: "The bond must be considered as given by the defendants in their individual capacities. It is not the bond of the Baptist church; and if the defendants are not bound the church certainly is not, for the church has not contracted either in its corporate name or by its seal. The addition of 'Trustees'

[54] Bradstreet v. Baker, 14 R. I. 546. To same effect: Hancock v. Younker, 83 Ill. 208; Haven v. Adams, 4 Allen (Mass.), 80.

[55] City of Kansas v. Hannibal, etc., R. Co. (1882), 77 Mo. 180.

[56] Bryson v. Lucas (1881), 84 N. C. 680, 37 Am. Rep. 634.

[57] Oliver v. Dix, 1 D. & B. Eq. (N. Car.) 158.

[58] Redmond v. Coffin, 2 Dev. Eq. (N. Car.) 437. See also, Cadell v. Allen, 99 N. Car. 542.

to the names of the defendants is, in this case, a mere *descriptio personarum*." [59]

And for the same reason, where A, B, C and others, "trustees of the Methodist Episcopal Church of Jacksonville, their successors and assigns," executed a bond, binding themselves, their heirs, executors and administrators, and signed it in their individual names, they were held personally liable.[60]

So where a lease under seal describes the lessor as "H. B., agent of M. L.," and it is signed "H. B. agent," with his seal, the words "he" and "his" being used in all the terms and covenants which name the party of the first part, a declaration in the name of M. L. in an action upon the covenants is bad, on demurrer.[61]

§ 1112. ——— The same rules apply where the promise or conveyance is made to the agent as when made by him. Thus where a contract to convey recited that it was made between W. of the first part (who was to convey) and F., president, of the second part, and was signed and sealed "F., Pres. of Buffalo Catholic Inst.," it was held, that the contract was that of F. and not of the corporation and that the corporation could not enforce specific performance of the agreement to convey.[62]

So where a conveyance was made to "E. H. P. vice-president of the National Bank of the Republic," it was held that, while a note running to "A. B. cashier" may be sued upon the bank, in accordance with a rule stated in the following chapter, the conveyance vested the title in E. H. P.[63]

[59] Taft v. Brewster (1812), 9 Johns. (N. Y.) 334, 6 Am. Dec. 280. See Fullam v. West Brookfield (1864), 9 Allen (Mass.), 1.

[60] Dayton v. Warne (1881), 43 N. J. L. 659.

[61] Loeb v. Barris, 50 N. J. L. 382.

[62] Buffalo Catholic Inst. v. Bitter, 87 N. Y. 250. This case, however, was decided upon demurrer to the complaint, which relied upon the contract as one which on its face was a contract with the complainant. There was no averment in the complaint that F. was president of the complainant, or its agent, or made the contract as such, or that it was intended as a contract between W. and the complainant. "It is unnecessary to decide" said the court, "whether the written instrument might not be helped out by averment so as to entitle the plaintiff to relief by way of specific performance."

[63] Greenfield v. Stout, 122 Ga. 303. In a conveyance to "A. L., administrator" the last word is merely descriptive. Love v. Love, 72 Kan. 658.

Where a corporation was properly named as the grantee in a deed, the fact that the *habendum* clause and warranties ran to "the president of" the corporation, naming it, does not defeat the deed. St. Stephen's Church v. Pierce, 8 Del. Ch. 179.

See also, Hamlin v. Meeting House, 103 Me. 343.

§ 1113. Distinction in case of public agents.—A distinction has been made in the case of public agents, who have entered into agreements, not negotiable, for the performance of public duties. In such a case it is to be presumed that they did not undertake personally to assume the public burdens, and although they may have entered into covenants under seal, partaking of a personal nature, yet where the obligation is known to be a public one, they can only be held personally bound, if at all, where the intent is clearly apparent so to bind them.[64] Said Chief Justice Marshall: "The intent of the officer to bind himself personally, must be very apparent indeed to induce such a construction of the contract;" [65] and it is said by another learned judge that: "It is much against public policy to cast the obligations that justly belong to the body politic upon this class of officials." [66]

These cases, however, are not to be confounded with the cases where the agents, like the trustees and officers of private corporations and

William P. O'Connor, attorney for Elizabeth McColgan, to lease any property which she owned individually, or as executrix of her husband John McColgan, made a lease, in her behalf, as "William P. O'Connor, as agent for Est. of John McColgan, as Landlord" and signed and sealed it "William P. O'Connor, agent." *Held*, that Elizabeth McColgan could not bring an action on the lease. McColgan v. Katz, 29 N. Y. Misc. 136.

Where a lease was made between W. G. M., for himself and as agent of E. L. S., A. R. B. and L. V. M., party of the first part," the covenants being made to and by "said party of the first part," and the lease was signed "W. G. M., seal," it was held to be the lease of W. G. M. personally, and that E. L. S., A. R. B. and L. V. M. could not sue upon it. Harms v. McCormick, 132 Ill. 104.

[64] Hodgson v. Dexter, 1 Cranch (U. S.), 345, 2 L. Ed. 130 (Secretary of War); Knight v. Clark, 48 N. J. L. 22, 57 Am. Rep. 534 (Township Trustees); Jones v. LeTombe, 3 Dallas (U. S.), 384, 1 L. Ed. 647 (Consul General of France); Fox v. Drake, 8 Cow. (N. Y.) 191 (Court House Commissioners); Tutt v. Hobbs, 17 Mo. 486 (School Trustees); Miller v. Ford, 4 Rich. (S. C.) L. 376, 55 Am. Dec. 687 (Commissioners of Roads); Simonds v. Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41 (Committee of town held to be personally liable on the ground that the intent was clear to make them so). Brown v. Austin, 1 Mass. 208, 2 Am. Dec. 11 (Agent appointed to take depositions by committee of Congress). McClenticks v. Bryant, 1 Mo. 598, 14 Am. Dec. 310 (Town Commissioners held personally liable because they exceeded their authority); Belknap v. Reinhart, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621 (Captain U. S. Army); Stinchfield v. Little, 1 Greenl. (Me.) 231, 10 Am. Dec. 65; Dawes v. Jackson, 9 Mass. 490 (Superintendent of States Prison); Freeman v. Otis, 9 Mass. 272, 6 Am. Dec. 66 (U. S. Collector of Customs); Walker v. Swartwout, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334 (Quartermaster general U. S. Army); Wallis v. Johnson School Township, 75 Ind. 368 (Trustee of schools).

[65] In Hodgson v. Dexter, 1 Cranch (U. S.), 345, 2 L. Ed. 130.

[66] Beasley, C. J. in Knight v. Clark, 48 N. J. L. 22, 57 Am. Rep. 534.

religious bodies, are not public in their nature, nor with cases of negotiable instruments, which stand upon different ground.

§ 1114. Whether necessary that deed should purport to be executed by an agent.—Whether it is necessary to the validity of the deed that it should on its face purport to be executed by an agent, or whether the agent may act in the principal's name throughout with nothing to disclose the fact of the agency, are questions which have been much discussed.

Thus in Wood v. Goodridge the agent had executed a mortgage by simply signing the name of his principal with nothing to show that it was signed by an agent and not by the principal in person. Fletcher, J., was of the opinion that such a form of execution was not authorized, and said:—

Rule of Wood v. Goodridge.—"It should appear upon the face of the instruments that they were executed by the attorney, and in virtue of the authority delegated to him for this purpose. It is not enough that an attorney in fact has authority, but it must appear by the instruments themselves which he executes, that he intends to execute this authority. The instruments should be made by the attorney expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves. Whatever may be the secret intent and purpose of the attorney, or whatever may be his oral declaration or profession at the time, he does not in fact execute the instruments as attorney, and in the exercise of his power as attorney, unless it is so expressed in the instruments. The instruments must speak for themselves. Though the attorney should intend a deed to be the deed of his principal, yet it will not be the deed of the principal, unless the instrument purports on its face to be his deed. The authority given clearly is, that the attorney shall execute the deed as attorney but in the name of the principal." [67] The decision in the case, however, was placed upon other grounds.

How of this rule.—This rule, certainly, has much to commend it, as tending to the due and orderly execution of important instruments, and as facilitating greatly the proper preservation in the public records of the evidence of the authority and of its exercise. But at most, it was a mere *dictum* in the case, and its authority has not generally been conceded, even in its own state [68]

[67] (1850) 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

[68] Hunter v. Giddings, 96 Mass. 41, 93 Am. Dec. 54.

§ 1115. ——— Further of this rule.—In Forsyth v. Day,[69] speaking of this case, Rice, J., said: "No case, I apprehend, can be found in the books which will sustain the rule so broadly laid down by the learned judge in the case of Wood v. Goodridge. Nor can the doctrine be sustained on principle. It is difficult to perceive any sound reason why, if one man may authorize another to act for him and bind him, he may not authorize him thus to act for and bind him in one name as well as in another. As matter of convenience in preserving testimony, it may be well that the names of all the parties who are in any way connected with a written instrument should appear upon the instruments themselves. But the fact that the name of the agent by whom the signature of the principal is affixed to an instrument, appears upon the instrument itself, neither proves nor has any tendency to prove, the authority of such agent. *That* must be established *aliunde*, whether his name appears as agent, or whether he simply places the name of his principal to the instrument to be executed." This, however, was the case of a promissory note and not of a deed.

Again in Devinney v. Reynolds,[70] a deed commencing: "To all to whom these presents shall come, Know ye that Michael Hollman by William McAllister, his lawful and regularly deputed attorney in fact, etc., grants," etc., concluded, "In witness whereof, the said Michael Hollman, by his attorney aforesaid, hath hereunto set his hand and seal," etc. To this were appended the name and seal of Michael Hollman. Said the court: "The execution of the deed is in proper form, and, indeed, we seldom see such instruments executed so much in accordance with approved precedents. It would be useless to add the name and seal of the attorney, for it is what it purports to be, the deed of the principal and not the attorney, and therefore does not require his name and seal, but the name and seal of the principal only."

§ 1116. ——— So in Berkey v. Judd,[71] a deed reciting that it was made by the principals by their attorney in fact, was signed and sealed

[69] (1856) 41 Me. 382.

[70] (1841) 1 Watts and Serg. (Penn.) 328.

In Tiger v. Button Land Co., 91 Neb. 433, the court, while approving the rule of this case, points out that where acknowledgment is a necessary part of execution, the acknowledgment must purport to be by agent, and the deed is not good if the agent has represented to the notary that he is acknowledging his own deed, though he does so under the name of the principal.

[71] (1875) 22 Minn. 287. So in Tidd v. Rines, 26 Minn. 201, it was held, that a deed signed "A. B., (the name of the grantor) by C. D., his attorney in fact," sufficiently indicates that it was executed by an attorney in fact for and in the name of his principal, without reciting that fact in the body of the deed.

in the names of the principals, followed by the words, "By their attorney in fact." The court said: "As respects the execution of a deed by an attorney in fact, although it is usual and better for him to sign the name of his principal, and to add thereto his own signature, with proper words indicating that the act is done by him as such attorney, yet it is not in all cases necessary that he should so append his own name. When the deed on its face purports to be the indenture of the principal, made by his attorney in fact, therein designating by name, it may be properly executed by such attorney by his subscribing and affixing thereto the name and seal of his principal alone.[72] In this case the deed purports on its face to be the indenture of the principals, and not that of the agent. It fully discloses that it was made for them and in their name by their attorney in fact who had full authority so to do. Its execution was properly acknowledged by him as such attorney in fact, and for and on behalf of his said principals. The neglect to sign his own name to the words 'by their attorney in fact' was a purely technical omission devoid of any legal effect whatever."

§ 1117. ——— In both of the cases last cited, however, it will be noticed that the fact that the deed was executed by an agent appeared from the face of the instruments.

In Wilks v. Back,[73] heretofore referred to, where the signature to the instrument, which was an arbitration bond, was: "For James Browne, Mathias Wilks," [Seal]. Lawrence, J., said: "Here the bond was executed by Wilks for and in the name of his principal; and this is distinctly shown by the manner of making the signature. Not even this was necessary to be shown; for if Wilks had sealed and delivered it in the name of Browne, that would have been enough without stating that he had so done."

Where the deed is to be signed in the presence and by the direction of the principal, mere parol authority is, as has been seen,[74] sufficient; and in such case there need be nothing in the deed to indicate that the signature was set by an agent and not by the principal.

§ 1118. ——— How in reason.—While the rule of Wood v. Goodridge is undoubtedly well founded in convenience and propriety, yet it is difficult in reason to perceive why even in those cases where nothing whatever appears upon the face of the instrument to indicate it, it may not be shown by evidence *aliunde* that it was in fact executed

[72] Citing Devinney v. Reynolds, 1 Watts & Serg. (Penn.) 328; and Forsyth v. Day, 41 Me. 382.

[73] 2 East, 142.

[74] See *ante*, § 216.

by an agent. It cannot be said that this is to contradict, add to or vary the deed by parol evidence, for its legal effect remains the same, and it is none the less afterward what it purported to be before,—the deed of the principal. Neither can it be said that in one case there is, while in the other there is not, evidence of the agency. In either event the agency must be proved as a fact. It cannot be established by mere recitals of authority or by any pretence of acting in that capacity.

§ 1119. Parol evidence not admissible to discharge agent.—Where the deed upon its face is the deed of the agent, parol evidence is not admissible to discharge the agent by showing that it was intended or understood to be the deed of the principal,[75] but where the deed is ambiguous, parol evidence may be resorted to, to show who was in fact the party intended to be charged.[76]

[75] Willis v. Bellamy, 52 N. Y. Super. Ct. 373; Higgins v. Senior, 8 M. & W. 834; Beckam v. Drake, 9 M. & W. 79; Leadbitter v. Farrow, 5 M. & S. 345; Spencer v. Field, 10 Wend. (N. Y.) 87; Townsend v. Hubbard, 4 Hill (N. Y.), 351; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Schriner v. Dickinson, 20 S. D. 433; Williams v. Empire Ins. Co., 8 Ga. App. 303. See this subject fully discussed in following chapter.

[76] Shuetze v. Bailey, 40 Mo. 69.

CHAPTER III

OF THE EXECUTION OF SIMPLE CONTRACTS

§ 1120. Purpose of this chapter.

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§ 1120. Purpose of this chapter.—It is intended in this chapter to discuss the manner of executing contracts not under seal, including therein such contracts whether written or unwritten. And as there are some special rules applicable to the execution of negotiable instruments, that subject will first be separately considered.

I.

OF THE EXECUTION OF NEGOTIABLE PAPER.

§ 1121. In general.—What was found to be true in the case of the instrument under seal with reference to the rules of interpretation, is also strikingly true here. It must be known what are the rules of interpretation which are applied to instruments of this sort, and what are the origins or reasons of those rules in order that safe directions for the execution of these instruments may be laid down.

It must also be known how far the results reached by the ordinary rules of interpretation may be affected by extrinsic evidence. In both of these respects, the negotiable instrument presents interesting and difficult problems.

1. Form and Interpretation.

§ 1122. In general.—Negotiable paper being intended to circulate in the commercial world as the representative of money, it is highly important that the character and liability of the parties to it, shall be disclosed with reasonable certainty upon the face of the paper itself. In no class of instruments is uncertainty, or ambiguity, or the necessity of making outside inquiry, so destructive to its mission, as in this.

Granting that the agent is authorized to execute negotiable paper—and that is what the present discussion assumes,—it will ordinarily be the purpose of the agent to so execute the paper that it shall bind his principal and not himself. In order to do this, it is obvious that the paper should be made in the name of the principal; that the promise should be his, and the signature his, though affixed by the hand of the

agent. Unless it be so executed, it will not bind the principal, but will usually bind the agent personally.

It may, of course, ordinarily be assumed that when parties have taken the trouble to execute what purports to be a negotiable instrument, it was the intention that some one should be bound thereby. Such a result, however, is not indispensable, and it may be found that the instrument binds no one: not the principal, because the promise or the signature is not his; and not the agent for the same reason or because he has expressly excluded personal responsibility.

§ 1123. General rule as to form.—In dealing with this general question of how the paper may be so executed as to bind the principal but not to charge the agent it has been said by a learned judge, that "In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal though done by the hand of the agent. If he expresses this, the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal, or to exempt the agent from personal liability." [1]

§ 1124. Method of signing.—The method approved in the execution of instruments under seal can with great propriety be adopted here. Thus if the bill or note be drawn, accepted or indorsed, "A B, by C D, his attorney or agent," or "A B, by his attorney or agent C D," there can be no question as to who is the party to be charged. "A B by C D" is also unequivocal, though not so full.[2]

A form more rare, but equally unequivocal is "A (agent), *per procuration,* P (principal)," or *"Per procuration,* P, A." The words *"per procuration"* are frequently abbreviated to *"per proc.," "per pro."* or *"p. p."* [3]

[1] Gray, J., in Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101.

[2] Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101; Bradlee v. Boston Glass Co., 16 Pick. (Mass.) 347; Weaver v. Carnall, 35 Ark. 198, 37 Am. Rep. 22; Ballou v. Talbot, 16 Mass. 461, 8 Am. Dec. 146; Jefts v. York, 4 Cush. (Mass.) 371, 50 Am. Dec. 791; Page v. Wight, 14 Allen (Mass.), 182; Barlow v. Congregational Society, 8 Allen (Mass.), 460; Emerson v. Providence Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66.

[3] See Attwood v. Munnings, 7 B. & C. 278, 1 M. & R. 66; Stagg v. Elliott, 12 C. B. (N. S.) 373. With reference to such a signature the negotiable Instruments Act (N. Y. § 40) provides, "A signature by 'procuration'

These forms, however, are not imperative. Thus, "C D agent for A B," "C D for A B," and "For A B, C D" are now quite generally regarded as sufficiently indicative of the intent, for although "agent for" a particular person or corporation may either designate the general relation which the person signing holds to another party, or show that the particular act in question is done in behalf of and as the very contract of that other, yet the court, if such is manifestly the intention of the parties will construe the words in the latter sense.[4]

"Pro A B, C D" is to the same effect and is also sufficient.[5] "Agent of" however is not the equivalent of "agent for," but is mere *descriptio personæ;*[6] and even the words "agent for" may under some circum-

operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority."

[4] Ballou v. Talbot, 16 Mass. 461, 8 Am. Dec. 146; Tucker v. Fairbanks, 98 Mass. 101; Rice v. Gove, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; Dolan v. Alley, 153 Mass. 380; Jefts v. York, 4 Cush. (Mass.) 371, 50 Am. Dec. 791; Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240; Tiller v. Spradley, 39 Ga. 35; Rawlings v. Robson, 70 Ga. 595; Hovey v. Magill, 2 Conn. 680; King v. Handy, 2 Ill. App. 212; Shuetze v. Bailey, 40 Mo. 69; Roney v. Winter, 37 Ala. 277; Wheelock v. Winslow, 15 Iowa, 464; Bank of Commerce v. Cohen, 4 Sil. (N. Y.) 283, 54 Hun, 635; Alexander v. Sizer, L R. 4 Exch. 102.

Contra: Offutt v. Ayers, 7 T. B. Monr. (Ky.) 356, where the note read, "I promise" and was signed, "For B. Ayres, W. B. Ayres;" Dawson v. Cotton, 26 Ala. 591, where the note read, "I promise to pay," and was signed, "B. Watson, Agent for Cyrus Cotton."

In Cook v. Sanford, 3 Dana (Ky.), 238, where the note read, "we promise to pay * * * Witness our hands and seals. V. M. Knight, for N. B. Cook & Co.," it was held that the note was clearly that of the principal, because of the plural forms.

In Owings v. Grubb's Admin., 6 J. J. Marshall (Ky.), 31, where the note was signed "For Thomas Owings, James Grubb," it was held that although upon the face of the instrument it was the agent's note, parol evidence is admissible to show that the instrument sued on was not the contract of the party sued. Same effect: Early v. Wilkinson, 9 Gratt. (Va.) 68.

So in Webb v. Burke, 5 B. Monroe (Ky.), 51, where the note read "I promise" and was signed, "John B. Burke, for Samuel Burke" it was held that while *prima facie* it was the note of the agent, parol evidence was admissible to show whose the contract was intended to be.

In Garrison v. Combs, 7 J. J. Marshall (Ky.), 84, 22 Am. Dec. 120, it was said, "An agreement, to the validity of which a seal is not essential, signed by 'A B, agent for C D,' is in effect and by construction of law the agreement not of A B but of C D. Such an agreement differs materially from one signed by 'A B for C D,' the latter being considered the agreement of A B to do something for C D, and the former an agreement by C D himself."

[5] Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160.

[6] See Tucker Mfg. Co. v. Fairbanks, *supra;* Haverhill Ins. Co. v. Newhall, 1 Allen (Mass.), 130, and the many other cases cited in § 1139 *post.*

stances also be held to be merely a description of the person, as where they are not followed by the proper name of the principal. Thus a note signed "D. H., agent for the Churchman" (the name of the newspaper which the agent carried on in the behalf of his principal), was held to be the note of D. H., and not of his principal.[7]

In Colorado, after an exhaustive examination, the sufficiency of the form "C D, agent for A B," was denied altogether.[8]

§ 1125. ——— So "A B, C D, agent," has been held to be sufficient, for while it is common and proper to say *by* or *per*, it is not indispensable: that it was so done may be sufficiently obvious without saying so. This form is most frequently adopted in the case of corporations and is a common and familiar method of signing the corporate name. Thus where a note reading "we promise to pay," was signed "Massachusetts Steam Heating Company, L. S. Fuller, treasurer," the court said: "The name of the company is signed to the note. This signature could not be made by the corporation itself and must have been written by some officer or agent. It was manifestly proper that some indication should be given by whom the signature was made, as evidence of its genuineness; and Fuller added his own name, with the designation of his official character. And the whole taken together shows it to be the signature of the Massachusetts Steam Heating Company and not of Fuller."[9]

So where the note read, "we promise," and was signed, "Warrick Glass Works, J. Price Warrick, Pres." it was held to be the note of the corporation only.[10] Said the court, "This conclusion seems to rest

[7] De Witt v. Walton, 9 N. Y. 571 (but as to this case see Green v. Skeel, 2 Hun (N. Y.), 485); see also, Shattuck v. Eastman, 12 Allen (Mass.), 369.

[8] Tannatt v. Rocky Mountain National Bank, 1 Colo. 278, 9 Am. Rep. 156.

[9] Draper v. Massachusetts Steam Heating Co., 5 Allen (Mass.), 338.

[10] Reeve v. First Nat. Bank, 54 N. J. Law 208, 33 Am. St. Rep. 675, 16 L. R. A. 143. So in Liebscher v. Kraus, 74 Wis. 387, 17 Am. St. Rep. 171, 5 L R. A. 496, where the note ran, "We promise," and was signed, "San Pedro Mining and Milling Co., F. Kraus, President," it was held that the note was that of the corporation only. Said the court, "The corporation could not sign its own name, and it is not otherwise shown on the face of the note than that Kraus signed the corporate name, and by adding the word 'president' to his own name, he shows conclusively that, as president of the corporation, he signed the note, and not otherwise. Such is the natural and reasonable construction of these signatures, and so it would be generally understood. The affix 'cashier,' 'secretary,' 'president,' or 'agent,' to the name of the person sufficiently indicates and shows that such person signed the bank or corporate name, and in that character and capacity alone. The use of the word 'by' or 'per' or 'pro' would not add to the certainty of what is thus expressed.

upon rational ground. The name of the corporation signed first stands as a principal and that of the officer as agent. The name of a corporation, so placed, raises the implication of a corporate liability. To so place it requires the hand of an agent. The name of an officer of such corporation, to which name the official title is appended, put beneath the corporate name, implies the relation of principal and agent. It means that, inasmuch as every corporate act must be done by a natural person, this person is the agent by whose hand the corporation did the particular act. This form of signature is just as significant with respect to the notes in question as if the name the 'Warrick Glass Works' had been written, 'Per Warrick, Agent.'" There are a few cases opposed. Thus where the note ran, "we promise," and was signed, "U. S. Desk Manufacturing Co., Wm. Lumley Sec'y," it was held that this was *prima facie* the note both of the manufacturing company and of Lumley.[11] Such a decision, however, ignores business usage and obvious intention and ought not to be followed.

§ 1126. ——— Where the names of two or more officers follow the corporate name, the case is not quite so clear. If the two officers who sign are those who usually and properly sign for a corporation, the instrument should be held to be that of the corporation only, in the absence of something further to show an intention to assume a personal liability.[12] There are, however, cases to the contrary. Thus,

It is not common to use these words in commercial business. It is sufficiently understood that the paper is signed by the officer or agent named, and for the corporation. But it is useless to prolong this discussion. It is almost too plain for argument. The note was that of the corporation alone, signed by Kraus at its president."

So a note reading "we promise to pay * * * at office Belfast Foundry Co.," and signed, "Belfast Foundry Company, W. W. Castle, President," binds the company. Castle v. Belfast Foundry Co., 72 Me. 167.

So a note reading "we promise to pay," and signed, "English S. M. Co., H. Pattberg, Manager," was held to be the note of the company. Chase v. Pattberg, 12 Daly (N. Y.), 171.

See also to the same effect: Falk v. Moebs, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266; Abbott v. Shawmut Ins. Co., 3 Allen (Mass.), 213; Atkins v. Brown, 59 Me. 90; Gleason v. Sanitary Milk Co., 93 Me. 544, 74 Am. St. R. 370; Latham v. Flour Mills, 68 Tex. 127; Williams v. Hippie, 17 Pa. Super. Ct. 81; Union Nat. Bank v. Scott, 58 N. Y. App. Div. 65; Miers v. Coates, 57 Ill. App. 216; Thompson v. Hasselman, 131 Ill. App. 257; Derby v. Gustafson, 131 Ill. App. 281.

So a note reading "we promise to pay," and signed "Pioneer Mining Company, John H. Mason, Supt." may be shown by parol to have been intended to bind the Company. Bean v. Pioneer Min. Co., 66 Cal. 451, 56 Am. Rep. 106.

So also, Swarts v. Cohen, 11 Ind. App. 20.

[11] Lumley v. Kinsella Glass Co., 85 Ill. App. 413.

[12] A note signed, "Globe Loan and Trust Co., H. O. Devries, Presdt. W.

where the note ran, "we promise," and was signed, "Independence Mf g Co., B. Brownell, Pres., D. B. Sanford, Secy.," it was held that the note, upon its face, purported to be the note of the corporation, of Brownell, and of Sanford.[13] This conclusion also seems erroneous and has been repudiated in other states.[14] So where the note ran, "I or we promise," and was signed, "Coleman & Ames White Lead Co., per C. I. Williams, Sec., Geo. J. Williams, Gen'l. Mangr." and was sealed with the corporate seal, it was held by the appellate court of Illinois to be the note of the corporation and of Geo. J. Williams.[15] The signature of C. I. Williams, through the use of the word "*per*," was clearly the signature of a mere agent, but the court thought that the *per* did not apply to the signature of Geo. J. Williams.[16] This decision however was reversed by the supreme court,[17] which said, "We think the word '*per*' applies to both, and refers as much to one as to the other. If the obligation of a corporation is being executed by two of its officers, it would be both unusual and unnatural to place the word '*per*' before each name, and where each one signs his own

B. Taylor, Secy.," is held to show on its face no personal liability on the part of Devries or Taylor. English, etc., Mortg. Co. v. Globe Loan and Trust Co., 70 Neb. 435. To same effect: American Nat. Bank v. Omaha Coffin Mfg. Co., 1 Neb. (Unof.) 322; Aungst v. Creque, 72 Ohio St. 551 (a well considered case); Northeastern Coal Co. v. Tyrrell, 183 Ill. App. 472.

A note signed, "The Kansas City & Olathe Electric Ry. Co., Wm. Lackman President, D. B. Johnson, Secretary," is, at least, so ambiguous as to admit parol evidence that Lackman and Johnson were not intended to be individually liable. Western Grocer Co. v. Lackman, 75 Kan. 34 (see also, Kline v. Bank, 50 Kan. 91, 34 Am. St. R. 107, 18 L. R. A. 563; Benham v. Smith, 53 Kan. 495).

Where the note is signed by the proper officers, *e. g.*, the president and secretary, so as to bind the corporation, and is also signed by others who append to their names such titles as "stockholders," "directors," and the like, these latter signers are held to be personally bound, on the theory that the titles so added are merely *descriptio personae*. Taylor v. Reger, 18 Ind. App. 466, 63 Am. St. R. 352; Savings Bank v. Central Market Co., 122 Cal. 28.

To same effect: Briel v. Exchange Nat. Bank, 179 Ala. 475.

[13] Heffner v. Brownell, 70 Iowa, 591, 75 Iowa, 341. This case was followed in McCandless v. Belle Plaine Canning Co., 78 Iowa, 161, 16 Am. St. Rep. 429, 4 L. R. A. 396; Lee v. Percival, 85 Iowa, 639; Matthews v. Dubuque Mattress Co., 87 Iowa, 246, 19 L. R. A. 676; Day v. Ramsdell, 90 Iowa, 731.

[14] Thus in English, etc., Mortg. Co. v. Globe Loan and Trust Co., 70 Neb. 435; the court declared the doctrine of the Iowa cases *supra* to be contrary to the weight of American authority.

[15] Harris v. Coleman, etc., Lead Co., 98 Ill. App. 27.

[16] See also General Electric Co. v. Gill, 64 C. C. A. 99, 127 Fed. 241, 129 Fed. 349.

[17] Williams v. Harris, 198 Ill. 501. There is a dictum to the contrary in General Electric Co. v. Gill, *supra*.

name it would be equally unnatural for the second one to connect his name with the first by the word 'and.' The word *'per'* was placed opposite the name of the secretary merely because his name came first, and if the name of the general manager had been written first, the secretary, by the same reasoning insisted upon would be individually liable. * * * We do not regard the use of the words 'I or we,' in the body of the note, as affecting or changing the legal import of the instrument. There is no personal pronoun which is properly adapted to use by a corporation in making a note. A proper method is to repeat the name of the corporation in the body of the note, but the word 'we' is frequently used by a corporation. Whether the pronoun 'I' or the pronoun 'we' is used in the body of a note, if it is signed by the corporation acting by its officer or officers it is the obligation of the corporation."

§ 1127. ——— The negotiable instruments act.—Upon the same subject the Negotiable Instruments Act, which has now been adopted in about forty of our jurisdictions,[18] provides as follows, "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." [19]

Unfortunately, this provision, which ought to give help, is so obscure, indefinite and inadequate, that it furnishes little aid. What the practical difference between the first clause and the second is, what words or what sort of words shall be deemed "words *indicating*" that the signer acts for a principal, etc., are not made clear, and it will require judicial interpretation to make this section definite. So far as it goes, however, the provision seems to be in the direction of the more recent cases. At present it is apparently necessary to still resort to the decisions which were made before the act was passed.[20]

[18] The last report available names Ala., Ariz., Colo., Conn., Del., D. C., Fla., Hawaii, Idaho, Ill., Iowa, Kan., Ky., La., Md., Mass., Mich., Mo., Mont., Neb., N. H., N. J., N. Mex., N. Y., Nev., N. Car., N. Dak., Ohio, Okla., Oreg., Pa., Philippine Islands, R. I., Tenn., Utah, Va., Wash., W. Va., Wis., Wyo.

[19] Section 20 (39 in the New York act).

A trustee of an insolvent firm is not liable, under this statute, on a note, signed by him as "trustee," given for property known to be purchased from the payee for the benefit of the assigned estate. Megowan v. Peterson, 173 N. Y. 1. To same effect: Kerby v. Ruegamer, 107 N. Y. App. Div. 491.

[20] See Birmingham Iron Foundry

§ 1128. —— Not necessary that agent's name appear.—Although reasons of convenience and propriety render it highly desirable that the fact that the note or bill is executed in the name of the principal by the agent, should appear on the face of the instrument, it cannot be regarded as indispensable, and the agent may sign the principal's name alone without adding anything to disclose the agency.[21]

This is also true where the principal is carrying on business in some other name than his own where that name has been adopted by him as his trade or business name.[22]

§ 1129. Not enough that principal be named only in body of instrument.—It is not enough to relieve the agent that the person, for whom or on whose account the promise is made or the bill drawn, be named or stated in the body of the instrument alone. In such a case, as a rule, it will be presumed that only the person who signed intended to be charged, unless there is a clear indication to the contrary.

Thus where the form of the bill was, "Forty days after date, pay to the order of T. L. fifty pounds, value received, which place to the account of the Durham bank, as advised," signed "C. F.," it was held to be the bill of C. F., though he was known at the time to be the agent of the Durham bank. Said Lord Ellenborough: "Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for* another, or by procuration of another, which are words of exclusion? Unless he says plainly 'I am the mere scribe,' he becomes liable. Now in the present case, although the plaintiff knew the defendant to be the agent of the Durham bank, he might not know but that he meant to offer his own responsibility. Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable, like any other drawer who puts his name to a bill without denoting that he does it in the character of a procurator." [23]

v. Regnery, 33 Pa. Super. 54; American Trust Co. v. Canevin, 107 C. C. A. 543, 184 Fed. 657; Megowan v. Peterson, *supra;* Kerby v. Ruegamer, *supra;* Schumacher v. Dolan, —— Iowa, ——, 134 N. W. 624.

See also Germania Nat. Bank v. Mariner, 129 Wis. 544; Daniel v. Glidden, 88 Wash. 556.

[21] First National Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430; Forsyth v. Day, 41 Me. 382.

[22] Conroe v. Case, 79 Wis. 338, where the principal was carrying on business in what had formerly been the trade name of the agent.

[23] Leadbitter v. Farrow, 5 Maule & Sel. 345. To the same effect see: Penkivil v. Connell, 5 Exch. 381; Mayhew v. Prince, 11 Mass. 54.

§ 1130. ——— And again where a note was executed in these words: "For value received, we, the subscribers, jointly and severally promise to pay Messrs. J. and T. B. or order, for the Boston Glass Manufactory, thirty-five hundred dollars, on demand, with interest," and was signed, "J. H., S. G., C. F. K.," it was held to be the note of the signers and not of the manufactory. Chief Justice Shaw, in delivering the opinion of the court, said: "The main question in the present case, arises from the form of the contract; and the question is, whether in this form it binds the persons who signed it, or the company for whose use the money was borrowed. As the form of words in which contracts may be made and executed, are almost infinitely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another to indicate the capacity or trust in which he acts, or the person for whose account his promise is made; or whether the words referring to a principal are intended to indicate that he does a mere ministerial act in giving effect and authenticity to the act, promise and contract of another. Does the person signing apply the executing hand as the instrument of another, or the promising and engaging mind of a contracting party?" [24]

And in a subsequent case in the same court, it is said: "It seems to be well settled in this court, and supported by English authority, that the mere insertion of 'for' or 'for and in behalf of' the principal, in the body of the note does not make it the contract of the principal if signed by the mere name of the agent without addition." [25]

§ 1131. ——— In accordance with the same rules, it was held that a note running "we, the trustees of the Methodist Episcopal Church," promise, etc., and signed by the trustees as individuals, with nothing to indicate that they signed as trustees, was their individual promise; [26] and the same ruling was made where a note running "we,

[24] Bradlee v. Boston Glass Manufactory, 16 Pick. (Mass.) 347. See also, Morell v. Codding, 4 Allen (Mass.), 403.

[25] Barlow v. Congregational Society, 8 Allen (Mass.), 460.

[26] Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71; but see the decision of the same court where the trustees added that word to their signatures, Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175. See also Burlingame v. Brewster, 79 Ill. 515, 22 Am. Rep. 177.

In Tenbrook v. Ellars, 71 Ill. App. 328, where a note was in the common form, "we promise to pay," but before the signatures were the words, "signed by Trustees of I. O. O. F. Lodge No.," etc., and then followed the signatures of the respective parties, it was held that the instrument was the note of the individuals signing it and that the words "Trustees," etc., were merely descriptive.

In Morell v. Codding, 4 Allen (Mass.), 403, where the note ran,

the directors of the Big Eagle and Harrison Turnpike Company promise," was signed by those officers in their individual names.[27]

§ 1132. ——— But a contrary conclusion was reached in Maine, where a note, beginning "We, the subscribers, for the Carmel Cheese Manufacturing Company, promise to pay," etc., was signed by the makers in their individual names.[28] But this conclusion was based largely upon the provisions of a statute of that state, which as the court says in an earlier case:[29] "was passed soon after the decision of Stinchfield v. Little (to which reference has been made before), and was undoubtedly intended to modify the technical rule of the common law as declared by the court in that case." That statute provides that "deeds and contracts, executed by an authorized agent of an individ-

"We, the prudential committee for and in behalf of the Baptist Church in Lee" and was signed simply with the makers' names, it was held that they were personally bound.

In Pomeroy v. Slade, 16 Vt. 220, the note read, "We, in behalf of the First Methodist Episcopal Society in, etc., promise to pay," and was signed by the makers without any additions, and it was held to be *prima facie*, if not conclusively, the individual note of the makers.

In Kendall v. Morton, 21 Ind. 205, the note was in the following terms, "We the subscribers of etc., promise to pay, etc., on behalf of the Cambridge City Greys" signed "James M. Cockfair, Reese Kendall, David Conklin Sect.," and it was held, that the signers were individually liable.

[27] Pack v. White, 78 Ky. 243. Followed in Maffet v. Hampton, 17 Ky. L. Rep. 534, 31 S. W. 881.

In Yowell v. Dodd, 66 Ky. 581, 96 Am. Dec. 256, where a note read, "the president and directors of, etc., promise to pay," and was signed "E. J. Dodd, Pres.," and under his signature the signatures of the four directors, it was held that whether the note bound the corporation or the individuals is "a question of intention to be determined from what appears on the face of the writing" and the court concluded that in this case the intention was to bind the corporation only.

In Caphart v. Dodd, 66 Ky. 584, 96 Am. Dec. 258, where the note ran, "the president, by order of the board of, etc., promise to pay," and was signed, "E. J. Dodd, Pres.," and under his signature the signatures of the directors, it was held, that from the face of the instrument, the intention of the signers was to bind themselves individually and not to bind the corporation and hence the signers were personally bound.

[28] Simpson v. Garland, 72 Me. 40, 39 Am. Rep. 297.

In McKenney v. Bowie, 94 Me. 397, the note read, "The Trustees and Treasurer, or their Successors in office, of, etc., promise to pay," and was signed by five trustees; below their names was added the word "Trustees;" it was then signed by the treasurer, with the word "Treasurer" added. *Held*, that the signers were personally liable. This conclusion was reached partly on the ground that the Society for which they purported to act was not incorporated: but even if it were, the court said it would be regarded as the note of the signers. The name of the society was not "The trustees and Treasurer of," etc.

[29] Nobleboro v. Clark, 68 Me. 87, 28 Am. Rep. 22. See also, Purinton v. Insurance Co., 72 Me. 22.

ual or corporation in the name of the principal, or in his own name for his principal, are to be regarded as the deeds and contracts of such principal." "'For his principal,'" says the court, "are the words used in our statute above cited, in regard to the proper execution of a contract by an agent; and 'for' when so used, means 'in behalf of.' * * * The words used in the body of the note, tending to show the meaning of the parties, should have the same force and effect as if following, or written against the defendants' signatures."

§ 1133. ——— Where intent to charge principal is manifest.— Where the body of the instrument discloses that it is evidently executed for or in behalf of a principal therein named, and the person signing adds to his signature such words as indicate that he was acting in a representative and not in a personal capacity, the instrument will be deemed to be the obligation of the principal. Thus where the contract ran "We, the undersigned committee for the first school district, promise in behalf of said district," etc., and was signed with the individual names of the committee with the addition of the word "committee," it was held that the intention to bind the district was apparent upon the face of the contract and that the members of the committee were not personally bound.[30]

Again, a note reading, "We promise to pay," etc., "on account of the London and Birmingham Iron Hardware Company," and signed "J. M., H. W., J. W., Directors," and countersigned "E. G., Secretary," was held to be the note of the company;[31] a note beginning "I, the subscriber, treasurer of the Dorchester Turnpike Corporation promise," etc., signed "A. B., treasurer of the Dorchester Turnpike Corporation," was held to be the note of the corporation and not of the treasurer;[32] a note reading, "the president and directors of the Woodstock Glass Company promise," etc., and signed "W. H., President," binds the company and not the president individually;[33] a note beginning "we as Trustees of the Amador and Nevada Wagon Road Company promise," etc., and signed, "J. M. K., L. N., J. T., Trustees, of the Amador and Nevada Wagon Road Company," is the note of the company and not of the trustees;[34] and a note beginning "we, as the

[30] Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521.

[31] Lindus v. Melrose, 2 Hurl. & Nor. 293.

[32] Mann v. Chandler, 9 Mass. 335.

[33] Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

[34] Blanchard v. Kaull, 44 Cal. 440. On the other hand, a note reading, "the Greenwood Gin Co. promise to pay," etc., signed "M. A. Wiers, Pres. of Company, W. A. Moore, Sec.," was said to be, if not manifestly the note of Wiers and of Moore, at least so ambiguous as to admit parol evidence to charge them personally.

trustees of the Methodist church, promise to pay," etc., and signed, "J. W. K., J. A. P., R. G. C., Trustees," is the note of the church and not of the trustees.[35]

§ 1134. ——— A note reading, "we, the trustees of the First Free Will Baptist Society of Chicago, promise," etc., and signed "Trustees of the First Free Will Baptist Society, of Chicago, Illinois, A. P. D., P. W. G.," and seven others, was held to be the note of the society;[36] while a note reading "we, the trustees of the Seventh Presbyterian Church, promise," etc., and signed "A. H. B., L. B. K., J. C. and F. D. M., Trustees," was held by the same court to be the individual note of the trustees, and not of the society;[37] the distinction being based upon the fact that in the first case the exact corporate name of the society, *i. e.* "The Trustees of the First Free Will Baptist Society, of Chicago," had been used both in the body of the note and in the signature, while in the second case it had not been, the corporate name there being "Trustees of the Society of the Seventh Presbyterian Church, of Chicago." The distinction here made cannot be reconciled with many of the cases cited above.

Where the note ran, "We, the Trustees of Musconetcong Grange, No. 114, known as W. Fleming and Company, promise," etc., and was signed "W. M. S., I. W., Trustees," it appearing that the words "the Trustees of Musconetcong Grange, No. 114," were the legal title of a corporation, the court said that, but for the words, "known as W. Fleming and Company," the note would be clearly the note of the corporation.[38] "What the significance of these added words is," said the court, "cannot be known without a resort to parol testimony," and the case was sent back for a new trial in order that such testimony might be introduced.[39]

So where the note ran, "We, or either of us, Trustees of Dist. No. 6," etc., promise to pay to the order of A. T., "it being money borrowed of said T. to build a school house in said Dist. No. 6," and was signed,

Wiers v. Treese, 27 Okla. 774. See also, Frankland v. Johnson, 147 Ill. 520, 37 Am. St. R. 234.

[35] Leach v. Blow, 8 Smedes & M. (Miss.) 221.

So, where the note read, "I, as treasurer of the Congregational Society, or my successors in office, promise," etc., and was signed: "S. S. R. Treasurer." Barlow v. Congregational Society, 8 Allen (Mass.), 460.

[36] New Market Savings Bank v. Gillett, 100 Ill. 254, 39 Am. Rep. 39. See also, Frankland v. Johnson, 147 Ill. 520, 37 Am. St. R. 234.

[37] Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175.

[38] Simanton v. Vliet, 61 N. J. L. 595.

[39] See Simanton v. Vliet, *supra*.

"T. W. W., L. F. G., Trustees," it was held to be clearly the note of the school district and not of the signers.[40]

Where a note reading "The X company promises to pay," etc., is signed "A, Pres. of Company, B, Sec.," it seems so clearly the note of the company that it is surprising to find courts holding that it is no more than ambiguous; but that is the fact.[41]

§ 1135. ——— **Effect of printed headings or titles on paper.**—The fact that the note was given for or on account of a principal may sufficiently appear from titles or headings printed upon the instrument coupled with words indicating that the signers acted in an official capacity. Thus, where a check with the words "Ætna Mills" printed on the margin was given in payment of a debt due from the mills and was signed "I. D. F., Treasurer," the court held it to be manifestly the check of the mills and not the personal check of F.,[42] saying, "the court has always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intention of the parties." The same doctrine has been applied in numerous other cases in the same court.[43]

On the other hand, where a note reading "We promise to pay," etc., and signed, "J. C., Prest., E. H. C., Treas." had printed across the end of it the words "Ridgewood Ice Co.," of which company they were respectively the officers, it was held to be the note of the individual signers, at least so far as "a holder taking *bona fide* and without notice of the circumstances of its making" was concerned. The official titles were held to be mere *descriptio personæ*, and "the appearance upon the margin of the paper of the printed name, 'Ridgewood Ice Company,' was not a fact carrying any presumption that the note was, or was intended to be one by that company." [44]

§ 1136. ——— **Effect of corporate seal.**—The same effect may often be given to the presence of a corporate seal coupled with titles indicating action in an official capacity.[45] Thus where a note begin-

[40] Warford v. Temple, 24 Ky. Law Rep. 2268, 73 S. W. 1023.

[41] Wiers v. Treese, 27 Okla. 774. See also, Frankland v. Johnson, 147 Ill. 520, 37 Am. St. R. 284.

[42] Carpenter v. Farnsworth, 106 Mass. 561, 8 Am. Rep. 360. See also, Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577; La Salle Nat. Bank v. Tolu, etc., Co., 14 Ill. App. 141.

[43] See Fuller v. Hooper, 3 Gray (Mass.), 334; Slawson v. Loring, 5 Allen (Mass.), 340, 81 Am. Dec. 750. See also, Hitchcock v. Buchanan, 105 U. S. 416, 26 L. Ed. 1078.

[44] Casco Nat. Bank v. Clark, 139 N. Y. 307, 36 Am. St. Rep. 705. Same: First Nat. Bank v. Stuetzer, 80 Hun, 435, aff'd 150 N. Y. 455; First Nat. Bank v. Wallis, 84 Hun, 376, aff'd 156 N. Y. 663. See Daniel v. Glidden, 38 Wash. 556.

[45] See Hood v. Hallenbeck, 7 Hun

ning "We promise" and signed W. B. S., "Sec'y," had impressed upon it the seal of the company containing the words "Neal Manufacturing Co., Madison, Ind.," of which company S. was the secretary, it was held to be the note of the company and not of S.[46] And the same effect was given to the seal of the company in Oregon, Illinois and Massachusetts. Thus a note stating, "We promise to pay," etc., signed "J. I., Pres., J. J. I., Sec. G. M. Co.," which had impressed upon it the seal of the company containing the words, "Granger Market Co.," is the note of the company and not of the officers;[47] and so is a note reading "We promise to pay," etc., signed "S. L. K., Pres., Chicago Ready Roofing Co., W. H. K., Sec'y," impressed with the seal of the "Chicago Ready Roofing Company;"[48] and so is a note reading "We promise to pay," etc., and signed "John Rhodes, Treasurer," upon and around which signature was the impression of a corporate seal bearing the name of the corporation.[49]

But a different conclusion was reached in England.[50]

§ 1137. ——— **Other evidences of intent—Directions to charge to principal.**—A bill or note drawn by an agent with such directions or expressions upon its face as indicate that it is drawn upon, or is to be charged to, the account of his principal, and which is signed by the agent with such additions as to disclose that he is acting in his character as agent, will also be deemed to be a charge upon the principal and not upon the agent.

And it has been held that it is not necessary that the bill or note itself should unequivocally disclose the name of the principal in order to exonerate the agent; but that it will be sufficient if enough appears upon the face of the transaction to put a prudent man, before taking the bill or note, upon inquiry.[51]

Thus a bill drawn by an agent upon his principal concluding "and charge the same to the account of your agency at Natchez," and signed "J. D. H., Agent" sufficiently indicates that the agent was act-

(N. Y.), 662; Pitman v. Kintner, 5 Blackford (Ind.), 250, 33 Am. Dec. 469, and the following cases in this section.

[46] Means v. Swormstedt, 32 Ind. 87, 2 Am. Rep. 330.

[47] Guthrie v. Imbrie, 12 Ore. 182, 53 Am. Rep. 331.

[48] Scanlan v. Keith, 102 Ill. 634, 39 Am. Rep. 302. To same effect see Reed v. Fleming, 209 Ill. 390. See also, Hood v. Hallenbeck, *supra*.

[49] Miller v. Roach, 150 Mass. 140, 6 L. R. A. 71.

[50] Dutton v. Marsh, L. R. 6 Q. B. 361. Compare Aggs v. Nicholson, 1 Hurls. & Nor. 165. See also Daniel v. Glidden, 38 Wash. 556.

[51] Davis v. Henderson, 25 Miss. 549, 59 Am. Dec. 229; Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

ing in a representative character;[52] so a bill headed "Office of Tioga Navigation Company," concluding, "charge to motive power and account," and signed, J. R. W., "Pres. T. N. Co.," purports upon its face to be the bill of the corporation and not the individual bill of the signer;[53] and a draft headed "New England Agency of the Pennsylvania Fire Insurance Company," having the words "Foster & Cole, General Agents for the New England States" printed in the margin, and appearing on its face to be drawn upon said insurance company in payment of a claim against it, is the draft of the company and not of Foster & Cole, although it is signed by them in their own names;[54] and a bill headed "Office of Belleville Nail Mill Co.," and concluding, "charge same to account of Belleville Nail Mill Co., W. C. B., Pres., J. C. W., Sec'y," is the bill of the company.[55]

§ 1138. ——— So where a draft was headed "Pompton Iron Works" and directed that the amount should be placed "to the account of Pompton Iron Works," it was held to be clearly the draft of the Iron Works and not of Burtt, though it was signed "W. Burtt, Agt.,"[56] and a bill headed "Adams & Co.'s Express and Banking House," drawn on Adams & Co., concluding, "and charge same to account of this office," and signed "C. P. N. per G. W. C., Ag'ts," is the bill of the company.[57]

So where a bill headed "Office of Portage Lake Manufacturing Company" and concluding, "charge the same to account of the company, I. R. Jackson, Agt.," was drawn upon "E. T. Loring, Agent," and was accepted by him in the same manner, it was held in Massachusetts that so far as the drawer, Jackson, was concerned, there was enough upon the face of the instrument to show that the bill was drawn as agent of the company, but it was further held that this conclusion exhausted the operation of the words showing that intent, and that they could not be used again to indicate that the acceptance of Loring was made in the same capacity.[58]

But on the other hand, in accordance with cases cited in a preceding section, a draft concluding, "and charge the same to the account

[52] Davis v. Henderson, *supra*.

[53] Olcott v. Tioga R. R. Co., 27 N. Y. 546, 84 Am. Dec. 298. See also La Salle Nat. Bank v. Tolu, etc., Co., 14 Ill. App. 141.

[54] Chipman v. Foster, 119 Mass. 189; to same effect, Tripp v. Swanzey Paper Co., 13 Pick. (Mass.) 291.

[55] Hitchcock v. Buchanan, 105 U. S. 416, 26 L. Ed. 1078.

[56] Fuller v. Hooper, 3 Gray (Mass.), 334.

[57] Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280.

[58] Slawson v. Loring, 5 Allen (Mass.), 340, 81 Am. Dec. 750.

of Proprietors Pembroke Iron Works. Joseph Barrell," was held to be the draft of Barrell because he had not added anything to his signature to indicate that he was acting in a representative character.[59]

§ 1139. When no principal is disclosed, agent is bound notwithstanding he signs as "agent," etc.—Where, however, the language used imports an individual promise and is signed by the agent in his own name the agent will, *prima facie* at least, be personally bound notwithstanding the fact that he adds the word "agent," "trustee," "president," "assignee," "administrator," etc., to his name. It is to be presumed that he intended to bind some one by the instrument, and as he has used no apt words to bind the principal and no other contracting party appears, he must be held to have intended to charge himself, and the words "agent," "trustee," etc., will be regarded as mere *descriptio personæ*.[60]

[59] Bank of North America v. Hooper, 5 Gray (Mass.), 567, 66 Am. Dec. 390; and to the same effect is, Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 45.

But where a trustee, or one in a like situation, who has no principal, makes a promise, the contract must be the contract of the trustee personally, unless the trustee stipulates that the promise is merely a charge on the trust estate. Hall v. Jameson, 151 Cal. 606, 121 Am. St. R. 137, 12 L. R. A. (N. S.) 1190. As to his power expressly to exclude personal liability, see Bank v. Eaton, 100 Fed. 8, affirmed *per curiam*, 47 C. C. A. 140, 107 Fed. 1003.

[60] Drake v. Flewellen, 33 Ala. 106; Hobson v. Hassett, 76 Cal. 203, 9 Am. St. R. 193; Savings Bank v. Central Market, 122 Cal. 28; Hall v. Jameson, 151 Cal. 606, 121 Am. St. R. 137, 12 L. R. A. (N. S.) 1190; Hopson v. Johnson, 110 Ga. 283; Saul v. Southern Seating Co., 6 Ga. App. 843; Chadsey v. McCreery, 27 Ill. 253; Bickford v. First Nat. Bank, 42 Ill. 237, 89 Am. Dec. 436; McNeil v. Shober, 144 Ill. 238; Haines v. Nance, 52 Ill. App. 406; Reed v. Fleming, 102 Ill. App. 668; Reddick v. Young, — Ind. —, 98 N. E. 813; Prescott v. Hixon, 22 Ind App. 139, 72 Am. St. R. 291; Dayries v. Lindsly, 128 La. 259; Blackstone Nat. Bank v. Lane, 80 Me. 165; Fowler v. Atkinson, 6 Minn. 578; Brunswick-Balke-Collender Co. v. Boutell, 45 Minn. 21; Penn. Mut. Life Ins. Co. v. Conoughy, 54 Neb. 123; Western Wheeled Scraper Co. v. McMillen, 71 Neb. 686; Savage v. Rix, 9 N. H. 263; Barker v. Mechanics' Fire Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; Pentz v. Stanton, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; Hills v. Bannister, 8 Cow. (N. Y.) 32; Cortland Wagon Co. v. Lynch, 82 Hun (N. Y.), 173; Manufacturers', etc., Bank v. Love, 13 N. Y. App. Div. 561; Jenkins v. Phillips, 41 N. Y. App. Div. 389; New York State Banking Co. v. Van Antwerp, 23 N. Y. Misc. 38; Sutherland v. St. Lawrence County, 42 N. Y. Misc. 38; Collins v. Ins. Co., 17 Ohio, 215, 93 Am. Dec. 612; Robinson v. Kanawha Valley Bank, 14 Ohio, 441, 58 Am. Rep. 829; Ogden Ry. Co. v. Wright, 31 Or. 150; Kitchen v. Holmes, 42 Or. 252; Deroy v. Richards, 8 Pa. Sup. Ct. 119; Moss v. Johnson, 36 S. Car. 551; Warren v. Harrold, 92 Tex. 417; Rand v. Hale, 3 W. Va. 495, 100 Am. Dec. 761; and the other cases cited in this section.

Thus a note in the usual form, "I promise to pay," etc., signed "A. B., Treas. St. Paul's Parish;" [61] "C. H., President of the Dorchester Avenue Railroad Company;" [62] "J. S. E., Trustee of Sullivan Railroad;" [63] "A. B., Treasurer of Eagle Lodge;" [64] "W. H. E., Pres. and Treas. Chelsea Iron Foundry Company;" [65] "J. B., Agent for Lewis County;" [66] or a draft signed "W. P. C., Treas.," [67] etc., with nothing in the body of the note to indicate that the promise is not the promise of the signer, will be held to be the personal obligation of him whose name is subscribed, notwithstanding the addition.

And, as is said by a learned judge, "Why should it not be so? That is the plain and direct import of the language he uses. 'I' is not the language of a corporation or association. It is that of an individual signer. If a signer appends to his signature a description of himself as agent, president, trustee, or treasurer of a corporation, it may import a declaration on his part that, having funds of such corporation in his possession, he is willing to be responsible, and accordingly makes himself responsible for a debt of theirs. And this *descriptio personæ* may aid him in the keeping and adjustment of his accounts with his different principals. But without some words in the contract importing that he promises for or on behalf of his principal, he cannot avoid the personal liability he has assumed." [68]

§ 1140. ——— The same rule was applied though the note read, "we" promise to pay and was signed by a single individual, "D. P. L., Treas'r Hallowell Gaslight Co." Said the court, "We think the note must be construed to be the note of the defendant, and not of the corporation. It contains no apt words showing that the parties understood it to be the contract of the corporation and not of the defendant. It nowhere appears that the defendant made the promise for the corporation. The language used expresses his own promise, and what is added after the signature is descriptive of the person." [69]

§ 1141. ——— What is true of one individual signer is also true of several, whether the form adopted be "I" or "we" promise. Thus a note in the usual form, signed by several with the addition "vestry-

[61] Sturdivant v. Hull, 59 Me. 172, 8 Am. Rep. 409; Mellen v. Moore, 68 Me. 390, 28 Am. Rep. 77.

[62] Haverhill M. F. Ins. Co. v. Newhall, 1 Allen (Mass.), 130.

[63] Fiske v. Eldridge, 12 Gray (Mass.), 474.

[64] Seaver v. Coburn, 10 Cush. (Mass.) 324.

[65] Davis v. England, 141 Mass. 587.

[66] Exchange Bank v. Lewis County, 28 W. Va. 273.

[67] Bank v. Cook, 38 Ohio St. 442.

[68] Barrows, J., in Sturdivant v. Hull, *supra*.

[69] McClure v. Livermore, 78 Me. 390. To same effect is Mellen v. Moore, 68 Me. 390, 28 Am. Rep. 77.

man, Grace Church" [70] or "President and Directors of the P. and S. Cheese Co.," [71] or "Trustees of First Universalist Society," [72] or "Trustees of the A. Lodge," [73] is the note of the individual signers.

§ 1142. ——— The same rule applies to indorsements. Thus the indorsement of a note by an individual who merely appends to his name the word "agent," "president of the X. Co.," etc., *prima facie* imports a personal obligation.[74]

§ 1143. Negotiable paper drawn upon an agent and accepted by him.—The principles which control the obligation of an agent who signs a note, apply in general to the obligation of an agent who undertakes to accept a bill for his principal, and the cases present the same conflict. Where a bill was drawn in the name of a corporation, by its president, with directions to charge to the account of the corporation, upon F. D. H. "Treas.," and was accepted by the latter in the same form, it was held to evince clearly an intention to charge the corporation and not the acceptor personally.[75] The same conclusion was reached in a similar case where the bill was drawn upon L. S. and accepted, L. S. "Treas. of L. F. and Mining Co.," that company being the drawer.[76] So where the bill was drawn upon J. O. E. "Treasurer of the N. & N. W. Railroad Company" and was "accepted payable on return of March estimates. J. O. E. Treas.," it was held not to be the personal obligation of the acceptor.[77]

§ 1144. ——— On the other hand where a draft was headed, "Office of Portage Lake Manufacturing Company," was signed I. R. J. "Agt.," drawn upon E. T. L. "Agent" and accepted by the latter in

[70] Tilden v. Barnard, 48 Mich. 378, 38 Am. Rep. 197.

[71] Rendell v. Harriman, 75 Me. 497, 46 Am. Rep. 421. But *contra*, see Farmers' & Mechanics' Bank v. Colby, 64 Cal. 352, where a note reading "we promise," and signed "G. A. C., Pres. Pac. Peat Coal Co., D. K. T., Sec. *pro tem.*" was held not to be the note of the officers personally and said to be the note of the company.

[72] Burlingame v. Brewster, 79 Ill. 515, 22 Am. Rep. 177; to like effect: Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175; Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71; Barlow v. Congregational Society, 8 Allen (Mass.), 460; Coburn v. Omega Lodge, 71 Iowa, 581; Hayes v. Brubaker, 65 Ind. 27.

[73] Richmond Locomotive Works v. Moragne, 119 Ala. 80; McClellan v. Robe, 93 Ind. 298; Williams v. Second National Bank, 83 Ind. 237.

[74] Terhune v. Parrott, 59 N. J. L. 16.

[75] Hager v. Rice, 4 Colo. 90, 34 Am. Rep. 68.

[76] Laflin & Rand Powder Co. v. Sinsheimer, 48 Md. 411, 30 Am. Rep. 472. In this and the preceding case it was also held, as will be seen in a later section that if there were any ambiguity it could be cleared up by parol evidence.

[77] Amison v. Ewing, 2 Cold. (Tenn.) 366. To same effect is Shelton v. Darling, 2 Conn. 435; Orpherts v. Smith, 62 N. Y. Supp. 409.

See also Louisville, etc., Ry. Co. v. Caldwell, 98 Ind. 245.

the same form, the court applied all of the words indicating corporate character in determining the liability of the drawer, declared that their effect was thus exhausted, and held the acceptance binding upon the acceptor personally.[78] So where a bill drawn by Kanawha and Ohio Coal Co. upon J. A. R. "Agent," was accepted by J. A. R. "Agent K. & O. C. Co." it was held to be the personal obligation of the acceptor.[79] So where a bill was drawn on, and accepted by, J. R. L. "President of the Rosendale Manufacturing Co.," but there was no proof that the president was authorized to bind the company by acceptances, it was held that the action was properly brought against the president personally.[80]

§ 1145. Negotiable paper drawn payable to an agent and indorsed by him.—Where a bill or note is drawn payable to a certain person to whose name are appended words indicating official character or representative capacity, the question of the nature of the title acquired by him,[81] and which may be transferred by his indorsement, is subject to the same conflict of authorities which has been seen in the preceding sections. Thus, a note payable to the order of "Geo. Moebs, Sec. & Treas.," signed, "Peninsular Cigar Co., Geo. Moebs, Sec. & Treas.," and indorsed, "Geo. Moebs, Sec. & Treas.," was held, by the supreme court of the United States, to be "drawn by, payable to, and indorsed by the corporation." [82]

On the other hand, in a case substantially identical, where a note was made payable to the order of "Adolph Pike, Pres.," and was indorsed by him in the same manner, it was held by the supreme court

[78] Slawson v. Loring, 5 Allen (Mass.), 340, 81 Am. Dec. 750.

[79] Robinson v. Kanawha Valley Bank, 44 Ohio St. 441, 58 Am. Rep. 829.

[80] Moss v. Livingston, 4 N. Y. 208.

In Nicholls v. Diamond, 9 Exch. 154, a bill of exchange, directed to "J. D., purser, West Downs Mining Company," was accepted by him: "J. D. per proc. West Downs Mining Co." J. D. was a member of the company which was not incorporated. *Held*, that J. D. was personally liable on this acceptance.

In Walker v. Bank, 9 N. Y. 582, where a bill of exchange was drawn by the Empire Mills, and addressed to "E. C. Hamilton, Esq." and "Accepted, * * * Empire Mills, by E. C. Hamilton, Treas.," it was held that the acceptance did not bind E. C. H. personally.

[81] *Paper payable to agent.*—The question of who may sue to enforce payment of such paper is discussed in later chapters dealing with the rights of action of agents against third persons.

[82] Falk v. Moebs, 127 U. S. 597, 32 L. Ed. 266.

To same effect: Nichols v. Frothingham, 45 Me. 220, 71 Am. Dec. 539.

Where a foreign corporation is represented by a local manager called "Commercial director," a note made to him in that name by one who knows the facts, is the note of the company. Societe des Mines v. Mackintosh, 5 Utah, 568.

of Illinois, denying the preceding case, that the word "Pres." was mere *descriptio personæ*, and that the note was payable to and indorsed by Pike individually.[83]

§ 1146. ——— **Paper payable to cashier of bank.**—In the case of banks, paper drawn payable to A. B. "cashier," "Cash.," or "Cas.," is quite universally considered as payable to the bank itself and the cashier's signature in the same form, in drawing or indorsing such paper, binds the bank and not himself personally.[84] The Negotiable Instruments Act now covers this point.

§ 1147. ——— **Other similar cases.**—So where a note ran to C. W. S., "Treasurer of the I. M. B. Co.," and was indorsed in the same way, it was held to be the note of the company and to be indorsed by it.[85] And the same conclusion was reached where the note was payable to the order of L. M. "President of the Metropolitan Fire and Marine Insurance Company" and indorsed in the name of the company by L. M., "President."[86]

So where a note or bill payable to a corporation by its corporate name has been indorsed by an authorized agent or official, with the title of his office appended, it is regarded as the indorsement of the corporation; as where a note was payable to the "Globe Mutual Insurance Co. or order," and was indorsed "L. G., President."[87]

[83] Hately v. Pike, 162 Ill. 241, 53 Am. St. R. 304.

See also Maher v. First Nat. Bank, 93 Ill. App. 404.

Ambiguous — Parol evidence. — In Souhegan Nat. Bank v. Boardman, 46 Minn. 293, where a note was made payable to "A. J. Boardman, Treasurer," and was indorsed by him in the same manner, it was held that the indorsement was *prima facie* the individual contract of the defendant, but that parol evidence was admissible to show that he made it only in his official capacity as treasurer of the maker corporation, and as its indorsement.

[84] Bank v. Wheeler, 21 Ind. 90; Nave v. Lebanon Bank, 87 Ind. 204; Burnham v. Webster, 19 Me. 232; Bank of Genesee v. Patchin Bank, 19 N. Y. 312; Bank of New York v. Bank of Ohio, 29 N. Y. 619; First Nat. Bank v. Hall, 44 N. Y. 395, 4 Am. Rep. 698; Robb v. Bank, 41 Barb. (N. Y.) 586; Houghton v. First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107; Baldwin v. Bank, 1 Wall. (U. S.) 234, 17 L. Ed. 534; Farrar v. Gilman, 19 Me. 440, 86 Am. Dec. 766; Ballston Spa Bank v. Marine Bank, 16 Wis. 120; Rockwell v. Elkhorn Bank, 13 Wis. 653; Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326, 5 L. Ed. 100.

[85] Vater v. Lewis, 36 Ind. 288, 10 Am. Rep. 29. To same effect: Babcock v. Beman, 11 N. Y. 200.

[86] Nichols v. Frothingham, 45 Me. 220, 71 Am. Dec. 539.

[87] Elwell v. Dodge, 33 Barb. (N. Y.) 336; same point, Russell v. Folsom, 72 Me. 436; Northampton Bank v. Pepoon, 11 Mass. 287; Nicholas v. Oliver, 36 N. H. 218; McIntyre v. Preston, 5 Gil. (Ill.) 48, 48 Am. Dec. 321.

§ 1148. How when made by public agents.—As has been seen, in the preceding chapter,[88] contracts made by public agents while acting in the exercise of their public functions are presumed to be made in behalf of the public, and are not binding upon them personally unless the intent to be so charged is very clear. Whether the same rule applies to the execution of negotiable instruments by public agents is not so clear, although in reason, it would seem that it should, as between the immediate parties where the principal is known or disclosed, and as against third persons where enough is shown to fairly put a prudent man upon his guard.

The cases upon this subject are not harmonious and in many of them the distinction between public and private agents does not seem to have received attention. Thus where a note reading, "I promise to pay," etc., was signed by G. H. and A. P., "School trustees," it was held that the note was the individual obligation of the signers, and that the words "School trustees" were but descriptive of the persons;[89] and a similar ruling was made where the paper was headed "State of Iowa, County of Jones, Township of Hale," and was signed, W. H. G., "Pres. School Board" and I. B. S., "Sec'y School Board."[90] So where notes were signed J. B., "Agent for Lewis County" it was held that J. B. was personally bound.[91] So a note reading "For value received as treasurer of the town of Monmouth, I promise to pay," etc., and signed "Wm. G. Brown, Treasurer," was held to be the individual note of Brown.[92]

So individuals who promised "as committeemen for the erection of a school house in Dist. No. 1," but signed in their own names were held personally liable;[93] and where a note reading "For value received in policy No. 138,181, * * * issued by the American Insurance Company * * * we promise to pay to said company," etc., was

[88] See *ante*, § 1113.

[89] Village of Cahokia v. Rautenberg, 88 Ill. 219. To the same effect, see Fowler v. Atkinson, 6 Minn. 579.

And so where one De Merolla, the Italian Vice Consul at Baltimore, borrowed money and gave a promissory note headed "Royal Consular Agency of Italy," dated "Baltimore, 2 June, 1882," and reading "Received from Charles Gola, Esq., for the use of this Vice Consulate of Italy, one thousand, five hundred dollars, to be returned within ninety days, with the usual interest and commissions," signed "E. De Merolla," and sealed "Royal Consular Agency of Italy, Baltimore," it was held to be simply the personal obligation of De Merolla. De Bebian v. Gola, 64 Md. 262.

[90] Wing v. Glick, 56 Iowa, 473, also reported in note to 37 Am. Rep. 142.

[91] Exchange Bank of Virginia v. Lewis County, 28 W. Va. 273.

[92] Ross v. Brown, 74 Me. 252.

[93] Bayliss v. Pearson, 15 Iowa, 279.

signed E. G., "president," J. A. C., "secretary," and E. G. "director," it was held that it was the individual note of the persons named.[94]

So again, where a note reading, "For value received I promise to pay," etc., "for causing full page view of the Leonard graded school building to be printed in the atlas of Clearfield County," was signed J. T. L., "President Sch. Bd." which was found to mean President of the School Board, it was held that L. was personally bound.[95]

So, where an instrument in the form of an order headed with the name of the state, county, and school district, read "Treasurer of School Dist. No. 16, in said county and state, will pay * * * out of any money belonging to said district. For [here were enumerated a number of school books and appliances]. Issued by authority of officers of said district and payment guaranteed by B. M., W. F. P., school officers," it was held to be the personal obligation of the signers, and the words "school officers" to be mere *descriptio personæ*.[96]

§ 1149. ——— But upon the ground that they were public agents, it was held, where two notes headed "Monticello, Ind." and reading "we promise to pay," etc., were signed, one, H. P. A., W. S. H., C. W. K., "Trustees of Monticello School," and the other H. P. A., C. W. K., "School trustees," that the words "Trustees of Monticello School," and "School trustees," were not mere *descriptio personæ*, but indicated an intent to charge the school town,[97] and this doctrine is reaffirmed in later cases in the same court.[98] *A fortiori* would the rule of this case apply where a note reading "I promise to pay," etc., "to be paid out of the township funds" is signed F. K. M., "Trustee of Johnson Tp."[99]

[94] American Ins. Co. v. Stratton, 59 Iowa, 696.

These cases in Iowa must evidently be distinguished from certain others in the same state. Thus, where a note reading, "We, the undersigned, directors of school district No. 4, Montpelier township, promise to pay;" etc., was signed by the individual names of the officers, it was held not binding on them personally, Baker v. Chambles, 4 Greene (Iowa), 428. So, where a similar note reading, "We, the board of school district No. 1," promise to pay, etc., was signed in the individual names. Lyon v. Adamson, 7 Iowa, 509.

The court in these cases holds that, under the Code, the form adopted is the proper form in which to pledge the responsibility of the district. The same Code, however, provides a different name by which districts shall be known and by which they shall make contracts, be sued, etc.

[95] Forcey v. Caldwell (Pa.), 9 Atl. 466.

[96] Merrill v. Young, 5 Kan. App. 761.

[97] School Town of Monticello v. Kendall, 72 Ind. 91, 37 Am. Rep. 139.

[98] Moral School Tp. v. Harrison, 74 Ind. 93.

[99] Wallis v. Johnson School Tp., 75 Ind. 368.

And where a sealed note reading "we, A. S. C., W. M. C., and J. H. K., members of the township committee of the township of Harrison, * * * and our successors in office promise to pay" was signed by the parties in their individual names, the court applied the doctrine in regard to public agents and held the signers not personally liable.[1]

Where a note reading, "We, as trustees of School Dist., No. 10," promise to pay, etc., was signed with the individual names of the makers, the court held that there could not well be any doubt that it was the promise of the district and not of the persons signing it, but that, if there was, it could be removed by showing the intention.[2]

So, where a note ran, "We, or either of us, trustees of district No. 6, * * * promise to pay to the order of Adam Temple, * * * it being money this day borrowed of said Temple to build a school house in said district No. 6," and was signed "T. W. W., L. F. G., Trustees," it was held that the note was clearly the obligation of the school district.[3]

The same question arises where a note is made payable to a public agent and by him indorsed: the agent in such a case is not liable as indorser. Thus where the note of a city was made payable "to the order of J. V. F., City Treas.," was negotiated and indorsed in blank thus, "J. V. F., City Treas.," it was held, that the agent was not personally liable for "it is plain that his name was used only to give the notes currency."[4]

2. The Admissibility of Parol Evidence to Show Intent.

§ 1150. In general.—Passing now to the second question suggested, namely, how far the interpretation of the instrument may be affected by parol evidence. The question of the admissibility of parol evidence to show who was intended to be bound by a negotiable instrument executed by an agent is one not free from difficulty, and the decisions are in conflict.

Where the instrument upon its face is apparently the promise of the agent only, there being nothing in the body of the instrument or appended to his signature to suggest the existence of a principal; and

[1] Knight v. Clark, 48 N. J. L. 22, 57 Am. Rep. 534.

[2] Sanborn v. Neal, 4 Minn. 126, 77 Am. Dec. 502.

[3] Warford v. Temple, 24 Ky. Law Rep. 2268, 73 S. W. 1023.

[4] Citizens' Savings Bank v. City of Newburyport, 95 C. C. A. 232, 169 Fed. 766.

where on the other hand the promise is, with equal clearness, the promise of the principal alone, the instrument needs no explanation, it binds him only whom it purports to bind, and parol evidence is inadmissible to discharge the apparent maker or to charge some one not disclosed.[5]

Where, however, the face of the paper itself suggests a principal as well as an agent, where the agent adds to his signature words indicating a representative capacity, or where otherwise the paper upon its face is ambiguous and capable of more than one interpretation, a resort to parol evidence to show the real intention will be suggested.

§ 1151. ——— In a recent case in Minnesota,[6] it was said by Mitchell, J., "Where both the names of a corporation and of an officer or agent of it appear upon a bill or note, it is often a perplexing question to determine whether it is in legal effect the contract of the corporation or the individual contract of the officer or agent. It is very desirable that the rules of interpretation of commercial paper should be definite and certain; and, if the courts of the highest authority on the subject had laid down any exact and definite rules of construction for such cases, we would, for the sake of uniformity, be glad to adopt them. But, unfortunately, not only do different courts differ with each other, but we are not aware of any court whose decisions furnish any definite rule or system of rules applicable to such cases. Each case seems to have been decided with reference to its own facts. If what the courts sometimes call 'corporate marks' greatly predominate on the face of the paper, they hold it to be the contract of the corporation, and that extrinsic evidence is inadmissible to show that it was the individual conract of the officer or agent. If these marks are less strong, they hold it *prima facie* the individual contract of the officer or agent, but that extrinsic evidence is admissible to show that he executed it in his official capacity in behalf of the corporation; while in still other cases they hold that it is the personal contract of the party who signed it; that the terms 'agent,' 'secretary,' and the like, are merely descriptive of the person, and that extrinsic evidence is not admissible to show the contrary. This court has in a line of decisions held that where a party signs a contract, affixing to his signature the term 'agent,' 'trustee,' or the like, it is

[5] Shuey v. Adair, 18 Wash. 188, 39 L. R. A. 473, 65 Am. St. R. 879; Sparks v. Despatch Trans. Co., 104 Mo. 531, 24 Am. St. R. 351, 12 L. R. A. 714; Bulwinkle v. Cramer, 27 S. Car. 376, 13 Am. St. R. 645; Phelps v. Borland, 30 Hun (N. Y.), 362; Auburn Bank v. Leonard, 40 Barb. (N. Y.) 119; Babbett v. Young, 51 N. Y. 238.

[6] Souhegan Nat. Bank v. Boardman, 46 Minn. 293.

prima facie his individual contract, the term affixed being presumptively merely descriptive of his person, but that extrinsic evidence is admissible to show that the words were understood as determining the character in which he contracted."

§ 1152. **Cases holding such evidence admissible.**—In a large and increasing number of cases wherein the instrument bore upon its face some reference to a principal, or some suggestion that the signer was acting in a representative capacity, parol evidence has been admitted to show who was the party intended to be bound.

Thus, in the Minnesota case[7] already quoted from, where a note signed by a corporation was made payable to the order of A. J. B. "Treasurer," and was indorsed by him in the same way, it was held that, though upon its face this was the indorsement of the defendant personally, extrinsic evidence was admissible to show that he made the indorsement only in his official capacity as the indorsement of the corporation.

Many other cases from the same state are to the same effect.[8]

So where an agent drew a bill upon his principal, signing it "T. R. T., agent for S. T.," and there was nothing in the body of the bill to show that it was drawn as the act of the principal, the supreme court of Colorado held, 1. That, contrary to the preponderance of authority that the form "C D, agent for A B," is sufficient to bind the principal, it was the individual obligaton of T. R. T.; and, 2. That even as between the original parties, parol evidence was not admissible to prove that the bill was drawn in a representative capacity, and not individually, and that the payee had full knowledge of this fact.[9]

But this case was practically overruled by a subsequent case in the same court, where it was held that in the case of a bill drawn upon "T. D. H., Treas." and accepted by him in the same form, parol evidence was admissible, to exonerate the agent, in an action between the original parties, to show that the acceptance was in an official capacity and was known by the payee to be so.[10] And the same ruling was made in a similar case in Maryland.[11]

[7] Souhegan Nat. Bank v. Boardman, 46 Minn. 293.

[8] Citing Pratt v. Beaupre, 13 Minn. 187; Bingham v. Stewart, 13 Minn. 106, and 14 Minn. 214; Deering v. Thom, 29 Minn. 120; Rowell v. Oleson, 32 Minn. 288; Peterson v. Homan, 44 Minn. 166, 20 Am. St. R. 564; Brunswick Balke Co. v. Boutell, 45 Minn. 21; Kraniger v. Peoples Bldg. Soc., 60 Minn. 94.

[9] Tannatt v. Rocky Mt. Nat. Bank (1871), 1 Colo. 278, 9 Am. Rep. 156.

[10] Hager v. Rice (1877), 4 Colo. 90, 34 Am. Rep. 68.

[11] Laflin & Rand Powder Co. v. Sinsheimer (1877), 48 Md. 411, 30 Am. Rep. 472.

And in accordance with these cases, the supreme court of Mississippi held that where a bill was drawn upon an agent and accepted by him, "Accepted, W. S. B., agent of H. W. H.," parol evidence was admissible, as between the original parties, to show that it was the intent at the time to bind H., the principal, only.[12]

§ 1153. ——— Where the note read "we, the president and directors" of a turnpike company "promise to pay," etc., and was signed by C. T. H., "President," J. H. H. and J. G. D., "directors" and E. R. S., "secretary," the court of appeals of Maryland held that parol evidence was admissible as between the original parties to exonerate the agent by showing that the signers of the note did so as the agents of the company and not as individuals and that the note was accepted as the note of the company.[13]

So where a note reading "We promise to pay," etc., was signed "Pioneer Mining Company, John E. Mason, Supt.," parol evidence was held, by the supreme court of California, to be admissible in an action by the payee to charge Mason to show that it was understood by the payee to have been the note of the company alone and to have been given for a consideration passing to the company.[14]

So where a bill was signed "John Kean, President Elizabethtown & Somerville R. R. Co.," the court of errors and appeals of New Jersey held that parol proof was admissible, in an action against Kean by a party who was apprised of that fact when he took it, to show that the bill was the bill of the company, and not of Kean, individually.[15]

In Kentucky, where a due bill was signed "for Thomas D. Owings, James Grubbs," parol evidence was held to be admissible as against the payee, to show that Grubbs was the manager of Owings' works, and that he executed and delivered the due bill as the obligation of Owings;[16] and the same ruling as against the payee was made in Connecticut, where a note was signed A. W. M., "agent for the Middletown Manufacturing Company."[17]

[12] Hardy v. Pilcher (1879), 57 Miss. 18, 34 Am. Rep. 432. See also Martin v. Smith, 65 Miss. 1. (The point in this case however was, more properly, not whether the principal could be held upon the acceptance, but rather, since he drew the paper on his own agent, it was not really to be regarded as his promise.)

[13] Haile v. Peirce (1869), 32 Md. 327, 3 Am. Rep. 139; and see Laflin & Rand Powder Co. v. Sinsheimer, *supra*.

[14] Bean v. Pioneer Mining Co. (1885), 66 Cal. 451, 56 Am. Rep. 106.

[15] Kean v. Davis (1847), 21 N. J. L. 683, 47 Am. Dec. 182.

[16] Owings v. Grubbs, 6 J. J. Marsh. (Ky.) 31; Webb v. Burke, 5 B. Mon. (Ky.) 51.

[17] Hovey v. Magill, 2 Conn. 680.

In Missouri, where a note reading "I promise to pay," etc., "for building a schoolhouse in Dist. No. 3," was signed by P. T. R., "Local Director," it was held in an action by the payee against the director that he might show by parol evidence that it was not intended to be his note but that of the district.[18] And the same ruling as against the payee has been made in Alabama,[19] Kansas,[20] South Dakota,[21] Oklahoma,[22] Texas,[23] Montana,[24] Virginia.[25]

§ 1154. ——— In Michigan, where the note read, "I promise," and was signed simply, W. S. W. "Agt." it was held, in an action by the payee, that while upon its face it was the promise of W., it could be shown by parol evidence to exonerate him, that the parties had had many dealings together and that this form of execution had come to be the recognized form for binding the principal.[26]

In Indiana, where a variety of views had been expressed,[27] the court has held in an action by an indorsee that a note headed "Midland Steel

[18] McClellan v. Reynolds, 49 Mo. 312; and the same ruling was made in other cases, Shuetze v. Bailey, 40 Mo. 69; Musser v. Johnson, 42 Mo. 74, 97 Am. Dec. 316; Washington Ins. Co. v. Seminary, 52 Mo. 480; Klostermann v. Loos, 58 Mo. 290; Turner v. Thomas, 10 Mo. App. 338.

See also Sparks v. Dispatch Transfer Co., 104 Mo. 531, 24 Am. St. R. 351, 12 L. R. A. 714, where there was nothing at all on the face of the note to indicate agent, and it was held that parol evidence was not admissible.

[19] Lazarus v. Shearer, 2 Ala. (N. S.) 718. See also Baker v. Gregory, 28 Ala. 544, 65 Am. Dec. 366; Drake v. Flewellen, 33 Ala. 106; May v. Hewitt, 33 Ala. 161; Ware v. Morgan, 67 Ala. 461.

[20] The note read "I promise," and was signed W. M. B., "President Odd Fellows Hall Association." A. T. L. "Secretary." Benham v. Smith, 53 Kan. 495. See also Kline v. Bank of Tescott, 50 Kan. 91, 34 Am. St. R. 107, 18 L. R. A. 533; Western Grocer Co. v. Lackman, 75 Kan. 34.

[21] Miller v. Way, 5 S. Dak. 468, the note read, "We the directors of the Custer County Agricultural, etc., Association promise to pay * * * Signed by directors Custer Co. Agricultural, etc., Association:" A. S. W., T. L. M., J. F. B., L. F. S., J. L. B., E. S., P. P., G. C. B.

[22] James v. Citizens' Bank, 9 Okla. 546. The note read, "We promise to pay" and was signed R. W. P., J. G. "President of Enid Town Co.," F. J. "Secretary Enid Town Co."

[23] Traynham v. Jackson, 15 Tex. 170, 65 Am. Dec. 152, the note read, "We, the trustees of Chappell Hill College, promise to pay," and was signed by eight persons. See also Texas L. & C. Co. v. Carroll, 63 Tex. 48, though the paper here was held to be non negotiable.

[24] Knippenberg v. Greenwood Min. Co., 39 Mont. 11.

[25] Early v. Wilkinson, 9 Gratt. (Va.) 68; Richmond, etc., R. R. Co. v. Snead, 19 Gratt. (Va.) 354, 100 Am. Dec. 670. (The action was not upon the note or due bill but upon the common counts, against the principal, and the due bill was admitted as evidence of the indebtedness of the latter.)

[26] Keidan v. Winegar, 95 Mich. 430, 20 L. R. A. 250.

[27] In Second Nat. Bank v. Midland Steel Co., 155 Ind. 581, 52 L. R. A. 307, the court said, "The decisions in this state upon the question presented here cannot easily be

Company," and reading, "We promise," and signed R. J. B. "President," while it may be *prima facie* the note of B., may still be shown by parol evidence to have been intended to be the note of the company.[28]

§ 1155. ——— In Nebraska, it seems that parol evidence will not support a plea at law denying liability on the notes, but that such evidence would support an action for rectification in equity.[29] In New York, where the makers of a note designated themselves "Trustees of the First Baptist Society of the Village of Brockport," it was held that while *prima facie* they were personally liable, yet, in an action by the payees, the presumption might be rebutted by parol evidence that the note was, to the knowledge of the payees, given as the obligation of the Society,[30] and this principle was reaffirmed in later cases.[31]

§ 1156. ——— Such evidence has also been freely admitted by the supreme court of the United States. Thus where a check headed "Mechanics' Bank of Alexandria," drawn on the cashier of the Bank

reconciled or distinguished. Among those holding that extrinsic evidence is not admissible to show that a contract executed by one who adds to his signature the words, 'president,' 'secretary,' 'agent,' 'trustee,' etc., is not the contract of the party so signing, but the obligation of another party, are the following: Prather v. Ross, 17 Ind. 495; Kendall v. Morton, 21 Ind. 205; Wiley v. Shank, 4 Blackf. (Ind.) 420; Mears v. Graham, 8 Blackf. (Ind.) 144; Hays v. Crutcher, 54 Ind. 260; Williams v. Second Nat. Bank, 83 Ind. 237; Willson v. Nicholson, 61 Ind. 241; Hayes v. Brubaker, 65 Ind. 27; Avery v. Dougherty, 102 Ind. 443, 52 Am. Rep. 680; Hobbs v. Cowden, 20 Ind. 310; Jackson Sch. Twp. v. Farlow, 75 Ind. 118. A different view seems to have been taken in other cases. Means v. Swormstedt, 32 Ind. 87, 2 Am. Rep. 330; McHenry v. Duffield, 7 Blackf. (Ind.) 41; Pitman v. Kintner, 5 Blackf. 250, 33 Am. Dec. 469; Kenyon v. Williams, 19 Ind. 44; Bingham v. Kimball, 17 Ind. 396; Ind., etc., R. Co. v. Davis, 20 Ind. 6, 83 Am. Dec. 303; Gaff v. Theis, 33 Ind. 307; Vater v. Lewis, 36 Ind. 288, 10 Am. Rep. 29; Pearse v. Welborn, 42 Ind. 331; Neptune v. Paxton, 15 Ind. App. 284; Louisville, etc., R. Co. v. Caldwell, 98 Ind. 245; Second Baptist Church v. Furber, 109 Ind. 492; Swarts v. Cohen, 11 Ind. App. 20; Hunt v. Listenberger, 14 Ind. App. 320."

[28] Second Nat. Bank v. Midland Steel Co., 155 Ind. 581, 52 L. R. A. 307.

[29] Western Wheeled Scraper Co. v. McMillen, 71 Neb. 686. See also Western Wheeled Scraper Co. v. Stickleman, 122 Iowa, 396.

[30] Brockway v. Allen, 17 Wend. (N. Y.) 40.

[31] See White v. Skinner, 13 Johns. (N. Y.) 307; Barker v. Mechanic Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; Babcock v. Beman, 11 N. Y. 200; Bank of Utica v. Magher, 18 Johns. (N. Y.) 342; Bank of Genessee v. Patchin Bank, 19 N. Y. 312; Randall v. Van Vetchen, 10 Johns. (N. Y.) 60, 10 Am. Dec. 193; Newman v. Greeff, 101 N. Y. 663; Schmittler v. Simon, 114 N. Y. 176, 11 Am. St. R. 621; First National Bank v. Wallis, 150 N. Y. 455.

of Columbia, was signed "Wm. Paton, Jr.," parol evidence was held to be admissible to show that Paton was the cashier of the Mechanics' Bank; that he drew the check as such cashier and that the Bank of Columbia knew it;[32] but where a note drawn payable to the order of "Geo. Moebs, Sec. and Treas.," by the "Peninsular Cigar Co., Geo. Moebs, Sec. and Treas.," was indorsed "Geo. Moebs, Sec. and Treas.," it was held that the indorsement was clearly that of the cigar company and that parol evidence was not admissible to show that the indorsement was intended to be that of Moebs personally.[33]

§ 1157. Cases holding such evidence not admissible.—But in Massachusetts, where a draft headed "Office of Portage Lake Manufacturing Company," drawn upon "E. T. Loring, Agent," and concluding "and charge the same to the account of the company," was signed by "J. R. Jackson, Agt.," and was accepted as follows, "Accepted June 15, E. T. Loring, Agent," it was held in an action by the payee against the acceptor, that parol evidence was not admissible to show that the defendant was in fact the agent of the company named on the face of the draft, that the plaintiff knew that he was so, and that the defendant had no personal interest in the company. In this case, as has been seen, the court construed the words disclosing the name of the company and upon whose account the bill was drawn, as showing that the bill was *drawn* as the bill of the company, and that

[32] Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326, 5 L. Ed. 100; see also, Baldwin v. Bank of Newbury, 1 Wall. (U. S.) 234, 17 L. Ed. 534, where, in an action on a note reading "Five months after date, I promise to pay to the order of *O. C. Hale, Esq., Cashier*, Thirty-five hundred dollars, payable at either bank in Boston, value received," it was held that parol evidence was admissible to show that Hale was cashier of the plaintiff bank, and that in taking the note he acted as the cashier and agent of the corporation, and Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665, where it is held that where a check was signed "W. G. Williams, V. Pres't," parol evidence was admissible to show that the person taking it, took it as the check of the corporation of which Williams was vice-president.

[33] Falk v. Moebs, 127 U. S. 597, 32 L. Ed. 266. "We conclude, therefore," says Mr. Justice Lamar, in this case, "that the notes involved in this controversy, upon their face, are the notes of the corporation. In the language of the court below, they were 'drawn by, payable to and indorsed by, the corporation.' There is no ambiguity in the indorsement, but, on the contrary, such indorsement is, *in terms*, that of the Peninsular Cigar Company. This being true, it follows that the court below was right in excluding from the jury the evidence offered to explain away and modify the terms of such indorsement." Citing White v. Bank, 102 U. S. 658, 26 L. Ed. 250; Martin v. Cole, 104 U. S. 30, 26 L. Ed. 647; Metcalf v. Williams, *Id.* 93.

See also American Trust Co. v. Canevin, 107 C. C. A. 543, 184 Fed. 657.

they could not be again used to show that it was also *accepted* in that character;[34] and where a note reading "I promise to pay," etc., was signed by W. H. E., "Pres. and Treas. Chelsea Iron Foundry Company," the same court held that it was the individual promise of W. H. E., and that it was erroneous in an action by the payee to admit oral testimony to show that at the time the note was given and afterwards, it was understood and agreed by the parties that it was the note of the foundry company.[35]

So in Iowa, where a note containing an individual promise was signed "E. G., President, J. A. C., Secretary, E. S., Director," it was held that it was the individual promise of the signers and that parol evidence was not admissible in an action by the payee to show that it was intended to be the promise of the school district of which the signers were the respective officers indicated.[36]

Many other cases in that state are to the same effect.[37]

§ 1158. ——— In Maine, where a note was drawn "we promise to pay," etc., and was signed by four individuals, adding "President and Directors of the Prospect and Stockton Cheese Company," the court held that evidence was not admissible even between the original parties, to show that it was intended to be the obligation of the company.[38]

In Illinois, where the note ran, "we, the trustees of the Methodist Episcopal Church in Lebanon, promise to pay," etc., and was signed with the individual names of the makers, the court decided that it was the individual note of the signers and that parol evidence could not be admitted in an action by the payee's administrator to show "that it was well understood by the payee when the makers executed the note, they were acting in their capacity as trustees of the church; that they intended to obligate the church corporation, having full au-

[34] Slawson v. Loring, 5 Allen (Mass.), 340, 81 Am. Dec. 750.

[35] Davis v. England, 141 Mass. 587. To like effect: Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101; Bartlett v. Hawley, 120 Mass. 92.

As to the reformation of the instrument, see Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 212.

[36] American Ins. Co. v. Stratton, 59 Iowa, 696.

[37] See, Heffner v. Brownell, 70 Iowa, 591, 75 Iowa, 341; McCandless v. Belle Plaine Canning Co., 78 Iowa, 161, 16 Am. St. R. 429, 4 L. R. A. 396; Lee v. Percival, 85 Iowa, 639; Matthews v. Dubuque Mattress Co., 87 Iowa, 246, 19 L. R. A. 676.

But see Western Wheeled Scraper Co. v. Stickleman, 122 Iowa, 396, where the court, as now constituted, expresses doubt as to the correctness of the earlier rule.

[38] Rendell v. Harriman, 75 Me. 497, 46 Am. Rep. 421.

thority in that regard, and did not intend to bind themselves personally or individually by their writing." [39]

In Ohio where a bill was accepted by J. A. R., "Agent K. & O. C. Co., parol evidence was rejected in an action by an indorsee to show that he was the duly authorized agent of Kanawha & Ohio Coal Company; that he accepted the bill for and on account of the company and that the payee knew these facts.[40]

Similar rulings have been made in South Carolina,[41] Vermont,[42] and perhaps other states.[43]

§ 1159. What rules applied.—The trouble that has been experienced in dealing with this question does not arise so much from a lack of appreciation of the proper principle involved, as from the difficulty of applying it, although the courts have not always agreed even upon the principle.

Thus the rule has been stated by a learned judge in this way: "Ordinarily, no extrinsic testimony of any kind is admissible to vary or explain negotiable instruments. Such paper speaks its own language, and the meaning which the law affixes to it cannot be changed by any evidence *aliunde*. One of the few exceptions to this rule is where anything on the face of the paper suggests a doubt as to the party bound, or the character in which any of the signers has acted in affixing his name; in which case, testimony may be admitted between the original parties to show the true intent. Thus, where one has signed as agent of another, while the *prima facie* presumption is that the words are merely *descriptio personæ*, and that the signer is individually bound, yet it may be shown in a suit between the parties that it was not so intended, but that, on the contrary, the true intention was that the payee should look to the principal whose name was disclosed in the signature of his agent, or who was well known to be the true party to be bound. The principle, though not recognized in all the cases, is, we think, a sound one, and supported by the weight of authority." [44]

[39] Hypes v. Griffin (1878), 89 Ill. 134, 31 Am. Rep. 71. But see Frankland v. Johnson, 147 Ill. 520; La Salle Nat. Bank v. Tolu Rock and Rye Co., 14 Ill. App. 141.

[40] Robinson v. Kanawha Valley Bank, 44 Ohio St. 441, 58 Am. Rep. 829; see also to same effect: Collins v. Insurance Co., 17 Ohio St. 215, 93 Am. Dec. 612; Titus v. Kyle, 10 Ohio St. 444. But see Aungst v. Creque, 72 Ohio St. 551.

[41] Moore v. Cooper, 1 Spears (S. Car.), 87; Fash v. Ross, 2 Hill (S. Car.), 294; Taylor v. McLean, 1 McMul. (S. Car.) 352.

[42] Arnold v. Sprague, 34 Vt. 402.

[43] In Georgia see, Cleaveland v. Stewart, 3 Ga. 283; Bedell v. Scarlett, 75 Ga. 56.

[44] Chalmers, J., in Hardy v. Pil-

And the principle has been asserted in another case as follows: "The established rule seems to be, that an agent, in making a promise for his principal, is liable on the promise unless it be expressed in terms which show that it was made for and on behalf of the principal; and where an agent makes a promissory note to a third person, in terms sufficient to bind himself as principal, the mere addition of the word 'agent' or other description of his office or capacity, to his signature, does not change or vary the legal effect of the promise itself.[45] * * * But sometimes the agent may attach to his signature the character in which he signs the instrument without any correspondent or other description in the body of the note—or he may, in the body of the instrument, disclose the name of his principal and sign his own individual name without any additional description whatever,—or he may sign his own name, without apt terms to charge himself, and in the body of the note use doubtful expressions to describe the principal, leaving the precise meaning of the instrument to be gathered from the terms on its face, so ambiguous or obscure as to render its interpretation, *per se,* too difficult and uncertain for just and sound construction. When the note is of this last description, that is where its language or terms are so unintelligible as to admit of no rational interpretation of the meaning, or are not sufficiently decisive of the intention of the parties, but, on the contrary, are equivocal and uncertain, extraneous proof, as between the original parties, may be admitted to show the true character of the instrument, and what party,—the principal or the agent, or both,—is liable.

"Where individuals subscribe their proper names to a promissory note, *prima facie* they are personally liable, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted, as between the original parties, by proof that the note was in fact given by the makers, as agents, with the payee's knowledge." [46]

And still again it has been said that "The rule is that when words which may be either descriptive of the person, or indicative of the character in which he contracts, are affixed to the name of the contracting party, *prima facie* they are descriptive of the person only, but the fact that they were not intended by the parties as descriptive of

cher, 57 Miss. 18, 34 Am. Rep. 432, citing 1 Dan. on Neg. Inst. § 418; Halle v. Peirce, 32 Md. 327, 3 Am. Rep. 139; McClellan v. Reynolds, 49 Mo. 312; Baldwin v. Bank, 1 Wall. (U. S.) 234, 17 L. Ed. 534; Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326, 5 L. Ed. 100.

[45] Citing Sumwalt v. Ridgely, 20 Md. 114.

[46] Halle v. Peirce, 32 Md. 327, 3 Am. Rep. 139.

the person, but were understood as determining the character in which the party contracted, may be shown by extrinsic evidence; but the burden of proof rests upon the party seeking to change the *prima facie* character of the contract." [47]

§ 1160. ——— In Kean v. Davis,[48] where the form of signature was "John Kean, President Elizabethtown and Somerville R. R. Co.," Chief Justice Green said: "It is at best, upon the face of the instruments, doubtful by whom they were executed. It is not clear who was the contracting party, whether the obligation was assumed by the agent, or whether he contracted on behalf of his principal. May extrinsic evidence be resorted to, to remove this doubt? Is parol evidence admissible to show by whom this contract was in fact made,—whether it is the contract of the agent or the contract of the principal?

"If this were a verbal and not a written contract, it is not questioned that the evidence offered is both pertinent and competent to discharge the agent, and fix the liability upon the principal. The objection urged to the evidence is, that the contract is in writing; that the construction of a written agreement is matter of law, to be settled by the court upon the terms of the instrument itself; and that evidence *aliunde* cannot be received to contradict or to vary the terms of a valid written instrument.

"It is material to observe that the *body* of this instrument contains not a word indicating by whom the contract was made. The language of the instrument is equally applicable to a contract made by the individual or by the corporation. It cannot be said that this evidence will either contradict or vary the terms of the instrument. The whole difficulty lies, not in the construction of the instrument, but in the import of the signature. That signature, as we have seen, may import either the act of the company or of the individual. The terms of the instrument are neither varied nor contradicted by proof that it was the contract of the one or of the other.

"The question is not what is the true construction of the language of the contracting party, but who is the contracting party? Whose language is it? And the evidence is not adduced to discharge the agent from a personal liability which he has assumed, but to prove that in fact he never incurred that liability. Not to aid in the construction of the instrument, but to prove whose instrument it is.

"Now it is true that the construction of a written contract is a question of law, to be settled by the court upon the terms of the instru-

[47] Pratt v. Beaupre, 13 Minn. 187. [48] 21 N. J. L. 683, 47 Am. Dec. 182.

ment. But whether the contract was in point of fact executed, when it was made, where it was made, upon what consideration it was made, and by whom it was made, are questions of fact to be settled by a jury, and are provable in many instances by parol even though the proof conflicts with the language of the instrument itself."

So in the United States Supreme Court, Mr. Justice Bradley said: "The ordinary rule doubtedly is that if a person merely adds to the signature of his name the word 'agent,' 'trustee,' 'treasurer,' etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personæ*. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be in fact a mere agent, trustee or officer of some principal, and is in the habit of expressing in that way his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents, thus made and used, as his personal obligations contrary to the intent of the parties." [49]

§ 1161. ——— **The reasons given for the contrary ruling** are numerous. Thus in the Colorado case above cited,[50] the court said: "If the defendant is liable as drawer of this negotiable instrument, that liability must be determined by the instrument itself. Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed. When a simple contract, other than a bill or note, is made by an agent, the principal whom he represents may, in general, maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another."

In Massachusetts, the court says: "The rule excluding all parol evidence to charge any person as principal, not disclosed on the face of a note or draft, rests on the principle that each person who takes

[49] Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665.

[50] Tannatt v. Rocky Mountain National Bank, 1 Colo. 278, 9 Am. Rep. 156. See *contra:* Hager v. Rice, 4 Colo. 90, 34 Am. Rep. 68.

b. That the instrument was, to the knowledge of the parties, intended to be the obligation of the principal and not of the agent, and that it was given and accepted as such, certainly where the purpose is to exonerate the agent,[63] or, by many authorities, to charge the principal.[64]

his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents, thus made and used as his personal obligations, contrary to the intent of the parties." Metcalf v. Williams, 104 U. S. 93, 99, 26 L. Ed. 665. See also, Hovey v. Magill, 2 Conn. 680; La Salle Nat. Bank v. Tolu, etc., Co., 14 Ill. App. 141; Milligan v. Lyle, 24 La. Ann. 144; Gerber v. Stuart, 1 Montana, 172.

So it may be shown that the principal was doing business in the agent's name or that he has adopted the agent's name as his own. Bank of Rochester v. Monteath, 1 Denio (N. Y.), 402, 43 Am. Dec. 681; Devendorf v. West Virginia, etc., Co., 17 W. Va. 135; Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 295; National Shoe & Leather Bank's Appeal, 55 Conn. 469; Crocker v. Colwell, 46 N. Y. 212; Chandler v. Coe, 54 N. H. 561; Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59; Conroe v. Case, 79 Wis. 338, 48 N. W. 480.

[63] Says Gray, J.: "As a general proposition, it is undoubtedly true, that one who signs a writing as agent, trustee or president is to be regarded as merely describing himself, and hence is to be held personally liable. But where a writing is thus executed, with full authority from the principal, the party upon whose account it is executed is alone liable." Bank of Genesee v. Patchen Bank, 19 N. Y. 312. See also, Brockway v. Allen, 17 Wend. (N. Y.) 40; Keidan v. Winegar, 95 Mich. 432, 20 L. R. A. 430; Crandall v. Rollins, 83 App. Div. 618; American Trust Co. v. Canevin, 107 C. C. A. 543; Knippenberg v. Greenwood Min. Co., 39 Mont. 11; Owings v. Grubbs, 6 J. J. Marsh. (Ky.) 31; McClellan v. Reynolds, 49 Mo. 312; Markley v. Quay, 14 Phila. 164.

See also the cases cited in detail in the preceding section.

See also Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050.

Contra: Collins v. Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612, where it is held that the agent cannot be exonerated, though perhaps the principal might be held.

[64] In Burkhalter v. Perry, 127 Ga. 438, 119 Am. St. R. 343, the payee was allowed to recover of the principal upon a note signed "D. C. N. Burkhalter, Agent," where it was alleged that the note sued on was the note of the principal, signed by his duly constituted agent, with intent thereby to charge the principal. But the court also said that, if the agent had been sued, he could not have shifted the responsibility by showing that it was intended to be the note of the principal. In Lockwood v. Coley, 22 Fed. 192 (before the U. S. circuit court in Georgia), recovery was also allowed to the payee against the principal upon a note signed "J. A. D. Coley, Agt.," he being shown to have been the agent of the defendant his wife. Almost identical in facts and holding is Green v. Skeel, 2 Hun (N. Y.), 485. (But there has been a good deal of question about this case. See Merchants Bank v. Hayes, 7 Hun, 530; Crandall v. Rollins, 83 App. Div. 618; Cortland Wagon Co. v. Lynch, 82 Hun (N. Y.), 73). Moore v. McClure, 8 Hun (N. Y.), 557 is also identical in facts and holding. See also Baker v. Gregory, 28 Ala. 544, 65 Am. Dec. 366.

c. That an instrument which is so ambiguous upon its face as to render it uncertain who was intended to be bound, was known to be intended to be the obligation of the principal, and this whether the purpose be to exonerate the agent or to charge the principal.[65]

Where parol evidence is thus admissible to exonerate the agent, counter evidence of the same sort is also admissible to charge him by showing that it was the intention to bind him personally.[66]

2. Between one of the original parties and a third party, such evidence is admissible to make either of the lines of proof mentioned above:

a. Where the third person is not a *bona fide* holder for value and without notice;[67] or

In Brenner v. Lawrence, 27 Misc. (N. Y.) 755, where a firm of bankers directed their cashier to draw a check on their account which he signed "H. M. Moore, Cashier," the principals were held liable (but Cashier paper has always stood upon somewhat distinct ground).

In Washington Mut. F. Ins. Co. v. St. Mary's Seminary, 52 Mo. 480, the payee recovered assessments upon an insurance note signed "Daniel McCarthy, President." (See the comments on this case in Sparks v. Despatch Trans. Co., 104 Mo. 531, 24 Am. St. R. 351, 12 L. R. A. 714).

In May v. Hewitt, 33 Ala. 161, the endorsee of a bill was allowed to recover of the principal upon a bill drawn upon "Owners of S. B. *Messenger*," and "accepted by B. W. Bell, Capt."

In Ferris v. Thaw, 72 Mo. 446, parol evidence was admitted to charge the members of a lodge upon a note signed by C. T. "W. M. [Worshipful Master] Polar Star Lodge No. 79; J. W. L. Treasure."

In Brown v. Tainter, 114 N. Y. App. Div. 446, it is held that where money is loaned upon the express condition that a certain person shall endorse the note and he does so, he cannot afterwards be held as an undisclosed principal though he got the benefit of the loan.

[65] This principle does not seem to be strongly controverted, but, as has been seen, the courts have not always agreed as to what constitutes such an ambiguity. It is certainly sustained by the great weight of authority. Kean v. Davis, 21 N. J. L. 683, 47 Am. Dec. 182; Haile v. Peirce, 32 Md. 327, 3 Am. Rep. 139; Early v. Wilkinson, 9 Gratt. (Va.) 68; Lazarus v. Shearer, 2 Ala. 718; Hardy v. Pilcher, 57 Miss. 18, 34 Am. Rep. 433; Martin v. Smith, 65 Miss. 1; Hager v. Rice, 4 Colo. 90, 34 Am. Rep. 68; Lacy v. Dubuque Lumber Co., 43 Iowa, 510; Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326, 5 L. Ed. 100; Baldwin v. Bank of Newbury, 1 Wall. (U. S.) 234, 17 L. Ed. 534; Dunbar Box Co. v. Martin, 53 Misc. (N. Y.) 312; Souhegan Bank v. Boardman, 46 Minn. 293.

For cases holding that the principal is bound where the agent signs and the note is "ambiguous" see: Lacy v. Dubuque Lumber Co., 43 Iowa, 510; Washington Mut. F. Ins. Co. v. St. Mary's Seminary, 52 Mo. 480; May v. Hewitt, 33 Ala. 161.

[66] Wiers v. Treese, 27 Okla. 774; Laflin, etc., Powder Co. v. Sinsheimer, 48 Md. 411; Black River Lumber Co. v. Warner, 93 Mo. 374 [the last was not a case of negotiable instrument].

[67] Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665 (where the plaintiff had full knowledge of the facts and was not allowed to recover of one

All considerations of propriety and convenience suggest such a clear and unequivocal statement of the character and purpose of the act, that there can be no misunderstanding. Hence a proper and formal execution would require that the relations of the parties be set forth, and that the instrument be declared to be the contract of the principal executed by his agent. As to the method of signing, the forms found to be sufficient for the execution of negotiable instruments may appropriately be followed.

Notwithstanding this, however, it is a matter of every-day experience that in the haste and press of business, contracts are drawn not only in inartificial, but frequently in equivocal and ambiguous language, and by persons ignorant not only of the technical meaning of legal phrases, but often of the accepted construction of the vernacular. From the very necessities of the case, therefore, as well as from a desire to give effect to the intention of the parties, courts look with indulgent eyes upon such contracts. The strict rules of the common law which govern the execution of solemn instruments under seal, do not apply here; neither is there the same necessity that they should tell their own story in that direct and positive manner that has been seen to be required of negotiable paper.[73]

§ 1166. Intention of the parties as expressed in the instrument the true test.—In determining whether a given form of execution is sufficient to bind the principal, the primary consideration is, What is the true intention of the parties as expressed in this contract? In settling this question it must be borne in mind that no particular form of words is required, and that the intention is to be gathered from the whole instrument and not from any isolated portion of it.[74] The situation of the parties and the circumstances of the case are to be taken into consideration. So, too, a valid usage or custom may be resorted to, in the proper cases, to aid in arriving at the intention, but not to contradict or vary the terms expressly employed.[75]

If, upon a survey of the whole instrument, it can be collected that

[73] See Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521; New England Insurance Co. v. De Wolf, 8 Pick. (Mass.) 56; Rice v. Gove, 22 Pick. (Mass.) 158, 33 Am. Dec. 724.

[74] Rogers v. March, 33 Me. 106; Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Pentz v. Stanton, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; Magill v. Hinsdale, 6 Conn. 464, 16 Am. Dec. 70; Hovey v. Magill, 2 Conn. 682; Spencer v. Field, 10 Wend. (N. Y.) 87; New England Ins. Co. v. De Wolf, 8 Pick. (Mass.) 56; City of Detroit v. Jackson, 1 Doug. (Mich.) 106; Fowle v. Kerchner, 87 N. C. 49.

[75] Oelricks v. Ford, 23 How. (U. S.) 49, 16 L. Ed. 534.

the true object and intent of it are to bind the principal and not the agent, courts of justice will adopt that construction of it, however informally it may be expressed.[76]

§ 1167. Principal alone bound by contract made in his name by an authorized agent.—It is ordinarily not only the duty, but also the interest of the agent to so execute the contract as to secure to the principal the benefits, and to impose upon him the obligations. This he may do by keeping within the scope of his authority, and executing the contract in the name of his principal. If he does so, the principal alone will be bound. The agent will not be bound upon the contract because the contract does not purport to bind him, and he will not be liable in any other form because he has done no more than he was legally authorized to perform.[77]

§ 1168. Presumption that known agent does not intend to bind himself.—Here, as elsewhere, it is the presumption that a known agent, authorized to act, who discloses his principal and avowedly purports to act for him, does not intend to bind himself personally.[78] Nevertheless, as will be seen, there are many cases in which he may, wittingly or unwittingly, do so: clearly, where his agency is not disclosed, and even where it is disclosed, if the agent so frames the un-

[76] Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Abbey v. Chase, 6 Cush. (Mass.) 56, and cases cited in note 74, above.

In Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050, Mr. Justice Swayne says: "Where the question of agency in making a contract arises, there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed and not the deed of the agent covenanting for him. Stanton v. Camp, 4 Barb. (N. Y.) 274.

"In the latter cases the question is always one of intent; and the court, being untrammeled by any other consideration, is bound to give it effect. As the meaning of the lawmaker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent or otherwise.

"The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so."

[77] Davis v. Lee, 52 Wash. 330, 132 Am. St. R. 973.

[78] See Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Jones v. Gould, 123 N. Y. App. Div. 236; Hall v. Lauderdale, 46 N. Y. 70; Blount v. Tomlinson, 57 Fla. 35; Durham v. Stubbings, 111 Ill. App. 10; and many other cases cited in subsequent sections.

dertaking as to make himself, according to the established principles of interpretation, the contracting party to the obligation.

§ 1169. Agent bound who conceals fact of agency or name of principal.—If the agent would bind the principal he must, of course, disclose, not only the fact of the agency, but also the name of the principal, and make the contract in the principal's name. If, instead of doing so, he conceals both facts and makes the contract as though he were himself the principal, he will ordinarily be personally liable upon it.[79] So if, though disclosing the fact that he is an agent, he does not disclose who his principal is, but keeps the latter's identity concealed, the agent will ordinarily be personally liable[80] unless he has clearly excluded such a result.[81] The principal, as will be more fully seen hereafter, may also be liable upon the contract when discovered, in both of the cases above referred to; but that fact does not relieve the agent if the other party prefers to hold him.

As will be seen hereafter,[82] also, it is not enough to relieve the agent that the other party had the means of ascertaining the name of the principal.[83] And the principal must be known at the time of making the contract; his subsequent disclosure will not suffice to relieve the agent.[84]

§ 1170. Known agent may bind himself by express words.—But although where an agent acts within the scope of his authority and

[79] See Book IV, Chap. III; Amans v. Campbell, 70 Minn. 493, 68 Am. St. R. 547; Bacon v. Rupert, 39 Minn. 512; Pugh v. Moore, 44 La. Ann. 209; Kneeland v. Coatsworth, 9 N. Y. Supp. 416; Bassett v. Perkins, 65 Misc. 103.

[80] Long v. McKissick, 50 S. Car. 218; Macdonald v. Bond, 195 Ill. 122; Magruder v. Belt, 12 App. D. C. 1151; Good v. Rumsey, 50 N. Y. App. Div. 280; Nichols v. Weil, 30 N. Y. Misc. 441.

A complaint which alleges that W. E. Harter, the defendant, conducted a business as the agent of his wife, in the name of "W. E. Harter, agent;" that in the conduct of such business he purchased from the plaintiff, and they delivered to him as such agent, certain goods; that at the time he purchased said goods he did not disclose the name of his principal, was held to state no cause of action against W. E. Harter, personally, since the complaint, not only alleged that he purchased the goods as agent, but as agent of his wife. "If in the complaint the plaintiff had stopped by alleging that W. E. Harter agent, had purchased the goods, that he did not, and never has disclosed as agent for whom he had purchased the goods, the defendant, W. E. Harter, could not have successfully demurred." Pope v. Harter, 66 S. Car. 54.

[81] As in Oglesby v. Yglesias, El. Bl. & El. 930; Carr v. Jackson, 7 Exch. 382; Lyon v. Williams, 5 Gray (71 Mass.), 557.

[82] See *post*, Book IV, Chap. III.

[83] Cobb v. Knapp, 71 N. Y. 349, 27 Am. Rep. 51; Nelson v. Andrews, 19 N. Y. Misc. 623; De Remer v. Brown, 165 N. Y. 410; Meyer v. Redmond, 141 N. Y. App. Div. 123.

[84] Cobb v. Knapp, *supra;* Nelson v. Andrews, *supra.*

in the name and behalf of his principal, he is not personally liable; still it is entirely competent for him to pledge his individual responsibility, and if by the terms of the contract he binds himself personally, and engages expressly in his own name to pay money or to perform other obligations, he will be personally responsible even though he was known to be an agent,[85] and did not really intend to bind himself, and though he describes himself as "agent," etc.[86] As in the case of negotiable paper, the mere recital of the fact of agency, and the mere addition to his signature of the title of his representative character, are *prima facie* to be construed as descriptive of the person only, and not as indicating an intention to charge a principal; and if, in such a case, the contract contains apt words to bind the agent personally, he will be held individually liable.

[85] Where an agent, although known to be acting in a representative capacity, makes the written contract in his own name, without adding thereto any indicia of representative capacity, or without indicating in any manner his agency, he will be bound personally; and parol evidence is not competent to vary the writing and discharge him of his liability. Sadler v. Young, 78 N. J. L. 594; Goodridge v. Wood, 133 Ill. App. 483; Meyer v. Redmond, 141 N. Y. App. Div. 123; Jones v. Gould, 197 N. Y. 580; Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528; Leterman v. Charlottesville Lumber Co., 110 Va. 769; McConnell v. Holderman, 24 Okla. 129; American Alkali Co. v. Bean, 125 Fed. 823.

Although a person recites in a contract that he makes it "for a bridge company to be organized and incorporated," but otherwise makes and signs it in his own name, he is personally liable. O'Rorke v. Geary, 207 Pa. 240. See also Kelner v. Baxter, L. R. 2 C. P. 174.

[86] Simonds v. Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521; Burrell v. Jones, 3 Barn. & Ald. 47; Fiske v. Eldridge, 12 Gray (Mass.), 474; Morell v. Codding, 4 Allen (Mass.), 403; Guernsey v. Cook, 117 Mass. 548; Miller v. Early, 22 Ky. Law Rep. 825, 58 S. W. 789; Campbell v. Porter, 61 N. Y. Supp. 712; Laramee v. Tanner, 69 Minn. 156; Marx v. Co-Operative Ass'n, 17 Tex. Civ. App. 408; Dockarty v. Tillotson, 64 Neb. 432; Lewis v. Weidenfeld, 114 Mich. 581; Bell v. Teague, 85 Ala. 211; Mead v. Altgeld, 136 Ill. 298; Florida, etc., R. Co. v. Varnedoe, 81 Ga. 175; Candler v. De Give, 133 Ga. 486; Ziegler v. Fallon, 28 Mo. App. 295; Hick v. Tweedy, 63 Law T. 765. See also, Fowler v. McKay, 88 Neb. 387; Hard v. Kelley, 19 S. D. 608; Cox v. Borstadt, 49 Colo. 83; *In re* Miley, 187 Fed. 177 (citing many West Virginia cases).

Where an offer was made "to Messrs. Gill & Co. (for the National Umbrella Co.)" and there was a written acceptance signed,

"Gill & Company,
By Sidney S. Gill,
W. B. Gill,
T. Harvey Gill."

W. B. Gill being not a partner of Gill and Company, it was held that he could not be regarded as an agent for Gill and Company, nor could he be assumed to represent the Umbrella Company, and must, therefore, be held liable as a joint contractor. Gill v. General Electric Co., 64 C. C. A. 99, 129 Fed. 349.

Thus where the committee of a town entered into a contract stated to be made "between Horace Heard, Eli Sherman and Newell Heard, committee of the town of Wayland, on the one part, and William Simonds and John Chapin on the other part," and in and by which, after a specific description of the work to be done, the committee promised as follows: "Said committee are to pay said Simonds & Chapin the sum of three hundred and seventy-five dollars when said work is completed," etc., and signed it as individuals, it was held that the members of the committee had made themselves personally liable. Said the court, by Shaw, Chief Justice: "Two things are here observable, the first is that they do not profess to act in the name or behalf of the town, otherwise than as such an intention may be implied from describing themselves as a committee. But such description, although it may have some weight, is far from being conclusive; and in many of the cases a similar designation was used, which was held to be a mere *descriptio personarum,* and designed to show for whose account the contract was made, and to whose account the amount paid under such contract should be charged. The second and more decisive circumstance respecting this contract is, that here is an express undertaking on the part of the committee to pay, 'Said committee are to pay said Simonds & Chapin,' etc. Having described themselves as a committee, this undertaking is as strong and direct as if the names had been repeated, and Heard, Sherman and Heard had promised to pay. The court are therefore of the opinion that by the terms of this contract, the committee intended to bind themselves and did become personally responsible, and that the action is well brought against them." [87]

§ 1171. ——— So where a contract was made "between T. W. Matthews, Secretary of the Mutual Endowment Association of Baltimore, Md., and S. T. Jenkins, of Atlanta, Ga.," and all the agreements were in the form "The said Matthews agrees," etc., and the

[87] Simonds v. Heard, *supra.* In Cutler v. Ashland, 121 Mass. 588, where the specifications for the building of a road was signed W. M., W. A. "Road Commissioners for Ashland Mass.," and appended to the specifications was a writing which ran "We, the subscribers, the road commissioners aforesaid, agree to pay," and signed W. M., W. A. "Commissioners of Ashland" the court distinguished Simonds v. Heard on the ground that in that case the contract was signed in their individual names, and said that here it was just as if the words had been transposed to read, "For Ashland, Mass., Warren Morse, William Aldrich, Road Commissioners."

contract was signed "T. W. Matthews, S. T. Jenkins," it was held to be the personal contract of Matthews.[88]

So, where an agreement to arbitrate recited that controversies existed between "the firm of C. A. McDonald and Co., general agents," and Edward L. Bond, and proceeded: "Now therefore we, the said firm of C. A. McDonald & Co. and Edward L. Bond do hereby mutually covenant and agree, to and with each other, to submit," etc. "and, we do mutually covenant and agree, to and with each other, that the award to be made * * * shall in all things and in every respect, by us, and each of us, * * * be well and faithfully kept, observed, and performed," and was signed, "C. A. McDonald & Co. [Seal]. Edward L. Bond [Seal]," it was held, that C. A. McDonald & Co. were liable upon the agreement, and not the insurance company of which they were general agents.[89]

§ 1172. ——— Contrary intention manifest.—But where, notwithstanding the failure to use precise and appropriate language, it still can be gathered from the whole instrument that the agent acted in a representative character, and made the contract as the contract of his principal, the words used will be regarded as employed with that intention, and not merely as descriptive of the person.[90]

Thus where a lease began "This agreement, made this 25th day of December, 1880, between Randolph Marshall, agent of Oliver Dougherty," etc., and was signed "Randolph V. Marshall, agent of O. R. Dougherty," the supreme court of Indiana, while recognizing the general rule that such expressions are ordinarily regarded as descriptive of the person, said: "While accepting the general rule to be that stated, the American authorities agree that if the contract itself shows that the words were not used as merely descriptive of the person they will not be so regarded, but will be assigned their real meaning. In the instrument before us it clearly appears that Marshall was the agent of the lessor, and acted as such, for we find this recited, 'That the said Marshall, agent as aforesaid, has rented, etc.' There are other provisions in the instrument clearly showing that Marshall executed the

[88] Matthews v. Jenkins, 80 Va. 463. See also, Grau v. McVicker, 8 Biss. (U. S. C. C.) 13 Fed. Cas. No. 5,708.

[89] Macdonald v. Bond, 195 Ill. 122.

[90] Rogers v. March, 33 Me. 106; Goodenough v. Thayer, 132 Mass. 152; Green v. Kopke, 18 C. B. 549 (9 J. Scott); Cook v. Gray, 133 Mass. 106; Lyon v. Williams, 5 Gray (Mass.), 557; McGee v. Larramore, 50 Mo. 425; Smith v. Alexander, 31 Mo. 193; Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Hall v. Huntoon, 17 Vt. 244, 44 Am. Dec. 332; Traynham v. Jackson, 15 Tex. 170, 65 Am. Dec. 152; Texas Land & Cattle Co. v. Carroll, 63 Tex. 48; Frambach v. Frank, 33 Colo. 529; Jones v. Gould, 123 N. Y. App. Div. 236.

lease as the agent of Dougherty, and we have no doubt that it should be treated as having been executed by him." [91]

And where an order for goods, beginning "our company being so far organized, by direction of the officers, we now order from you," etc., was signed "Charles Wyman, Edward P. Ferry, Carlton L. Storrs, Prudential Committee, Grand Haven Fruit Basket Co.," and was accepted by a letter addressed to the "Grand Haven Fruit Basket Company," the supreme court of the United States held, in an action brought to charge the members of the committee personally, that it was entirely clear that both parties understood and meant that the contract was to be, and in fact was, with the corporation, and not with the committee.[92]

§ 1173. ——— So where an agreement recited that it was between W., "superintendent of the Keets Mining Company, and P.," and was signed, W., "Supt. Keets Mining Co." and by P., it was held to be the contract of the company.[93]

So where a charter for the hiring of a boat, between W. L. M. "party of the first part, hereinafter called the owner," and C. S. L. "party of the second part, herein after called the hirer," all of whose covenants were made by "the hirer," signed C. S. L. "For the Sun Printing and Publishing Association," was accompanied by an agreement of suretyship made in the name of the Sun Printing and Publishing Company, also signed C. S. L. "For Sun Printing and Publishing Association," and had appended a certificate of acknowledgment

[91] Avery v. Dougherty (1885), 102 Ind. 443, 52 Am. Rep. 680.

Where a lease recited that it was made "between J. B. party of the first part and the Rochester Boot and Shoe Company, by N. N. president, party of the second part, and was signed, N. N., "Pres't [seal]," it was held that the agent was not personally liable. Neufeld v. Beidler, 37 Ill. App. 34.

So, in Wheeler v. Walden, 17 Neb. 122, where a lease recited that it was "between M. A. W. of the first part and L. E. W. of the second part" and was signed, D. A. W. "agent," it was held to be the agreement of the principal.

In Baker v. Chambles, 4 Greene (Iowa), 428, where a lease ran, "We, the undersigned directors of school district, etc., promise to pay," and was signed, G. W. B., V. W. N., S. L., it was held that, the school district alone was bound.

[92] Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050.

See also, State v. Commissioners of Cass County, 60 Neb. 566, where a loan was made to an unincorporated religious society on a mortgage of lands belonging to the society, executed by the trustees holding the legal title to the lands, and securing bonds executed by the trustees, in their own names, adding "Trustees M. E. Church South," the trustees were held not personally liable on the bonds. Elwell v. Tatum, 6 Tex. Civ. App. 397.

[93] Post v. Pearson, 108 U. S. 418, 27 L. Ed. 774.

in which the notary certified that said C. S. L., known to him to be the managing editor of the Sun Printing and Publishing Company, acknowledged that he executed the agreement as the act and deed of said company under its authority, it was held, by the supreme court of the United States, that this also was the agreement of the company.[94]

§ 1174. ——— So again, where there was a proposal in writing, directed "to the Building Committee of the Baptist Church," to build a church building for a certain sum, and a written acceptance reading, "Bid accepted * * * to complete the church" etc., signed, "I. A. W., R. B.," who were in fact the building committee, though nothing in the acceptance or the signatures indicated it, and all the payments thereafter made were made through the pastor of the church, it was held that this did not bind the signers personally.[95]

And so where an agent received goods for carriage under a receipt which stated that "the several railroads between Boston and Zanesville agree to transport over their lines," and which he signed in his own name "for the corporations," it was held that the agent was not personally liable, although the names of the corporations were not stated.[96]

§ 1175. Personal liability excluded by terms of contract.—It is entirely possible that, though the form of the contract is such as would ordinarily bind the agent personally, there are terms in it which expressly exclude that liability, and such terms will be given effect. Even though the contract as so modified should not be sufficient to bind the principal, it will not, on that account only, bind the agent. As has often been pointed out, it is not indispensable that either one should be bound.[97]

Thus where a charter party, which was executed in such a form as ordinarily to bind the agent, contained a clause that as the charter was concluded by the agent "for another party, the liability of the former [the agent] in every respect and as to all matters and things" should cease as soon as the cargo was shipped, it was held that the agent was not liable for demurrage at the port of discharge.[98]

[94] Sun Printing, etc., Ass'n v. Moore, 183 U. S. 642, 46 L. Ed. 366.

[95] Johnson v. Welch, 42 W. Va. 18.

[96] Lyon v. Williams, 5 Gray (71 Mass.), 557. (But compare O'Rorke v. Geary, 207 Pa. 240; Groom v. Parkinson, 10 Vict. L. R. 14; Sprent v. Bowes, 1 Aust. J. R. 111).

See also numerous *dicta* that a broker is not personally liable (in the absence of a custom) where he stipulates "for his principal" though he does not name him. Dale v. Humfrey, El. B. & El. 1004; Fleet v. Murton, L. R. 7 Q. B. 126; Pike v. Orgley, 18 Q. B. Div. 708; Southwell v. Bowditch, 1 Com. Pl. Div. 374.

[97] See Walker v. Bank, 9 N. Y. 582.

[98] Oglesby v. Yglesias, El. B. & El. 930; Carr v. Jackson, 7 Exch. 382.

§ 1176. II. The admissibility of parol evidence to show intent.—The remaining question here, as in the preceding subdivisions, is, how far the rules governing the use of parol evidence to affect a written contract, will permit extrinsic evidence to alter the conclusions which the rules of interpretation would otherwise require. The generally accepted results upon this question may be shortly stated. Where an agent has entered into a contract which in terms charges himself, parol evidence is not admissible to discharge him by showing that he intended to charge the principal,[99] (although in a doubtful case it is admissible to show that it was the intention to charge himself personally),[1] but where the contract bears upon its face evidence that the person signing was in fact an agent,[2] and where the contract is so framed as to render it uncertain whether the agent or the principal was intended to be bound,[3] parol evidence may be received to show that it was the intention to bind the principal and not the agent.[4]

But although parol evidence may not in other cases be admissible to release the agent, it may be made use of to charge the principal. Thus the principal, as will be seen hereafter, may be charged as such by parol evidence upon a simple contract made by his agent, even though the contract gives no indication on its face of an intention to charge any other person than the signer. And this doctrine applies as well to those contracts which are required to be in writing as to

[99] Bryan v. Brazil, 52 Iowa, 350; Western Publishing House v. Murdick, 4 S. Dak. 207, 21 L. R. A. 671.

[1] Black River Lumber Co. v. Warner, 93 Mo. 374; Candler v. De Give, 133 Ga. 486.

[2] Deering v. Thom, 29 Minn. 120; Pratt v. Beaupre, 13 Minn. 187; Halle v. Peirce, 32 Md. 327, 3 Am. Rep. 139. In Deering v. Thom, the agent gave the purchaser of a machine an instrument as follows: "If the Marsh harvester don't work to his satisfaction, he, W. Thom, can return the machine to me, and I will return his note for the same. A. M. Schnell, agent." Gilfillan, C. J., said: "The memorandum signed by Schnell is standing alone and without anything to explain it *prima facie* his contract, and not that of his principal, and the word 'agent' affixed to his signature is *prima facie, descriptio personæ* and not as determining the character in which he contracted. But it was open to proof that it was the intention to bind his principal and not himself. Bingham v. Stewart, 13 Minn. 106, s. c. 14 Minn. 214; Pratt v. Beaupre, 13 Minn. 187."

[3] Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326, 5 L. Ed. 100; Deering v. Thom, *supra*.

[4] Southern Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368; Eddy v. American Amusement Co., 9 Cal. App. 624; Southern Badge Co. v. Smith (Tex. Civ. App.), 141 S. W. 185 (compare Marx v. Luling Co-op. Ass'n, 17 Tex. Civ. App. 403, where the instrument was held not ambiguous and therefore not open to parol evidence); Ziegler v. Fallon, 28 Mo. App. 295.

those to whose validity a writing is not essential.[5] This rule is not obnoxious to the principle which forbids the contradiction of written instruments by parol testimony, for the effect is not to show that the person appearing to be bound is not bound, but to show that some other person is bound also.[6]

Where a contract was made in the name of the principal and was signed in the name of the principal, by the agent, so that upon its face it appeared to be clearly and solely the contract of the principal, it was held that parol evidence was not admissible to show that it was really intended to be the contract of the agent. There was no ambiguity, and no lack of authority was alleged, the name of the principal was not a fictitious one, nor was the form of signature one which would be adopted where one person is doing business in the name of another.[7]

§ 1177. Right acquired under agent's contract.—The same general principles will apply where the question is, not who is liable, but who has acquired rights under the agent's contract. The proper method where an agent is commissioned to acquire rights under a contract for his principal is, of course, to take the instrument by which they are acquired, in the name of the principal. In the cases of simple contract, now being considered, much liberality would be exercised in so interpreting the language as to preserve the principal's rights.[8]

[5] Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Huntington v. Knox, 7 Cush. (Mass.) 371; Eastern Railroad v. Benedict, 5 Gray (Mass.), 561, 66 Am. Dec. 384; Lerned v. Johns, 9 Allen (Mass.), 419; Hunter v. Giddings, 97 Mass. 41, 93 Am. Dec. 44; Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1; National Ins. Co. v. Allen, 116 Mass. 398; Texas Land & Cattle Co. v. Carroll, 63 Tex. 48; Higgins v. Senior, 8 M. & W. 834.

[6] See Higgins v. Senior, *supra*.

[7] Heffron v. Pollard, 73 Tex. 96, 15 Am. St. Rep. 764. The contract in this case stated, that it was "made and entered into by, and between John W. Fry, on the one part," and other persons on the other part. It was signed, "John W. Fry, per Heffron." The action was to hold Heffron personally liable.

[8] "Where a chattel mortgage is given to an agent, the principal, though undisclosed may assert his rights as if named in the mortgage; the relation of principal being shown by parol." State ex rel. Carpenter v. O'Neill, 74 Mo. App. 134.

A deed, which recited that in consideration of a sum "paid by R. W. agent" for plaintiff, the other party sold and conveyed a stock of goods, but which did not expressly state to whom the conveyance was so made, was held to vest the title in the principal and not in the agent. And this is true even though the bill of sale was made in pursuance of a contract made by the same agent who described himself as "agent for" the plaintiff, but signed and sealed the contract in his own name. Hayes Woolen Co. v. McKinnon, 114 N. Car. 661.

In Kelly v. Thuey, 143 Mo. 422, an

And even though the contract is made in the agent's name, so that the agent might sue upon it, the principal's right, as will be more fully seen hereafter, is usually paramount, and he may ordinarily intervene and bring the action in his own name.[9]

§ 1178. Contracts involving the Statute of Frauds.—The fact that the contract was one which the Statute of Frauds requires to be in writing, makes no difference. Such a contract may be signed for the principal by a person thereunto lawfully authorized, and though the agent sign in his own name alone, the principal may still charge or be charged by parol evidence.[10] The rule is otherwise, however, where the agent has entered into a contract in his own name and under seal.[11]

2. Oral Contracts.

§ 1179. How to be executed.—Although the agent undertakes to make a mere unwritten contract, there is still the same necessity, if he would execute it properly so as to bind his principal and not to charge himself, that he shall fully disclose his agency, and bargain in the name and on the account of his principal.

This case, however, is very much more free from difficulties than the preceding ones. Here are no formal and technical rules of interpretation to be considered, and no parol evidence rule to hamper the determination of the real intention of the parties.

§ 1180. Principal presumptively bound where agency disclosed.—Where an agent, who has fully disclosed his agency, or whose relation to the subject matter is otherwise known, undertakes to make a contract, or do some other act with reference to the principal's business

undisclosed principal was allowed specific performance of a contract made for him by his agent, overruling Kelly v. Thuey, 102 Mo. 522.

[9] See *post*, § —.

[10] Neaves v. North State Mining Co., 90 N. C. 412, 47 Am. Rep. 529. In this case it was held that a draft for the purchase money of land, drawn by an agent without disclosing his principal's name, is a sufficient memorandum to charge the principal under the Statute of Frauds.

It is not necessary, to satisfy the Statute of Frauds, that a contract for the sale of land shall name or describe the vendor so long as it is signed for him by his agent. White v. Dahlquist, 179 Mass. 427. To same effect see, Gowen v. Klous, 101 Mass. 449; Tobin v. Larkin, 183 Mass. 389. Same in respect to chattels: Lerned v. Johns, 9 Allen (Mass.), 419; Sanborn v. Flagler, 9 Allen, 474; Wiener v. Whipple, 53 Wis. 298, 40 Am. Rep. 775.

See Karns v. Olney, 80 Cal. 90, 13 Am. St. R. 101.

[11] Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Providence v. Miller, 11 R. I. 272, 23 Am. Rep. 453.

See also, Bourne v. Campbell, 21 R. I. 490.

and within the scope of the agent's authority, it is constantly to be presumed that he is doing so on his principal's account; that the benefits to enure from the contract are to belong to the principal, and that the obligations which it imposes are to be assumed by the principal and not by the agent. An intention, on the agent's part, to obtain rights or incur obligations is not to be presumed, and can only be established by clear evidence to that effect.[12] Where the contract or act is one which can only be lawfully performed on the principal's account, the presumption that the agent intends to act for the principal is obviously stronger.[13]

The mere fact that the principal cannot be held upon the contract does not, as will be seen, necessarily make the agent liable upon the contract;[14] he will often be liable upon a warranty of authority though he may exclude even this by the form of dealing.

[12] Meeker v. Claghorn, 44 N. Y. 349; Hall v. Lauderdale, 46 N. Y. 70; Covell v. Hart, 14 Hun (N. Y.), 252; Thompson v. Irwin, 76 Mo. App. 418; Anderson v. Timberlake, 114 Ala. 377; Owen v. Gooch, 2 Esp. 567; Colloty v. Schuman, 73 N. J. L. 92.

In Owen v. Gooch, *supra*, it was said by Lord Kenyon: "We must keep distinct the cases of orders given by the parties themselves, and by others as their agents. If the mere fact of ordering goods was to make the party who ordered them liable, no man could give an order for a friend in the country, who might request him to do it, without risk to himself. If a party orders goods from a tradesman, though in fact they are for another, if the tradesman was not informed at the time that they were for the use of another, he who ordered them is certainly liable, for the tradesman must be presumed to have looked to his credit only. So if they were ordered for another person, and the tradesman refuses to deliver to such person's credit, but to his credit only who orders them, there is then no pretext for charging such third person; or if the goods are ordered to be delivered on account of another, and after delivery the person who gave the order refuses to inform the tradesman who the person is, in order that he may sue him, under such circumstances he is himself liable. But wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable."

[13] Thus where the action is to charge the cashier of a bank on a contract which if made, could only be made by him, as an officer, and on account of the bank, namely, to apply the proceeds of certain lands upon a note held by the bank, the presumption is that it was made in his official capacity and bound the bank, and not the cashier personally. Pease v. Francis, 25 R. I. 226.

[14] See Michigan College of Medicine v. Charlesworth, 54 Mich. 522. Here a tramp had been run over in a railway yard. Some one called a physician who telephoned to the superintendent and asked if he should go. The latter said, yes. Nothing was said about pay, and the superintendent had no authority to employ a physician for this purpose at the company's expense. *Held*, that the superintendent was not personally liable upon a contract of employment.

§ 1181. Agent may bind himself by special agreement.—It is nevertheless possible, as has often been pointed out, for a known agent to bind himself personally. The agent may proffer, or the other party may demand, and receive the agent's responsibility instead of or even in addition to that of a known principal; and where this is the case the agent will be personally bound.[15]

Here, also, as in the preceding cases, it is possible for the agent to bind himself without having had any intention so to do, or even though he had a clearly defined intention not to do so. If he has given the ordinary external evidences of assent to his personal responsibility, he may be bound, whatever his real intention.

§ 1182. ——— How question determined.—Whether the agent has thus bound himself in these cases is usually a question of fact to be determined in view of all the circumstances of the case. The intention of the parties as evidenced by their words and conduct is the thing to be discovered, and technical rules of construction have but little place. To whom did the promisee give credit, and to whom did the promisor reasonably understand the credit to be given, are usually the crucial questions in the case.[16]

§ 1183. Or by failing to disclose his principal.—As has been elsewhere pointed out, it is indispensable to the agent's immunity that his principal shall have been disclosed. Hence, if the agent conceals the fact of his agency and presents himself as the ostensible principal, the

[15] Meeker v. Claghorn, 44 N. Y. 349; Hall v. Lauderdale, 46 N. Y. 70; Dahlstrom v. Gemunder, 198 N. Y. 449, 19 Ann. Cas. 771; Ross v. McAnaw, 72 Mo. App. 99; Mickleberry v. O'Neal, 98 Ga. 42; Dockarty v. Tillotson, 64 Neb. 432; Watle v. Thayer, 56 Ill. App. 282; McIntosh-Huntington Co. v. Rice, 13 Colo. App. 393; Long v. McKissick, 50 S. C. 218; Bell v. Teague, 85 Ala. 211; Mead v. Altgeld, 136 Ill. 298; Miller v. Early, 22 Ky. Law Rep. 825, 58 S. W. 789; Johnson v. Welch, 42 W. Va. 18.

[16] See Hall v. Lauderdale, 46 N. Y. 70; Worthington v. Cowles, 112 Mass. 30; Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Hovey v. Pitcher, 13 Mo. 191; Fleming v. Hill, 62 Ga. 751; Phinizy v. Bush, 129 Ga. 479.

In Paterson v. Gandasequi, 15 East, 62, where the question was whether the agent or the principal (both of whom had taken part in the negotiations) was bound, the court took the question from the jury. *Held*, error. In Addison v. Gandasequi, 4 Taunt. 574, a case growing out of the same transaction, the case was left to the jury who found that the credit had been extended to the agent. *Held*, that the evidence justified the verdict. In Williamson v. Barton, 7 H. & N. 899, the four judges of the Exchequer were equally divided on the question of fact whether credit was given to the agent or to his principal.

agent must ordinarily be held personally responsible.[17] So, though the agent discloses the fact of the agency, if he fails or refuses to disclose who his principal is, he must ordinarily be held personally liable unless such liability be expressly excluded.[18] It is of course true, as will be seen hereafter, that the undisclosed principal when discovered may also be held liable but this is an alternative liability and does not of itself relieve the agent.[19]

[17] Amans v. Campbell, 70 Minn. 493, 68 Am. St. R. 547; Bacon v. Rupert, 39 Minn. 512; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51.

[18] Long v. McKissick, 50 S. Car. 218; Good v. Rumsey, 50 N. Y. App. Div. 280.

[19] The whole question of the liability of the agent to third persons will be found more fully discussed, *post*, Book IV, Chapter III.

BOOK IV.

OF THE RIGHTS, DUTIES AND LIABILITIES ARISING OUT OF THE RELATION

CHAPTER I

IN GENERAL

§ 1184. Purpose of Book IV.
1185. What parties interested.
1186. How subject divided.
1187. In general—Duty the measure of liability.

§ 1184. Purpose of Book IV.—Having heretofore considered how the relation of principal and agent may be created; by what rules the nature and extent of the authority conferred shall be determined; and in what manner the authority so conferred and construed shall be executed, it remains to consider in this book, what are the rights, duties and liabilities of all of the parties concerned, growing out of, or based upon, the actual or attempted execution of the agency.

§ 1185. What parties interested.—It will be obvious that the persons who are interested in this inquiry are numerous, involving all of the possible parties to the transaction, and that their several rights, duties and liabilities *inter sese* will not always be identical or reciprocal, or determined by the same standards. Thus, as has already been seen, the circumstances may be such that a given act of the agent must, in questions arising between the principal and third persons, be deemed to be fully authorized; while the same act, in questions arising between the principal and the agent, may be deemed to be wholly unauthorized. So, as has been seen, the acts of one, who was before a mere stranger to an assumed principal, may become, by the latter's words or conduct, binding upon him as an actual principal; while the acts of an agent fully authorized, may from defective or excessive execution fail to bind the principal at all, and be binding only upon the agent himself in some cases, and in others, upon no one.

When the agent has fully and properly executed his authority in the name and for the benefit of his ostensible principal, his mission is performed and his rights and liabilities are determined. Henceforth

his principal is entitled to the benefits and is subject to the liabilities arising from the transaction.

Where, however, he has executed his authority in his own name, or so ambiguously as to render it uncertain upon the face of the transaction in what character and capacity he acted, it will be found in many cases that dual rights and liabilities have been created, and that one or other of the parties is entitled to elect upon whom to fasten the liability.

§ 1186. How subject divided.—Such being the general nature of the subject, it will be found convenient to treat it under the following heads:

1. The duties and liabilities of the agent to his principal.
2. The duties and liabilities of the agent to third persons.
3. The duties and liabilities of the principal to the agent.
4. The duties and liabilities of the principals to third persons.
5. The duties and liabilities of third persons to the agent.
6. The duties and liabilities of third persons to the principal.

No separate consideration of the rights of the parties is intended, because, as will be seen, the duties and liabilities of one party are generally reciprocally the rights of the other.

CHAPTER II

OF THE DUTIES AND LIABILITIES OF THE AGENT TO HIS PRINCIPAL.

I. TO BE LOYAL TO HIS TRUST.

1188. Loyalty to his trust, the first duty of the agent.

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1192. Agent authorized to purchase for his principal may not purchase for himself.—Agent charged as trustee.

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1194. —— What evidence of trust sufficient.

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1199. —— Injury to principal not test—Sale at fixed price.

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1202. To what agents this rule applies.

1203. Further of this rule—Indirect attempts.

1204. Agent authorized to insure may not issue policies to himself.

1205. Agent authorized to purchase or hire may not purchase or hire of himself.

1206. Double agency—Agent may not represent other party also without consent of principal.

1207. Agent must fully inform the principal.

1208. Agent liable for misrepresentations.

1209. Agent may not take advantage of confidential information acquired in the business to make profit at principal's expense.

1210. —— After termination of agency.

1211. —— Information respecting trade secrets, names of customers, etc.

1212. —— Ordinary experience, learned in the business.

1213. —— Information leading to outside profit.

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1215. Agent employed to settle claim, may not buy and enforce it against his principal.

1216, 1217. Agent may not acquire rights against his principal based on his own neglect or default.

1218, 1219. Agent may not acquire adverse rights in principal's property confided to his care.

1220. These rules can not be defeated by usage.

1221. Agent may purchase, sell, etc., with principal's consent.

1222. Principal may ratify act.

1223. Gratuitous agents — Volunteers.

1224, 1225. Profits made in the

course of the agency belong to the principal.
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1235. Agency must exist.
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1241. Duty of principal to make clear the extent of authority.
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1285. But liability increased if special risks disclosed.
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1287. Agent not liable if principal also negligent.

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1297. When duty to insure arises.
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1300. Forms of negligence.
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1307. Neglect to give principal notice of material facts.
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1312. Liability of banks.
1313. —— For the neglect of the notary.
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1319. Liability of express companies.
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1328. Account only to principal—Joint principals.
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1335. Duty to keep principal's property and funds separate from his own—Liability for commingling.
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VI. TO GIVE NOTICE TO PRINCIPAL OF MATERIAL FACTS.

1353. Duty of agent to give principal notice of facts material to agency.

§ 1187. In general—Duty the measure of liability.—It is evident that the extent of the liability of the agent to his principal is to be determined by ascertaining the nature and scope of the duty owed to him. Liability follows from the non-performance of a legal duty; and if, in what shall be hereafter said, that fact may not in each instance be mentioned, it must be constantly understood.

The duties which the agent owes his principal are numerous, and many of them are peculiar. It is scarcely within the limits of an ordinary treatise to enter minutely into all the questions that may arise, but it is possible to so group them under the respective principles that govern them as to furnish a rule, not only for the same states of fact, but also for similar ones.

I.

TO BE LOYAL TO HIS TRUST.

§ 1188. Loyalty to his trust, the first duty of the agent.—Loyalty to his trust is the first duty which the agent owes to his principal. Without it, the perfect relation cannot exist. Reliance upon the agent's integrity, fidelity and capacity is the moving consideration in the creation of all agencies; in some it is so much the inspiring spirit, that the law looks with jealous eyes upon the manner of their execution, and condemns, not only as invalid as to the principal, but as repugnant to the public policy, everything which tends to destroy that reliance.[1]

§ 1189. May not put himself in relations antagonistic to his principal.—It follows as a necessary conclusion from the principle last stated, that the agent must not put himself into such relations that his own interests or the interests of others whom he also represents become antagonistic to those of his principal. Indeed, this rule is but a restatement of the previous one, and is based upon the same fundamental principles. The agent will not be permitted to serve two masters,

[1] Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600.

without the intelligent consent of both.[2] As is said by a learned judge: "So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects the principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them, he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. *Fidelity in the agent* is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal."[3] "This doctrine," to speak again in the beautiful language of another, "has its foundation, not so much in the commission of actual fraud, as in that profound knowledge of the human heart which dictated that hallowed petition 'Lead us not into temptation but deliver us from evil,' and that caused the announcement of the infallible truth that 'a man cannot serve two masters.'"[4]

§ 1190. ——— "The general interests of justice and the safety of those who are compelled to repose confidence in others," it is further said, in another, "alike demand that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase, can he be himself the seller. The moment he ceases to be the representative of his employer and places himself in a position towards his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his service requires and his duty to his principal demands. He is no longer an agent but an umpire; he ceases to be the champion of one of the contestants in the game of bargain, and sets himself up as judge to decide, between his principal and himself, what is just and fair. The reason of the rule is apparent; owing to the selfishness and greed of our nature, there must, in the great mass of the transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and the buyer, and universal experience has shown

[2] Bentley v. Craven, 18 Beav. 76; European, etc., Ry. Co. v. Poor, 59 Me. 277, re-reported in note to 59 Am. Rep. 468.

[3] Manning, J., in People v. Township Board, 11 Mich. 222. Quoted with approval in Jansen v. Williams, 36 Neb. 869, 20 L. R. A. 207.

[4] Caruthers, J., in Tisdale v. Tisdale, 2 Sneed (Tenn.), 596, 64 Am. Dec. 775.

that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interests as more important and entitled to more protection than his own." [5]

§ 1191. May not deal in business of his agency for his own benefit.—Akin to these rules and founded upon the same principles, is the other rule that the agent may not deal in the business of his agency for his own benefit. His duty to his principal requires that his efforts shall be in the behalf and for the benefit of his principal. He cannot perform this duty if he is constantly attempting to use his agency for his own purposes.[6]

Following these principles into details, we have:—

§ 1192. Agent authorized to purchase for his principal may not purchase for himself—Agent charged as trustee.—An agent instructed to purchase property for his principal and relied upon to buy it in the principal's name and for his direct account, will not be permitted, without his principal's knowledge and consent, to become the purchaser of the same property for himself. If the property be land and is purchased with the principal's money, the agent will clearly be a trustee; [7] and even though he purchased with his own money, he will, nevertheless, be considered as holding the property in trust for his principal, and the latter upon repaying or tendering him the amount of the purchase price and his reasonable compensation,[8] may by proper proceeding in equity compel a conveyance to himself,[9] or where eject-

[5] Porter v. Woodruff, 36 N. J. Eq. 174.

[6] Switzer v. Skiles, 3 Gilman (Ill.), 529, 44 Am. Dec. 723; Bunker v. Miles, 30 Me. 431, 50 Am. Dec. 632; Miller v. Davidson, 3 Gilman (Ill.), 518, 44 Am. Dec. 715.

[7] Kraemer v. Deustermann, 37 Minn. 469; Reitz v. Reits, 80 N. Y. 538; Balloch v. Hooper, 6 Mack. (D. C.) 421; Gashe v. Young, 51 Ohio St. 376; and cases cited in the following note.

[8] He will not be entitled to compensation where he acts in bad faith. Harrison v. Craven, 188 Mo. 590; Trice v. Comstock, 57 C. C. A. 646, 121 Fed. 620.

[9] Rhea v. Puryear, 26 Ark. 344; McMurry v. Mobley, 39 Ark. 309; Sandfoss v. Jones, 35 Cal. 481; Church v. Sterling, 16 Conn. 383; Chastain v. Smith, 30 Ga. 96; Hitchcock v. Watson, 18 Ill. 289; Dennis v. McCagg, 32 Ill. 444; Bryant v. Hendricks, 5 Iowa, 256; Judd v. Mosely, 30 Iowa, 424; Krutz v. Fisher, 8 Kan. 90; Fisher v. Krutz, 9 Kan. 501; Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145; Matthews v. Light, 32 Me. 305; Kendall v. Mann, 11 Allen (93 Mass.), 15; Jackson v. Stevens, 108 Mass. 94; McDonough v. O'Neil, 113 Mass. 92; Snyder v. Wolford, 33 Minn. 175, 53 Am. Rep. 22; Winn v. Dillon, 27 Miss. 494; Soggins v. Heard, 31 Miss. 426; Gillenwaters v. Miller, 49 Miss. 150; Cameron v. Lewis, 56 Miss. 76; Harrison v. Craven, 188 Mo. 590; Johnson v. Hayward, 74 Neb. 157; Morrison v. Hunter, 74 Neb. 559; Von Hurter v. Spengeman, 17 N. J. Eq. 185; Bennett v. Austin, 81 N. Y. 308; Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640; Parkist v. Alexander, 1 Johns. Ch. (N. Y.) 394; Van Horne

ment is an equitable remedy, he may maintain that action.[10] If the property be personalty the same considerations will ordinarily apply, though a resort to equity will less frequently be necessary, and the principal may maintain replevin or trover against the agent, or against any one holding through or for him, who is not a purchaser for value.[11]

And what the agent cannot do directly he will not be permitted to do indirectly, as by causing the property to be purchased ostensibly by another, but in reality for his own benefit. The court will look behind the appearance sought to be put upon the transaction, and determine the case according to its true inwardness.[12]

v. Fonda, 5 Johns. Ch. (N. Y.) 388; Sweet v. Jacocks, 6 Paige (N. Y.), 355, 31 Am. Dec. 252; Van Epps v. Van Epps, 9 Paige (N. Y.), 237; Torrey v. Bank of Orleans, 9 Paige (N. Y.), 649; Burrell v. Bull, 3 Sanford (N. Y.), Ch. 15; Sanford v. Norris, 4 Abb. App. Dec. (N. Y.) 144; Hargrave v. King, 5 Ired. (N. C.) Eq. 430; Eshleman v. Lewis, 49 Pa. 410; Smith v. Brotherline, 62 Pa. 461; Seichrist's Appeal, 66 Pa. 237; Wolford v. Herrington, 74 Pa. 311, 15 Am. Rep. 548; Peebles v. Reading, 8 Serg. & R. (Pa.) 484; Barziza v. Story, 39 Tex. 354; Pinnock v. Clough, 16 Vt. 500, 42 Am. Dec. 521; Wellford v. Chancellor, 5 Gratt. (Va.) 39; Jackson v. Pleasonton, 95 Va. 654; Onson v. Cown, 22 Wis. 329; McMahon v. McGraw, 26 Wis. 615; Ringo v. Binns, 10 Pet. (35 U. S.) 269, 9 L. Ed. 420; Rothwell v. Dewees, 2 Black (67 U. S.), 613, 17 L. Ed. 309; Jenkins v. Eldredge, 3 Story, 181, Fed. Cas. No. 7,266; Baker v. Whiting, 3 Sumner, 475, Fed. Cas. No. 787.

[10] Rose v. Hayden, *supra;* McKay v. Williams, 67 Mich. 547, 11 Am. St. R. 597.

[11] Plaintiffs in Boston engaged F to go to Ogden to purchase hides for them. By the written contract, plaintiffs agreed to pay all of F's expenses and F agreed to give his entire services to the employment and to engage in no other business. Money was advanced by plaintiffs upon drafts drawn upon them by F and collected through Odgen banks, F rendering the plaintiffs periodical statements. F became connected with P. C. & Co., a firm engaged in the slaughtering business and advanced them money, the proceeds of plaintiff's drafts, which they used to purchase cattle, the hides being subsequently delivered to F. P. C. & Co. being indebted to the defendants, who were bankers in Odgen, F to secure this indebtedness, gave defendants a bill of sale of all the hides in his possession. Plaintiffs demanded the hides of the defendants who refused to deliver and sold them to satisfy the indebtedness. *Held*, that upon delivery of the hides to F title to them vested in plaintiffs, and that F having no authority to pledge them, the plaintiffs could recover their value. Edwards v. Dooley, 120 N. Y. 540.

An agent to purchase wheat for his principal, who was to supply funds whenever requested, bought wheat as agent but did not ask for funds and refused to deliver the wheat to the principal. *Held*, that the wheat belonged to the principal, the refusal was a conversion, and the principal may recover for the loss of profits. Nading v. Howe, 23 Ind. App. 690.

[12] Cameron v. Lewis, 56 Miss. 76; Eldridge v. Walker, 60 Ill. 230; Hughes v. Washington, 72 Ill. 84; Rogers v. Rogers, 1 Hopk. (N. Y.) 524 (aff'd 3 Wend. 503); Kruse v. Steffens, 47 Ill. 112; Forbes v. Hal-

If, in such a case, the agent colludes with a third person to buy the property, in order to sell it to the principal at an advance in which the agent is to share, the agent will be responsible to the principal for the loss thereby sustained.[13]

§ 1193. ——— Same principle applies to leases.—This principle is of course not confined to transactions involving an absolute purchase; it includes leasings and other similar arrangements as well. And it is immaterial that the agent was not directly employed to procure the lease; he will not, it is held, be permitted to avail himself of the knowledge, acquired through the agency, that his principal desires or is attempting to negotiate such a transaction, in order to forestall him or to make a profit to himself.

An illustration of this principle is found in a case in California. There a warehouseman, occupying premises under a lease about to expire, was negotiating for a renewal. His clerk, who from his access to his principal's books and papers and his knowledge of the business, knew of these facts, secretly obtained a lease of the premises to himself and another person, who was a party to the scheme, by telling the landlord that his principal would probably give up the premises at the expiration of his term. But the court directed a conveyance to the principal, saying that an agent should not, any more than a trustee, adopt a course that will operate as an inducement to postpone the principal's interest to his own; and that an agent or subagent who uses the information he has obtained in the course of his agency as a means of buying or leasing for himself will be compelled to convey to the principal.[14]

And the same result was reached in a similar case in Illinois, where a confidential agent of the lessee of a theater, shortly before his principal's lease would expire, secretly procured a lease of the theater for a new term to himself, though at a larger rent, denying to his principal that he was trying to secure the lease. The court held that the lease was acquired in violation of the agent's duty, and presumably because of his peculiar means of knowledge of the profits of the business, and that a personal benefit thus obtained by an agent would, in equity, inure to the benefit of the principal.[15]

sey, 26 N. Y. 58; Davoue v. Fanning, 2 Johns. (N. Y.) Ch. 257; Beaubien v. Poupard, Harr. (Mich.) Ch. 206.

[13] Boston v. Simmons, 150 Mass. 461, 15 Am. St. R. 230.

[14] Gower v. Andrew (1881), 59 Cal. 119, 43 Am. Rep. 242.

[15] Davis v. Hamlin (1883), 108 Ill. 39, 48 Am. Rep. 541. See also Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304; Vallette v. Tedens, 122 Ill. 607, 3 Am. St. Rep. 502; Prebble v. Reeves, [1909] Vic. L. R. 436, affirmed [1910] Vic. L. R. 88.

Other cases involving the question of taking advantage of information acquired during the agency, are referred to in a later section.[16]

§ 1194. ——— What evidence of trust sufficient.—In order to establish a trust in real estate, as against the agent, if the trust be denied, it has been said to be the settled rule that the evidence of it must, to satisfy the statute of frauds, be in writing, or the principal must have paid or furnished the purchase money.[17] But in a case in Kansas, it is held after an elaborate resumé of the authorities that, though the agent was orally employed, and though he purchased with his own money, the trust arose from the relation, and that the principal on tendering the amount so paid, and a reasonable compensation for his services, could, if the agent refused to convey to him, recover

Gower v. Andrew, and Davis v. Hamlin, were followed in the late case of Essex Trust Co. v. Enwright, — Mass. —, 102 N. E. 441, and in Pikes Peak Co. v. Pfuntner, 158 Mich. 412.

See also the partnership cases of Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; Knapp v. Reed, 88 Neb. 754, 32 L. R. A. (N. S.) 869, Ann. Cas. 1912 B. 1095; Williamson v. Monroe, 101 Fed. 322.

[16] See *post*, § 1209.

[17] "Where a man merely employs another person by parol, as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds." 2 Sugden on Vendors (14th Ed.), 703, followed in James v. Smith, [1891] 1 Ch. 384. Same rule: Burden v. Sheridan, 36 Iowa, 125, 14 Am. Rep. 505; Bartlett v. Pickersgill, 1 Eden, 515, cited in 1 Cox, 15, 4 East, 577, note, 4 Burr. 2255; Botsford v. Burr, 2 Johns. (N. Y.) Ch. 405; Perry v. McHenry, 13 Ill. 227; Collins v. Sullivan, 135 Mass. 461; Kendall v. Mann, 11 Allen (Mass.), 15; Davis v. Wetherell, 11 Allen (Mass.), 19; Parsons v. Phelan, 134 Mass. 419; Barnard v. Jewett, 97 Mass. 87; Dodd v. Wakeman, 26 N. J. Eq. 484; Fickett v. Durham, 109 Mass. 419; Firestone v. Firestone, 49 Ala. 128; Allen v. Richard, 63 Mo. 55; Nixon's Appeal, 63 Penn. St. 279; Steere v. Steere, 5 Johns. (N. Y.) Ch. 1, 9 Am. Dec. 256; Walter v. Klock, 55 Ill. 362; Watson v. Erb, 33 Ohio St. 35; Pinnock v. Clough, 16 Vt. 500, 42 Am. Dec. 521; Hidden v. Jordan, 21 Cal. 92.

[18] Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145. In this case Valentine, J., says: "The controlling question in this case is not whether the principal advanced the purchase money or not, but it is whether in equity and good conscience the agent who in fact purchased the property with his own money in his own name, in violation of his agreement with his principal and in abuse of the confidence reposed in him by his principal, can be allowed to retain the fruits of his perfidy. The weight of authority is, we think, that he cannot. Sandford v. Norris, 4 Abb. N. Y. Ct. App. 144; Wellford v. Chancellor, 5 Gratt. (Va.) 39; Onson v. Cown, 32 Wis. 329; Winn v. Dillon, 27 Miss. 494; Cameron v. Lewis, 56 Miss. 76; Gillenwaters v. Miller, 49 Miss. 150; Chastain v. Smith, 30 Ga. 96; Heard v. Pilley, L. R., 4 Ch. App. 548; Lees v. Nuttall, 1 Russ. & M. Ch. 53; same cases affirmed on appeal, 2 Myl. & K. Ch. 819; Taylor v. Salmon, 4 Myl. & C. Ch. 134; Cave v. Macken-

the land,[18] and that he might even recover in ejectment, ejectment being in that state an equitable as well as a legal remedy.[19]

The same question arises in the case of alleged partnerships to deal in lands. The weight of authority seems to be that the relation may be shown by parol, and that the trust may arise from the relation;[20] but there are numerous cases to the contrary.[21]

§ 1195. ——— When rule does not apply.—But where the agent is not employed to obtain the conveyance, but for an entirely collateral matter,—as to bring his principal into communication with some one who would lend him the money with which to make the purchase, although the agent, with secret intention to buy the land himself, dissuades the principal from seeking other assistance in finding the money,—no trust is created which would be violated if the agent purchases the land himself with his own money;[22] and so it has been said that even though the agent had been employed to buy certain land, still if he first expressly and unequivocally relinquishes his agency,[23] or if his agency has otherwise expired,[24] or if he has first exhausted

zie, Fisher Ann. Dig. (1877), 400; Baker v. Whiting, 3 Sumner (U. S. C. C.) 476; Snyder v. Wolford, 33 Minn. 175, 53 Am. Rep. 22; Peebles v. Reading, 8 Serg. & R. (Penn.) 484; Burrell v. Bull, 3 Sandf. Ch. (N. Y.) 15."

See also, Boswell v. Cunningham, 32 Fla. 277, 21 L. R. A. 54, citing in addition to cases above given, Firestone v. Firestone, 49 Ala. 123; McMurray v. Mobley, 39 Ark. 309; Church v. Sterling, 16 Conn. 388; Cotton v. Holliday, 59 Ill. 176; Switzer v. Skiles, 3 Gilm. (Ill.) 529, 44 Am. Dec. 723; Reed v. Warner, 5 Paige Ch. (N. Y.) 650; Sweet v. Jacocks, 6 Paige Ch. (N. Y.) 355, 31 Am. Dec. 352; Wolford v. Herrington, 74 Pa. 311, 15 Am. Rep. 548; Jenkins v. Eldredge, 3 Story, 181; Benson v. Heathorn, 1 Younge & C. (Eng.) 326.

[19] Rose v. Hayden, *supra*.

[20] See Gilmore on Partnership, 94, and note in 4 L. R. A. (N. S.) 427, where the cases are fully cited. Morgart v. Smouse, 103 Md. 463, 115 Am. St. R. 367.

[21] See Gilmore on Partnership, 94; Schener v. Cochem, 126 Wis. 209, 4 L. R. A. (N. S.) 427; Nester v. Sullivan, 147 Mich. 493; Norton v. Brink, 75 Neb. 566, 7 L. R. A. (N. S.) 945.

[22] Collins v. Sullivan, 135 Mass. 461, distinguishing Lees v. Nuttall, 1 Russ. & Myl. 53, s. c., 2 Myl. & K. 819, and Parkist v. Alexander, 1 Johns. (N. Y.) Ch. 394, on the ground that there the principal had a previous interest in the land, at least honorary, as by oral agreement with the owner, and the agent was employed for the very purpose of procuring or completing the title.

[23] First Nat. Bank v. Bissell, 2 McCrary (U. S. C. C.), 73, 4 Fed. 694 (not a very authoritative case upon this point).

The agent's renunciation of the agency in such a case must be open and unequivocal, and the burden is upon him to show that it was so. Bergner v. Bergner, 210 Pa. 113. A merely colorable renunciation will not suffice. Witte v. Storm, 236 Mo. 470.

See also dicta in McMahon v. McGraw, 26 Wis. 614; Baker v. Whiting, 3 Sumn. 475, Fed. Cas. No. 787.

But compare Trice v. Comstock, 57 C. C. A. 646, 121 Fed. 620, 61 L. R. A. 176, and other cases cited §§ 1209, 1210 *post*.

[24] Lamb Knit-Goods Co. v. Lamb, 119 Mich. 568; Bemis v. Plato, 119 Iowa, 127; Dennison v. Aldrich, 114 Mo. App. 700; Evans v. Evans, 196

all reasonable efforts to buy on the terms fixed by the principal,[25]—there being no sharp practice or unfairness,—and he afterwards buys with his own funds, no trust will arise.

So where three parties agreed to make a purchase for their joint benefit, but one of them when called upon to furnish his share of the necessary funds declined to do so, and the two others went on and made the purchase, it was held that no trust could arise in favor of the one who had not joined.[26]

§ 1196. ——— The rule is also to be modified where it is the expectation that the agent will acquire title in his own name and in his own present right, though the principal is ultimately to acquire it by paying the agent. Thus it is said "that where a commercial correspondent advances his own money or credit for a principal for the purchase of property for such principal, and takes the bills of lading in his own name, looking to the property as security for reimbursement, such correspondent becomes the owner of the property, instead of the pledgee, up to the moment when the original principal shall pay the purchase price, and the correspondent occupies the position of an owner under a contract to sell and deliver when the purchase price is paid." [27]

§ 1197. **Agent authorized to sell can not sell for himself.**—For similar reasons an agent, authorized to sell or lease property for his principal, has no right to substitute his own property and sell or lease it for himself. If he does so, the principal may at least have damages against him, or, in cases where it could be ascertained, the profit made by the agent at the expense of the principal.[29]

§ 1198. **Agent authorized to sell, exchange or lease may not become the purchaser or lessee.**—For the same reasons, an agent authorized to sell, exchange or lease his principal's property, may not without the latter's consent, become the purchaser or lessee.[30] If he

Mo. 1; Board of Trustees v. Blair, 45 W. Va. 812; Learmonth v. Bailey, 1 Vic. L. R. (Eq.) 122.

[25] Pearsall v. Hirsh, 59 N. Y. Super. Ct. 410.

[26] Yeager's Appeal, 100 Pa. 88.

[27] Drexel v. Pease, 133 N. Y. 129; Moors v. Kidder, 106 N. Y. 32; Farmers' Bank v. Logan, 74 N. Y. 568.

[29] In Gladiator Consol. Gold Min. Co. v. Steele, 132 Iowa, 446, an agent for the sale of stock belonging to the principal, upon receiving an order for stock accompanied by drafts in payment, instead of supplying the principal's stock, furnished stock of his own of the same sort, and kept the drafts in payment for it. *Held*, that he must account to his principal for the drafts.

[30] McKinley v. Irvine, 18 Ala. 681; White v. Ward, 26 Ark. 445; Forrester, etc., Co. v. Hvatt, 90 Ark. 301; Curry v. King, 6 Cal. App. 568; Burke v. Bours (Cal.), 26 Pac. 102; Banks v. Judah, 8 Conn. 145; Church

does so, the principal may repudiate the act and recover back his property,[31] or, if the agent has disposed of it at a profit, the principal, guilty of no laches, may compel an accounting for the profits.[32] Here, too, as in the preceding cases, the law looks at the natural and legitimate tendency of such transactions, and not at the motive of the agent in any given case. This tendency is demoralizing, and the fact that in a certain case the agent's motive was honorable, or that the result is more beneficial to the principal, will make no difference if the latter chooses to repudiate it.[33] Said a learned judge: "If such contracts were to be held valid, until shown to be fraudulent or corrupt, the re-

v. Sterling, 16 Conn. 388; Hodgson v. Raphael, 105 Ga. 480; Merryman v. David, 31 Ill. 404; Kerfoot v. Hyman, 52 Ill. 512; Cottom v. Holliday, 59 Ill. 176; Mason v. Bauman, 62 Ill. 76; Hughes v. Washington, 72 Ill. 84; Stone v. Daggett, 73 Ill. 367; Tewksbury v. Spruance, 75 Ill. 187; Francis v. Kerker, 85 Ill. 190; Cornwell v. Foord, 96 Ill. App. 366; Sturdevant v. Pike, 1 Ind. 277; Green v. Peeso, 92 Iowa, 261; Fisher v. Lee, 94 Iowa, 611; Rogers v. French, 122 Iowa, 18; Krhut v. Phares, 80 Kan. 515; Butcher v. Krauth, 14 Bush. (Ky.) 713; Robertson v. Western F. & M. Ins. Co., 19 La. 227, 36 Am. Dec. 673; Florence v. Adams, 2 Rob. (La.) 556, 38 Am. Dec. 226; McClendon v. Bradford, 42 La. Ann. 160; Matthews v. Light, 32 Me. 305; Parker v. Vose, 45 Me. 54; Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 198; Clute v. Barron, 2 Mich. 194; Dwight v. Blackmar, 2 Mich 330, 57 Am. Dec. 130; Moore v. Mandlebaum, 8 Mich. 433; People v. Township Board, 11 Mich. 222; Powell v. Conant, 33 Mich. 396; Merriam v. Johnson, 86 Minn. 61; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304; Meek v. Hurst, 223 Mo. 688, 135 Am. St. R. 531; Rockford Watch Co. v. Manifold, 36 Neb. 801; Jansen v. Williams, 36 Neb. 869, 20 L. R. A. 297; Ruckman v. Bergholz, 37 N. J. L. 437; Moore v. Moore, 5 N. Y. 256; Bain v. Brown, 56 N. Y. 285; Cumberland Coal Co. v. Sherman, 30 Barb. (N. Y.) 553; Clark v. Bird, 66 N. Y. App. Div. 284; Evans v. Wren, 93 N. Y. App. Div. 346; Van Dusen v. Bigelow, 13 N. D. 277, 67 L. R. A. 288; Clendenning v. Hawk, 10 N. D. 90 (lease); Rich v. Black, 173 Pa. 92; Tynes v. Grimstead, 1 Tenn. Ch. 508; Shannon v. Marmaduke, 14 Tex. 217; Scott v. Mann, 36 Tex. 157; Mosley v. Buck, 3 Munf. (Va.) 232, 5 Am. Dec. 508; Segar v. Edwards, 11 Leigh (Va.), 213; Colbert v. Shepherd, 89 Va. 401; Chezum v. Kreighbaum, 4 Wash. 680 (but *cf.* Robinson v. Easton, 93 Cal. 80, 27 Am. St. R. 167); Stewart v. Mather, 32 Wis. 344; Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. Ed. 482; Robertson v. Chapman, 152 U. S. 673, 38 L. Ed. 592; Blank v. Aronson, 109 C. C. A. 327, 187 Fed. 241. But in Mississippi see Union Planters' Bank v. Edgell (Miss.), 32 So. 409.

[31] Louisville Bank v. Gray, 84 Ky. 565, and other cases cited in preceding note.

[32] Forrester, etc., Co. v. Evatt, 90 Ark. 301; Rich v. Black, 173 Pa. 92; Cornwell v. Foord, 96 Ill. App. 366; Merriam v. Johnson, 86 Minn. 61; Smitz v. Leopold, 51 Minn. 455; McNutt v. Dix, 83 Mich. 328, 10 L. R. A. 660; Pommerenke v. Bate, 3 Sask. L. R. 51.

See also Tyler v. Sanborn, 128 Ill. 136.

[33] People v. Township Board, 11 Mich. 222.

sult, as a general rule, would be that they must be enforced *in spite of fraud or corruption*. Hence the only safe rule in such cases is to treat the contract as void, without reference to the question of fraud in fact, unless affirmed by the opposite party. This rule appears to me so manifestly in accordance with sound public policy as to require no authority for its support." [34]

The prohibition applies, of course, as much to indirect violations as to direct ones.[35]

§ 1199. ——— Injury to principal not test—Sale at fixed price.— It is immaterial here that the principal has not been injured, or that the agent gave him as good terms as anybody would give.[36] Neither is the situation altered, ordinarily, by the fact that the principal had fixed a price at which he was willing to sell, and that the agent buys at that price.[37] Even in such a case, there may be a conflict between duty and interest. The agent may know that more can be obtained, and it would ordinarily be his duty to obtain it. So, "if before a sale is made, the land, to the knowledge of the agent, is greatly increased in value, or if he learns of a fact increasing the value, not known to the principal at the time of making the price, or if, before selling at the fixed price, he should receive an offer of a larger price, no one

[34] Christiancy, J., in People v. Township Board, *supra*.

[35] Hodgson v. Raphael, 105 Ga. 480; Webb v. Marks, 10 Colo. App. 429; Smith v. Tyler, 57 Mo. App. 668; Blank v. Aronson, 109 C. C. A. 327.

But if agent later purchases from one who bought without any arrangement to resell to the agent, the agent may keep. Learmonth v. Bailey, 1 Vic. L. R. (E.) 122.

[36] Where the agent, by misrepresenting the price he paid for property, has induced the principal to pay him the larger sum, the principal may recover the excess from the agent even though the principal has sold the property at a profit over the amount so misrepresented. Salsbury v. Ware, 183 Ill. 505.

[37] Porter v. Woodruff, 36 N. J. Eq. 174; Tilleny v. Wolverton, 46 Minn. 256; Merriam v. Johnson, 86 Minn. 61; Colbert v. Shepherd, 89 Va. 401; Meek v. Hurst, 223 Mo. 688, 135 Am. St. R. 531; Rich v. Black, 173 Pa. 92; McNutt v. Dix, 83 Mich. 328; Albright v. Phoenix Ins. Co., 72 Kan. 591.

But in Selover v. Isle Harbor Land Co., 91 Minn. 451, it was said that "where lands were offered for sale at a stipulated figure which a commission was allowed, there is no rule of law to prevent the party, who in good faith earns and receives such commission by effecting a sale, from being at the same time interested as a purchaser. Quite another question would arise if no fixed price had been established, and the agent was relied upon and expected to obtain the best figure possible for the lands," citing Merriam v. Johnson, *supra*.

See also Carpenter v. Fisher, 175 Mass. 9, holding, that one who has had an option to purchase land but elects not to exercise it, is not thereby disqualified to act as agent for another purchaser.

would suppose that the agent might sell at the fixed price without informing the principal of what had come to his knowledge."[38]

§ 1200. ——— Public sale equally voidable.—It is immaterial, also, that the sale which the agent is authorized to make, or cause to be made, is to be a public one.[39] And even though the sale be one which the agent does not cause, and which he is not able to prevent, as where the land which he is authorized to sell is being sold upon the foreclosure of a mortgage, and the like, he will still, ordinarily, it is held, be incompetent to purchase.[40] His interest as purchaser, to buy as cheaply as possible, would conflict with the principal's interest to secure the highest price obtainable. *A fortiori* would this be so if he resorts to schemes or practices to prevent competition.[41]

§ 1201. ——— Effect of fraud or concealment.—Since the sale or lease, when voidable at all, is voidable notwithstanding the fact that the agent acted in good faith, it is all the more impeachable, if such a thing be possible, where the agent has been guilty of fraud or sharp practice, or has concealed his relations to the transaction, or has failed to disclose to the principal material facts within the agent's possession affecting the value or situation of the property.[42]

§ 1202. To what agents this rule applies.—This rule is of frequent application, not only to agencies which are strictly private in their nature, but to those which are public or *quasi*-public as well.

[38] Tilleny v. Wolverton, *supra.*

[39] See the numerous cases cited in § 1202, *post.*

[40] Kimball v. Ranney, 122 Mich. 160, 446 L. R. A. 403, 18 Am. St. R. 548; Adams v. Sayre, 70 Ala. 318; Albright v. Phoenix Ins. Co., 72 Kan. 591.

[41] Adams v. Sayre, 70 Ala. 318.

[42] Pierce v. Beers, 190 Mass. 199; Jansen v. Williams, 36 Neb. 869, 20 L. R. A. 207; Merriam v. Johnson, 86 Minn. 61; Fisher v. Lee, 94 Iowa, 611; Green v. Peeso, 92 Iowa, 261; Rogers v. French, 122 Iowa, 18; Clark v. Bird, 66 N. Y. App. Div. 284; Cornwell v. Foord, 96 Ill. App. 366; Burke v. Bours, 92 Cal. 108; Van Dusen v. Bigelow, 13 N. D. 277, 67 L. R. A. 288; Webb v. Marks, 10 Colo. App. 429; Williams v. Moore-Gaunt Co., 3 Ga. App. 756; Prince v. Dupuy, 163 Ill. 417.

Where the agent undertakes to get property for himself at a reduced price by falsely representing to his principal that the goods are for another to whom the principal is willing for special reasons to make a reduction, the agent is liable for the difference to the principal. Pierce v. Beers, *supra.*

Where agent to sell plaintiff's hotel, induced plaintiff to exchange the same for a farm of little value, by misrepresenting the character of it, having a secret agreement with the owner of the farm that, on the consummation of the trade, the owner of the farm would convey the hotel to the agent at a price representing the real value of the farm, and thus in effect get the hotel for much less than its value, plaintiff was held entitled to a reconveyance of the hotel. White v. Leech (Iowa), 96 N. W. 708.

Thus an administrator,[43] executor,[44] guardian,[45] sheriff,[46] deputy sheriff,[47] trustee,[48] assignee,[49] or commissioner in bankruptcy,[50] judge of probate,[51] county treasurer,[52] commissioner to sell land,[53] school director or trustee,[54] members of the board of health,[55] etc., will not be permitted, either directly or indirectly, to purchase of himself the rights or property which he is authorized in that capacity to sell.[56] A public or private agent[57] authorized to let a contract will not be permitted to let it to himself. A railroad agent authorized to furnish an excursion train to third persons, will not be permitted to furnish one ostensibly to a third person but in reality for his own benefit.[58]

These rules also apply to the directors and officers of corporations. The former are regarded in equity as trustees, and the ministerial officers occupy the relation of agents.[59]

[43] Dwight v. Blackmar, 2 Mich. 330, 57 Am. Dec. 130; Pearson v. Moreland, 7 Smedes & M. (Miss.) 609, 45 Am. Dec. 319; Scott v. Freeland, 7 Smedes & M. (Miss.) 409, 45 Am. Dec. 310; Planters' Bank v. Neely, 7 How. (Miss.) 80, 40 Am. Dec. 51; McGowan v. McGowan, 43 Miss. 553; Hoffman v. Harrington, 28 Mich. 106; Obert v. Hammel, 3 Har. (N. J. L.) 74; Coat v. Coat, 63 Ill. 73; Kruse v. Steffens, 47 Ill. 112; Smith v. Drake, 23 N. J. Eq. 302.

[44] Rogers v. Rogers, 1 Hopk. (N. Y.) 524; Schenck v. Dart, 22 N. Y. 420; Winter v. Geroe, 5 N. J. Ch. 319; Dunlap v. Mitchell, 10 Ohio, 117; Worthy v. Johnson, 8 Ga. 236, 52 Am. Dec. 399; Scott v. Gorton, 14 La. 115, 33 Am. Dec. 578.

[45] Ward v. Smith, 8 Sandf. (N. Y.) Ch. 592.

[46] Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; Carr v. Houser, 46 Ga. 477; Flury v. Grimes, 52 Ga. 343; Mayor of Macon v. Huff, 60 Ga. 228.

[47] Perkins v. Thompson, 3 N. H. 144.

[48] Robertson v. Western F. & M. Ins. Co., 19 La. 227, 36 Am. Dec. 673; Green v. Winter, 1 Johns. (N. Y.) Ch. 26, 7 Am. Dec. 475; Davoue v. Fanning, 2 Johns. (N. Y.) Ch. 252.

[49] *Ex parte* Lacey, 6 Ves. Jr. 626.

[50] *Ex parte* Bennett, 10 Ves. Jr. 382.

[51] Walton v. Torrey, Har. (Mich.) Ch. 259.

[52] Clute v. Barron, 2 Mich. 192; Pierce v. Boughman, 14 Pick. (Mass.) 356.

[53] Ingerson v. Starkweather, Walk. (Mich.) Ch. 346.

[54] Currie v. School District, 35 Minn. 163.

[55] Fort Wayne v. Rosenthal, 75 Ind. 156, 39 Am. Rep. 127.

[56] People v. Township Board, 11 Mich. 222.

[57] Flint, etc., R. R. Co. v. Dewey, 14 Mich. 477.

[58] Pegram v. Charlotte, etc., R. R. Co., 84 N. C. 696, 37 Am. Rep. 639.

[59] Cook v. Berlin Woolen Mills Co., 43 Wis. 433; Cumberland Coal Co. v. Hoffman Steam Coal Co., 30 Barb. (N. Y.) 159; Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Jackson v. Ludeling, 21 Wall. (U. S.) 616, 22 L. Ed. 492; Wilbur v. Lynde, 49 Cal. 290, 19 Am. Rep. 645; City of San Diego v. San Diego, etc., R. R. Co., 44 Cal. 106; Commissioners, etc. v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Bedford Coal Co. v. Parke County Coal Co., 44 Ind. App. 390; Greenfield Savings Bank v. Simons, 133 Mass. 415.

That officers or directors of a private corporation may stand in such a fiduciary relation to the shareholders as to require them to disclose

And the principle is applied not only to the agent himself, but to sub-agents, clerks and assistants appointed by him;[60] and it extends also to his partner in business.[61] Whatever disabilities the agent labors under attach equally to those whom he employs under him.

§ 1203. Further of this rule — Indirect attempts.—It seems scarcely necessary to repeat here, what has already been emphasized, that what the agent cannot do directly, he will not be permitted to do indirectly, as by having the property acquired ostensibly by another, but in reality for his own benefit.[62]

§ 1204. Agent authorized to insure may not issue policies to himself.—The same principles apply to the agent who is authorized to furnish insurance. Such an agent may not, directly or indirectly, without the full knowledge and consent of his principal, issue policies to himself, or insure his own property. If he does so, the principal may repudiate the act.[63] The same rule has been applied to cases where, although the agent was not the sole or individual owner, he was yet in some manner beneficially interested in the property insured.[64] But

information respecting the value of the shareholders' stock which they propose to purchase, see Strong v. Repide, 213 U. S. 419; Oliver v. Oliver, 118 Ga. 362; Stewart v. Harris, 69 Kan. 498, 105 Am. St. R. 178, 66 L. R. A. 261, 2 Ann. Cas. 878. *Contra:* Hooker v. Midland Steel Co., 215 Ill. 444, 106 Am. St. R. 170; Board of Commissioners v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Walsh v. Goulden, 130 Mich. 531; Carpenter v. Danforth, 52 Barb. (N. Y.) 581; O'Neile v. Ternes, 32 Wash. 528.

[60] Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192.

[61] New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85.

[62] Eltridge v. Walker, 60 Ill. 230; Merriam v. Johnson, 86 Minn. 61; Eneau v. Rieger, 105 Mo. 659; Webb v. Marks, 10 Colo. App. 429. Or by a third person for the joint benefit of himself and such third person. Hughes v. Washington, 72 Ill. 84; Fry v. Platt, 32 Kan. 62 (the third person was supposed to be another agent to sell); Finch v. Conrade, 154 Pa. 326. Mere fact that purchaser is brother-in-law of the agent will not of itself invalidate the sale. Walker v. Carrington, 74 Ill. 446. *Held* invalid where deeded to agent's wife. Reed v. Aubrey, 91 Ga. 435, 44 Am. St. R. 49; Green v. Hugo, 81 Tex. 482, 26 Am. St. R. 824; Winter v. McMillan, 87 Cal. 256, 22 Am. St. R. 243 (to agent and wife jointly).

See also Tyler v. Sanborn, 128 Ill. 186.

[63] Zimmerman v. Dwelling-House Insurance Co., 110 Mich. 399, 33 L. R. A. 698; Bentley v. Columbia Insurance Co., 19 Barb. (N. Y.) 595; Fireman's Fund Ins. Co. v. McGreevy, 55 C. C. A. 543, 118 Fed. 415.

[64] Ritt v. Washington Marine Ins. Co., 41 Barb. (N. Y.) 353 (agent was one of several tenants in common of a boat); Glenn Falls Ins. Co. v. Hopkins, 16 Ill. App. 220 (agent a partner of firm whose goods he insured); Wildberger v. Hartford Fire Ins. Co., 72 Miss. 338, 28 L. R. A. 220, 48 Am. St. R. 559 (agent insured goods which were in his possession as receiver, and of which he had the legal title by assignment for purposes of the trust); Green-

if the principal, with full knowledge of the facts, assents to the act, the insurance becomes binding.[65]

§ 1205. Agent authorized to purchase or hire may not purchase or hire of himself.—An agent authorized to purchase or hire property for his principal, will not, without the intelligent consent of his principal, be permitted to purchase or hire of himself; and if he does so, the principal is not bound, but may repudiate the transaction. This rule is founded upon the same principles as the preceding ones. The law will not permit the agent to put himself in a position where there is such abundant opportunity, if not temptation, to take advantage of his relations for his own benefit.[66]

And it makes no difference that the intention of the agent was honest and the result of his action might be to the advantage of his principal; the latter may still repudiate it. The tendency of such transactions is bad, and a good intention in a particular case will not save it, unless the principal sees fit to affirm it.[67]

And what was said in a preceding section applies here also. The agent may not accomplish by indirect and covert means what he could not do directly and openly.

The remedy of the principal in such a case is usually the repudiation of the transaction. He cannot, it is held, recover, as a profit made by the agent, the difference between the amount at which the agent sold to him and the price which the agent may have paid for the property before the agency was created,[68] though he may recover the difference between the price paid by the principal and the fair value.[69]

wood Ice Co. v. Georgia Home Ins. Co., 72 Miss. 46 (agent was a stockholder, director and vice-president of the corporation whose property he insured).

[65] Pratt v. Dwelling-House Ins. Co., 130 N. Y. 206, reversing 53 Hun (N. Y.), 101.

[66] Taussig v. Hart, 58 N. Y. 425; Tewksbury v. Spruance, 75 Ill. 187; Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; Florence v. Adams, 2 Rob. (La.) 556, 38 Am. Dec. 226; Ely v. Hanford, 65 Ill. 267; Conkey v. Bond, 36 N. Y. 427; Beal v. McKiernan, 6 La. (O. S.) 407; Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600; Baird v. Ryan, 17 Ky. L. Rep. 1417, 35 S. W. 132; Disbrow v. Secor, 58 Conn. 35; Oliver v. Lansing, 48 Neb. 338; Friesenhahn v. Bushnell, 47 Minn. 443; Whitehead v. Lynn, 20 Colo. App. 51, aff'd 45 Colo. 427.

[67] Taussig v. Hart, 58 N. Y. 425; Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; People v. Township Board, 11 Mich. 222; Montgomery v. Hundley, 205 Mo. 138, 11 L. R. A. (N. S.) 122.

[68] Whitehead v. Lynn, 20 Colo. App. 51.

[69] Oliver v. Lansing, 48 Neb. 338. In Watson v. Bayliss, 62 Wash. 329, 34 L. R. A. (N. S.) 1210, an agent had obtained an option before his employment by the principal; the agent was hired to purchase the prop-

§ 1206. Double agency—Agent may not represent other party also without consent of principal.—The principal has a right to assume when he employs an agent, unless he is advised to the contrary, that the agent is in a situation to give to his principal that undivided allegiance and loyalty which the proper performance of the agency requires, and that he will remain in that situation. If the agent has, or acquires, in the subject-matter, any interest of his own which may conflict with that of his principal, or if, by reason of being or becoming the agent of the opposite party, he has an interest of the latter to protect which may conflict with the interest of the principal, it is his duty to fully advise his principal of the circumstances, and not to undertake to act without the principal's consent.[70] If, after a full and frank disclosure, the principal is willing to confide his interests to him, the principal cannot afterwards object. Otherwise, it is the practically invariable rule that the agent may not, in the same transaction, be both agent and opposite party, or while agent of one, become the agent of the other party whose interests may conflict. If, without such knowledge and consent, he does undertake to contract, the law deems the principal in that transaction to be practically unrepresented, and any bargain in his name, or act done on his account, is usually voidable at the principal's option. He need not show himself injured, and his right to repudiate the transaction is not affected by the good faith of the opposite party. The effect of these double dealings, however, as between the principal and the other party, will be more fully considered in a later chapter.[71] The effect as between the principal and the agent,—the only matter under consideration here,—is that the agent violates his duty to his principal, is entitled to no compensation for his services, must account for any profits made from the principal, and must indemnify his principal against any loss thereby sustained.[72] Commissions which are paid by the principal to

erty for the principal, and, in so doing, misrepresented the price at which it was obtainable, and thus made a profit to himself of the difference between the price at which he had acquired the option and the price which the principal gave. *Held*, that agent was liable to his principal for this difference.

See also Primeau v. Granfield, 180 Fed. 847.

[70] Marsh v. Buchan, 46 N. J. Eq. 595; Morey v. Laird, 108 Iowa, 670; St. Louis Electric, etc., Co. v. Edison, 64 Fed. 997; Cameron v. Blackwell, 53 Tex. Civ. App. 414.

[71] See *post* Book IV, Chap. VII.

[72] As to forfeiture of compensation for disloyalty, see *post* Book IV, Chap. IV; Little v. Phipps, 208 Mass. 331; Lemon v. Little, 21 S. D. 628; Andrew v. Ramsay, [1903] 2 K. B. 635.

In Warren v. Burt, 58 Fed. 101, it was said, "No man, whether he be principal or agent, can be a vendor and a purchaser at the same time;

the agent before the discovery of the double agency may be recovered back.[73]

As between the principal and the agent at least, however it may be as between the principals themselves, the rules above given apply as well to one of the two principals as to the other. Each may demand of the agent that he shall both be and remain loyal to that principal's interests, and may have remedies against the agent if he does not do so.

§ 1207. Agent must fully inform the principal.—It is always the duty of an agent, as will be more fully seen hereafter,[74] to fully inform the principal of all facts relating to the subject-matter of the agency which come to the knowledge of the agent, and which it is material for the principal to know for the protection of his interests. This duty, moreover, has a specific application in this connection which justifies a reference to it here. As has been already seen, it is absolutely essential, when an agent undertakes to sustain dealings with his own principal, that it shall appear that the agent frankly and freely gave to his principal full information respecting, not only the agent's relation to the contract, but also, the various conditions respecting time, value, situation, condition and the like, which may fairly be deemed to be material in determining upon the desirability of entering into the contract.[75] But even where the agent is not personally interested in the contract, his duty to give the principal full information of all the material facts relating to the transaction, which are within his knowledge, still exists. A failure to perform this duty, while not necessarily rendering transactions with third persons void-

and an agent of the vendor who intentionally becomes interested as a purchaser in the subject matter of his agency, violates his contract of agency, betrays his trust, forfeits his commission as agent, and is liable to his principal for all the profits he makes by his purchase." (Citing, Michoud v. Girod, 4 How. 503; Crump v. Ingersoll, 44 Minn. 84; Hegenmeyer v. Marks, 37 Minn. 6, 5 Am. St. Rep. 808; Jacobus v. Munn, 27 N. J. Eq. 48; Moore v. Zabriskie, 18 N. J. Eq. 51; Bank v. Tyrrell, 27 Beav. 273, 10 H. of L. Cas. 26; Panama, etc., Tel. Co. v. India Rubber, etc., Co., 10 Ch. App. 515; Bent v. Priest, 86 Mo. 475). See also Williams v. Moore-Gaunt Co., 3 Ga. App. 756.

In Hogle v. Meyering, 161 Mich. 472, where the agent having an undisclosed option upon property, misrepresented to the principal the price at which it could be purchased and procured its purchase by the principal for a price higher than the option price, keeping the surplus himself, it was held that he forfeited his commission and must restore it, and must also restore the surplus amount of his principal's money which he had so obtained. See also Watson v. Bayliss, 62 Wash. 329, 34 L. R. A. (N. S.) 1210.

[73] Burnham City Lumber Co. v. Rannie, 59 Fla. 179; Cannell v. Smith, 142 Pa. St. 25, 12 L. R. A. 395.

[74] See Subd. VI of this chapter.

[75] See Neilson v. Bowman, 29 Gratt. (Va.) 732; Newstead v. Rowe, 8 Sask. L. R. 176.

able, as it would do if the agent were himself personally interested, will still make the agent liable to the principal for any losses which he has proximately sustained thereby.[76] Frequent illustrations are found in the cases in which agents for the sale of property, and the

[76] See, Hegenmyer v. Marks, 37 Minn. 6, 5 Am. St. Rep. 808; Smitz v. Leopold, 51 Minn. 455; Schick v. Suttle, 94 Minn. 135; Holmes v. Cathcart, 88 Minn. 213, 97 Am. St. Rep. 513, 60 L. R. A. 734; Carpenter v. Fisher, 175 Mass. 9; Emmons v. Alvord, 177 Mass. 466; Prince v. Dupuy, 163 Ill. 417; Kramer v. Winslow, 130 Pa. 484, 17 Am. St. Rep. 782; Humbird v. Davis, 210 Pa. 311; Calmon v. Sarraille, 142 Cal. 638; Duryea v. Vosburgh, 138 N. Y. 621; Williams v. Moore-Gaunt Co., 3 Ga. App. 756; Leonard v. Omstead, 141 Iowa, 485; Durward v. Hubbell, 149 Iowa, 722; Rorebeck v. Van Eaton, 90 Iowa, 82; Hindle v. Holcomb, 34 Wash. 336; Warren v. Burt, 7 C. C. A. 105, 58 Fed. 101; Ritchey v. McMichael (Cal.), 35 Pac. 151.

Duty to disclose identity of purchaser.—The identity of the purchaser may often be a matter of consequence to the principal, and when it appears to be so the agent should disclose it. But an agent authorized to sell to any purchaser he could find, is not guilty of fraud in not disclosing the identity of a prospective purchaser, where the principals did not ask or make any inquiry concerning who such purchaser was and some of them, at least, admitted that they did not care. Rank v. Garvey, 66 Neb. 767. To like effect: Ranney v. Henry, 160 Mich. 597. Compare Spinks v. Clark, 147 Cal. 439.

Duty to disclose identity of seller. Agent as seller. Where, without the knowledge and consent of the principal, an agent to buy property sells his own property to the principal, the latter may rescind and recover what he paid. Disbrow v. Secor, 58 Conn. 35.

Where an agent for the exchange of lands puts his own land in without his principal's knowledge or consent, the trade is voidable. McLain v. Parker, 229 Mo. 68.

Duty of broker seeking employment to disclose facts respecting a proposed purchaser.—In Larson v. Thoma, 143 Iowa, 338, it was held that the broker was not under such duty to disclose where his prior information consisted merely of the facts that a particular person was desirous of obtaining land of that sort, that he was aware of the location of principal's tract, and intending to inspect the same, and that he had applied to the broker in regard to buying such a tract.

Duty to disclose agent's previous relations to property.—Where a person has an option to purchase land but elects not to exercise it, he is not thereafter disqualified to become the agent of another person to purchase the land, and the existence of this former option is held not to be such a material fact that he is bound in good faith to disclose it to such principal, where there was no difference between the option price and the price at which the principal bought. Carpenter v. Fisher, 175 Mass. 9.

Failure of agent to disclose that he was indorser upon notes assumed and paid by principal.—An agent acting for his principal in the exchange of lands was already an endorser of notes secured by a mortgage upon the land which his principal received, and which mortgage the principal assumed and afterwards paid. The agent did not disclose the fact of such endorsement to his principal. *Held*, that while this was a circumstance which might be taken into account, it did not constitute fraud *per se;* neither did it show that the agent had brought about the satisfaction of his debt with the property or funds

like, have permitted the principal to sell his property at a certain price without informing him of what the agent knew, namely, that he could procure better terms.[77]

§ 1208. Agent liable for misrepresentations.—*A fortiori* will the agent be liable to his principal where, to induce the principal to make the contract, in order, for example, that the agent may earn his commissions, the agent has made false representations to the principal concerning the material facts relating to the transaction, and has thereby induced the principal to deal to his detriment.[78]

of the principal. Beatty v. Bulger, 28 Tex. Civ. App. 117.

Failure to inform principal that agent was paying taxes which debtor should have paid.—Where agents for collection of interest upon a loan secured by mortgage neglected to inform the principal for several years that the debtor was not paying the interest or taxes, and that the agent himself was paying the money, any loss by depreciation of the security during this time (in which the principal could have foreclosed if he had known the facts) must fall upon the agent. Bush v. Froelich, 14 S. D. 62.

Duty to disclose facts relating to proposed change in contract with agent.—While the agent is negotiating with his proposed principal with reference to becoming his agent the parties are dealing at arm's length and no fiduciary relation as yet exists, but, when the relation is once entered upon, a fidiciary relation is created, and it is then the duty of the agent to fully disclose the facts where he is seeking to uphold a subsequent modification of the contract in his favor. Neilson v. Bowman, 29 Gratt. (Va.) 732.

Sub-agents and assistant attorneys "are the agents and attorneys of the principal and client, it matters not by whom they were employed, and are subject to all the obligations of agency or attorneyship toward their principal or client, in so far as the information acquired by them during the exercise of the agency, is concerned." Dorr v. Camden, 55 W. Va. 226, 65 L. R. A. 348.

An agent to sell owes no duty to report to his principal an offer which the principal has already said he would not accept. Burchell v. Gourie, etc., Collieries, [1910] A. C. 614.

[77] See Holmes v. Cathcart, Leonard v. Omstead, and many other cases cited in the preceding note. Also Snell v. Goodlander, 90 Minn. 533.

[78] Varner v. Interstate Exchange, 138 Iowa, 201; Tate v. Aitken, 5 Cal. App. 505.

Agent who misrepresents the price at which property can be purchased, and keeps the excess, is liable to the principal for the amount. Pouppirt v. Greenwood, 48 Colo. 405; Hindel v. Holcomb, 34 Wash. 336. Principal may also recover the commissions paid the agent. Palmer v. Pirson, 4 N. Y. Misc. 455. The measure of damages for false representations made by an agent is the difference between the value as represented and the value in fact. Durward v. Hubbell, 149 Iowa, 722.

Where an agent for the purchase of land for the joint account of himself and his principal, misrepresents the price to be paid, tells the principal that he is himself contributing as much as the principal, whereas he buys the land for one-third of the principal's contribution, keeps the residue, and pays nothing himself, he is liable to the principal for the whole amount. McLain v. Parker, 229 Mo. 68.

And where the principal, before the discovery of the agent's double dealing, has bound himself by contract to the other party, he need not, it is held, rescind the contract, but may perform it, and then recover of the agent damages for the loss he has sustained.[79]

§ 1209. Agent may not take advantage of confidential information acquired in the business to make profit at principal's expense.— Moreover, it is frequently said that an agent will not be permitted, during the continuance of his agency, to take advantage of the knowledge of the principal's situation, needs, or desires, which knowledge he acquires by reason of his employment and in a confidential capacity, to compete with or undermine his principal's interest by acquiring for himself that which the principal deems it necessary or desirable to acquire for his own interest or protection.

Whether so wide a proposition as that can be maintained or not, there seem to be a variety of cases in which the law will not permit the agent to acquire for himself rights or estates in which the principal has a present or potential interest, and which, though the agent may not owe a duty to his principal to acquire for him, the duty of loyalty will forbid his acquiring for himself to the prejudice of the principal. Thus, such an agent will not be permitted to acquire, on his own account, a lease of the principal's premises which he knows the principal desires and intends to renew.[80] An agent, employed to investigate and make an abstract of his principal's title, will not be permitted to conceal a defect therein which he thus discovers, and buy in and enforce the outstanding claim on his own account.[81] An agent

Where an agent, employed in the sale of land, represented to his principal that he had received the cash deposit called for by the contract, whereas he had taken the worthless note of the vendee, the agent is liable to the principal for the amount of the deposit; and it is immaterial that the principal, on the vendee's default, resold at such a price that he lost nothing by the breach of that contract. Wood v. Blaney, 107 Cal. 291.

[79] Great Western Gold Co. v. Chambers, 153 Cal. 307.

[80] Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541; Essex Trust Co. v. Enwright, —— Mass. ——, 102 N. E. 441. See also, Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304.

An agent hired to give his entire time to securing oil land leases for his principal will not be permitted while so employed to take and hold leases on his own account except with the full knowledge and consent of the principal. Fox v. Simons, 251 Ill. 316.

But in Lempriere v. Ware, 2 Vict. 1, it was held that an agent, who in the course of his agency had learned the value of lands, was not thereby disqualified from buying them at a public sale, thereby being no duty on his part to pay them for the principal, and it not being a case in which the principal had a preferential right.

[81] Ringo v. Binns, 10 Peters (35 U. S.) 269, 9 L. Ed. 520; Vallette v. Te-

of a mining company who discovers defects in the location of its claim will not be permitted to take advantage of the situation, to relocate it in his own name.[82]

§ 1210. ——— After termination of agency.—Even though the relation has terminated, the disability in this respect may still continue. Thus in one case it is said: "The duty of an attorney to be true to his client, or of an agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term." In this case it was held that an agent who, by reason of his employment to assist his principals in selling lands in a tract on which they had an option and which they were exploiting, had learned of the location, value and possibilities of the tract and who were its owners, would not be allowed, by resigning his agency, to purchase the land on his own account and thus defeat his principal's purposes. He was charged as a trustee.[83]

§ 1211. Information respecting trade secrets, names of customers, etc.—So where the agent acquires information respecting trade secrets, formulae, lists of customers, and the like, under an express or implied contract not to disclose it,[84] or under such circumstances as

dens, 122 Ill. 607, 3 Am. St. Rep. 502.

Same effect: Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609.

[82] Largey v. Bartlett, 18 Mont. 265. See also Fisher v. Seymour, 23 Colo. 542; Lockhart v. Rollins, 2 Idaho, 540.

See also Cragin v. Powell, 128 U. S. 691, 32 L. Ed. 566.

[83] Trice v. Comstock, 57 C. C. A. 646, 121 Fed. 620, 61 L. R. A. 176. To same effect: Dennison v. Aldrich, 114 Mo. App. 700.

In Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609, the same doctrine was applied to prevent an attorney from buying and holding land in which his client was interested, merely by terminating his relation as attorney.

Where an agent has sold to his principal the benefit of certain information he cannot be allowed later to use it to his own advantage to defeat the principal. Winn v. Dillon, 27 Miss. 494.

In Bemis v. Plato, 119 Iowa, 127, a former agent for the payment of taxes was permitted to hold under a tax title acquired by him where it appeared that the agency had ended before this tax matured and its nonpayment was due to no fault on his part.

[84] See Thum v. Tloczynski, 114 Mich. 149, 68 Am. St. Rep. 469, 38 L. R. A. 200 (injunction granted to restrain defendant from disclosing the processes of manufacture of a sticky fly paper in violation of implied contract); Fralich v. Despar, 165 Pa. 24 (injunction granted against disclosure of trade secrets, there being an express written contract never to divulge the same); Reichenbach v. Eastman Kodak Co., 79 Hun (N. Y.), 183 (injunction granted where defendants, some of whom were under express agreement, had organized a company to use the trade secrets in question, and to compete with the plaintiff company); Peabody v. Nor-

made it confidential,[85] he, and his confederates usually, may be restrained, either during or after the determination of the agency, from practically appropriating this property of the principal by using the information so acquired to the principal's detriment.

§ 1212. ——— Ordinary experience learned in the business.— This rule, however, will not apply to the experience, skill or training which the agent acquires in the ordinary course of his agency. "Every agent," it is said, "has a lawful right to carry with him into a new employment all the skill and knowledge acquired in his previous engagements and nothing short of an express contract on his part not to do so, will debar him, and then only under the strict rules of law especially established to protect trade secrets." [86]

folk, 98 Mass. 452, 96 Am. Dec. 664 (injunction granted; express contract not to disclose); Wiggins Sons Co. v. Cott-A-Lap Co., 169 Fed. 150 (injunction not allowed because it did not appear that there was immediate danger of a disclosure as alleged); Salomon v. Hertz, 40 N. J. E. 400 (injunction granted restraining a disclosure of tanning processes, but as to information regarding customers and prices the court held that the restriction thereon lasted only during the continuance of the employment).

See also Vulcan Detinning Co. v. American Can Co., 72 N. J. Eq. 387, 12 L. R. A. (N. S.) 102; Stone v. Goss, etc., Co., 65 N. J. Eq. 756, 103 Am. St. Rep. 794, 63 L. R. A. 344; Philadelphia Extracting Co. v. Keystone Extracting Co., 176 Fed. 830; Lord v. Smith, 109 Md. 42; Little v. Gallus, 4 N. Y. App. Div. 569; Morison v. Moat, 9 Hare, 241.

But in Taylor Iron Co. v. Nichols, 73 N. J. E. 684, 133 Am. St. R. 753, 24 L. R. A. (N. S.) 938, an injunction to restrain disclosure of secrets was denied, because, the contract not to divulge was too broad; and because, the time limit in the contract did not correspond with the time of the plaintiff's exclusive control of some of the secrets in question.

[85] In a variety of cases, the former agent has been restrained from using lists of customers, codes, diagrams, patterns, catalogues, price lists, etc., which constituted the principal's property, and which the agent acquired or copied, without his principal's consent to their subsequent use, while he was in the principal's employment. See Merryweather v. Moore, [1892] 2 Ch. 518 (patterns); Robb v. Green, [1895] 2 Q. B. 1, 315 (list of customers); Louis v. Smellie, 73 L. T. Rep. 226 (list of agents); Lamb v. Evans, [1893] 1 Ch. 218 (memoranda, lists, and material from principal's catalogues); Simmons Hardware Co. v. Waibel, 1 S. D. 488, 36 Am. St. R. 755, 11 L. R. A. 267 (code of price marks); Stevens v. Stiles, 29 R. I. 399, 20 L. R. A. (N. S.) 933, 17 Ann. Cas. 140 (list of patrons); Summers v. Boyce, 97 L. T. Rep. 505.

See also Kirchner v. Gruban, [1909] 1 Ch. 413.

Agent will not be allowed to register as his own the principal's trade marks. Munoz v. Struckmann, 9 Philipp. 52.

[86] New Era Gas Co. v. Shannon, 44 Ill. App. 477.

As to the right of the agent, after the termination of his agency, to solicit the business of the patrons of his former principal with whom he had become acquainted during the agency, see Proctor v. Mahin, 93 Fed. 875 (holding that he may do so). Compare Trego v. Hunt, [1896] App. Cas. 7.

§ 1213. ——— **Information leading to outside profit.**—In a partnership case, in which the firm claimed the right to profits made by one partner as the result of information which he acquired as a partner, it was said by Lindley, L. J., "As regards the use by a partner of information acquired by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, the profits of which belong to the firm, he must account to the firm for any benefits which he may have derived from such information, but there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business." [87]

§ 1214. ——— **Information leading to patents or inventions.**—So far as patents for inventions made by others than the agent are concerned, they stand upon no different footing with respect of the questions considered in this chapter than any other species of property; but patents for inventions made by the agent, even though made during the agency, and even though the agent's attention to the matter was the result of the knowledge or information acquired in the principal's business, are not regarded as a fruit of the agency within the rules here being dealt with, and the principal cannot have them merely as the result of the relation. There must be an employment to make the inventions or a contract that the principal shall have them.[88]

§ 1215. **Agent employed to settle claim, may not buy and enforce it against his principal.**—The principles now being considered find further illustration in the rule that an agent, who is employed to settle or compromise a claim against his principal, will not be permitted to avail himself of the benefit of a favorable settlement, by purchasing the claim himself at a discount and enforcing it against his principal for the full amount.[89]

[87] Aas v. Benham, [1891] 2 Ch. 244. Followed in Latta v. Kilbourn, 150 U. S. 524, 37 L. Ed. 1169.

See also Trego v. Hunt, *supra*.

[88] American Circular Loom Co. v. Wilson, 198 Mass. 182, 126 Am. St. Rep. 409; Dalzell v. Dueber Watch Case Co., 149 U. S. 315, 37 L. Ed. 749; Hapgood v. Hewitt, 119 U. S. 226, 30 L. Ed. 369; Solomons v. United States, 137 U. S. 342, 34 L. Ed. 667; Pressed Steel Car Co. v. Hansen, 71 C. C. A. 207, 137 Fed. 403, 2 L. R. A. (N. S.) 1172; Deane v. Hodge, 35 Minn. 146, 59 Am. Rep. 321; Burr v. De La Vergne, 102 N. Y. 415.

See also National Wire Bound Box Co. v. Healy, 110 C. C. A. 613, 189 Fed. 49.

[89] Davis v. Smith, 43 Vt. 269; Case v. Carroll, 35 N. Y. 385; Albertson v. Fellows, 45 N. J. Eq. 306, 17 Atl. 816;

Thus where two partners who were financially embarrassed employed an agent to assist them in settling with their creditors, and the agent, while so employed, purchased an outstanding claim against the firm, at a large discount, but did not disclose the fact of the discount to his employers, who gave him their note for the full amount of the claim, it was held that the benefit of the discount inured to the principals, and that there was a failure of consideration of the notes to that extent.[90]

§ 1216. Agent may not acquire rights against his principal based on his own neglect or default.—It is the duty of the agent to protect the interest of his principal confided to his care. He will not therefore, be permitted to build up in himself rights and interests against his principal based upon his own neglect or default in the performance of his duty.

Thus an agent whose duty it is to pay the taxes or other charges upon his principal's lands, cannot by neglecting to pay such taxes or charges acquire a valid title to the lands upon a sale of them for the non-payment thereof, and, if such purchase be made, the agent will be deemed to hold it in trust for his principal.[91] This rule applies although the duty of paying the taxes is not directly imposed. It is enough that such a course puts the interests of the agent, in the course of his agency, in conflict with those of the principal,—a result which it is his duty to avoid. Thus an agent authorized to care for, or to manage, or to sell his principal's real estate, will not be permitted to acquire adverse interests by purchasing the same at a tax sale.[92] Nor

Quinn v. Le Due (N. J. Eq.), 51 Atl. 199; Smith v. Brotherline, 62 Pa. 461; Reed v. Norris, 2 Myl. & C. 361.

[90] Noyes v. Landon, 59 Vt. 569.

[91] Curts v. Ciana, 7 Biss. (U. S. C. C.) 260, Fed. Cas. No. 3,507; Franks v. Morris, 9 W. Va. 664; Barton v. Moss, 32 Ill. 50; Oldhams v. Jones, 5 B. Mon. (Ky.) 458; Krutz v. Fisher, 8 Kan. 90; Matthews v. Light, 32 Me. 305; Huzzard v. Trego, 36 Pa. 9; Bartholemew v. Leech, 7 Watts (Penn.), 472; Young v. Goodhue, 106 Iowa, 447; Stanley v. McConnell, 64 Ill. App. 591; Fox v. Zimmerman, 77 Wis. 414; McMahon v. McGraw, 26 Wis. 614; Curtis v. Borland, 35 W. Va. 124; Siers v. Wiseman, 58 W. Va. 340; Backus v. Cowley, 162 Mich. 585; Hudson v. Herman, 81 Kan. 627; Gamble v. Hamilton, 31 Fla. 401; Knupp v. Brooks, 200 Pa. 494.

In Enslen v. Allen, 160 Ala. 529, an agent authorized to manage property, collect rents, etc., arranged and hastened the foreclosure of an outstanding mortgage, and bought in the property at the sale. *Held*, that the agent was constructive trustee for the principal.

That agency involving payment of taxes may be found from conduct and circumstances and the presumed continuance of prior agency. See Siers v. Wiseman; Gamble v. Hamilton; Knupp v. Brooks, *supra*.

[92] Ellsworth v. Cordrey, 63 Iowa, 675; Collins v. Rainey, 42 Ark. 531; Woodman v. Davis, 32 Kan. 344.

will an agent employed to loan money on mortgage securities, and owing a duty to look after and supervise such loans, and collect and remit installments of principal and interest, be permitted to undermine the securities so taken by buying, for himself or another, the mortgaged property at tax sales.[93]

§ 1217. ——— The mere fact that the principal has not furnished the agent with the money with which to pay the taxes, makes no difference,[94] nor will the neglect of the principal to reimburse the agent for money expended in such a purchase, authorize him to acquire and hold the title, unless he has first made a full and complete renunciation of his agency.[95]

Where the agent was supplied with funds, either directly or through collections, etc., in his hands, and available for the purpose, with which to pay the taxes, the principal may compel a cancellation or conveyance without tendering to the agent the amount paid by him;[96] but, where the agent was not so supplied, a tender of reimbursement is essential.[97]

For reasons similar to those which apply to the tax case, an agent employed to do the annual assessment work on a mining claim, will not be permitted, after having thus lulled his principal into a sense of security, to defeat his interests by omitting to do the work and thereby causing his principal's claim to lapse, and then relocating the mine in his own name and on his own account.[98]

[93] Abrams v. Wingo (Kan. App.), 59 Pac. 661; Dana v. Duluth Trust Co., 99 Wis. 663; Bush v. Froelich, 14 S. D. 62; Gonzalia v. Bartelsman, 143 Ill. 634.

[94] Bowman v. Officer, 53 Iowa, 640; Page v. Webb (Ky.), 7 S. W. 308.

[95] Bowman v. Officer, *supra;* McMahon v. McGraw, 26 Wis. 614; Krutz v. Fisher, 8 Kan. 90.

But in Eckrote v. Myers, 41 Iowa, 324, where an attorney was retained to foreclose a mortgage and in so doing expended money for necessary fees which the client not only refused to pay, but made no response whatever to repeated demands, it was held that the attorney, after a lapse of three years, was entirely justified in purchasing the property at a tax sale and that the client could not, seven years subsequently, have the deed set aside.

Although an attorney employed to collect a note may be liable in damages for not properly docketing a judgment so as to make it a lien upon the debtor's land, he is not, because of such negligence, to be charged as a trustee if, after the termination of the relation and the death of the client, he buys the land at a tax sale. Farrand v. Land & River Impr. Co., 30 C. C. A. 128, 86 Fed. 393.

[96] Fox v. Zimmerman, 77 Wis. 414, 46 N. W. 533; Dana v. Duluth Trust Co., 99 Wis. 663, 75 N. W. 429; Young v. Goodhue, 106 Iowa, 447, 76 N. W. 822.

[97] Bush v. Froelich, 14 S. D. 62, 84 N. W. 230.

[98] Argentine Mining Co. v. Benedict, 18 Utah, 183, 55 Pac. 559; O'Neill v. Otero, 15 N. M. 707, 133 Pac. 614.

§ 1218. Agent may not acquire adverse rights in principal's property confided to his care.—The rule stated in the preceding section may be given a still wider range. For, it is well settled that the agent may not, during the continuance of his agency, acquire adverse rights in the property or interests of his principal which were confided to his care and which would be defeated or impaired by the enforcement of the interest acquired by the agent. To hold otherwise is to say that an agent, who has undertaken a duty with reference to certain interests of his principal, may practically render the performance of that duty impossible by acquiring for himself that which formed the occasion and foundation of it. Even though there may be no specific duty like that to pay taxes, referred to in the preceding section, the general duty to protect his principal's property, and to be loyal to his interests, requires that any acquisition of outstanding rights or interests in the principal's property concerning which the agent has undertaken a duty, the performance of which would be inconsistent with the agent's claims, shall be deemed to have been made on the principal's account, and the principal may have the benefit on reimbursing the agent for his outlay.[99]

§ 1219. ——— Thus, as stated in the preceding section, the agent authorized to sell, care for, or manage his principal's lands or securities will not be permitted to acquire and hold adverse tax titles, even though he was not charged specifically with the duty to pay taxes.[100] So an agent authorized to manage and sell lands will not be permitted to acquire a title to them by bidding them in at a mortgage sale.[1] Nor, as has been seen, will an agent whose duty it is to buy up and remove an outstanding claim against his principal's title, be permitted to buy it in his own name and enforce it against his principal.[2] Nor can an agent employed to settle a debt against his

[99] Robertson v. Chapman, 152 U. S. 673, 38 L. Ed. 592; Dana v. Duluth Trust Co., 99 Wis. 663; Bush v. Froelich, 14 S. Dak. 62; Abrams v. Wingo, 9 Kan. App. 884; McKinley v. Williams, 20 C. C. A. 312, 74 Fed. 94.

An agent to rent lands and have the care of the property cannot make himself a tenant of any part of the land or the owner of a crop grown thereon without his principal's consent. Paige v. Akins, 112 Cal. 401; Moneta v. Hoffman, 249 Ill. 56.

[100] Dana v. Duluth Trust Co., 99 Wis. 663; Bush v. Froelich, 14 S. Dak. 62; Abrams v. Wingo, 9 Kan. App. 884.

[1] Adams v. Sayre, 70 Ala. 318.

Agent owing duties to acquire, sell or manage a mining claim will not be permitted to relocate it for himself. Largey v. Bartlett, 18 Mont. 265; Fisher v. Seymour, 23 Colo. 542; Lockhart v. Rollins, 2 Idaho, 503.

[2] Smith v. Brotherline, 62 Pa. 461; Case v. Carroll, 35 N. Y. 385; Witte v. Storm, 236 Mo. 470.

principal, be permitted to take an assignment of it to himself and enforce it against his principal.[3]

So, if an agent discovers a defect in his principal's title, he cannot use it to acquire a title for himself; and if he does so, he will be deemed to be a trustee holding for his principal.[4]

If an agent wishes to acquire such a title, he must first make an unambiguous relinquishment of his agency,[5] and if any doubt exists as to whether he had done so, it will be solved in the principal's favor.[6]

§ 1220. These rules cannot be defeated by usage.—The law will not permit these important safeguards to be easily defeated. Hence it has been held that the rule that an agent who undertakes to act for his principal may not, without the latter's consent, in the same matter act for himself, cannot be avoided upon the authority of any local or temporary usage of which the principal was ignorant and which he had no reason to anticipate.[7]

§ 1221. Agent may purchase, sell, etc., with principal's consent.—It is not to be inferred, however, that there is any inherent incapacity in an agent to purchase from his principal or to sell to him. Where the facts are fully disclosed, and the agent acts in good faith, taking no advantage of his situation, the principal may, if he sees fit, deal with the agent as with any other person.[8]

The same thing is true where the question is as to the capacity of the agent to buy for himself that which it would ordinarily be his duty to buy for his principal. If the principal, with full knowledge, consents to it, there can be no objection.[9]

But, as is said in a recent case,[10] "while a transaction of the character disclosed is not necessarily voidable at the election of the prin-

[3] Reed v. Norris, 2 My. & C. 361.

[4] Ringo v. Binns, 10 Pet. (U. S.) 269, 9 L. Ed. 420; Vallette v. Tedens, 122 Ill. 607, 3 Am. St. Rep. 502.

[5] Continental L. Ins. Co. v. Perry, 65 Iowa, 709.

[6] Fountain Coal Co. v. Phelps, 95 Ind. 271.

[7] Butcher v. Krauth, 14 Bush (Ky.), 713; Ferguson v. Gooch, 94 Va. 1; Robison v. Mollett, L. R., 7 H. of L., 802; reversing same case, L. R., 5 C. P. 646, and L. R., 7 C. P. 84; Commonwealth v. Cooper, 130 Mass. 285; Farnsworth v. Hemmer, 1 Allen (Mass.), 494, 79 Am. Dec. 758; Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168; Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66; Bartram v. Lloyd, 88 L. T. 286.

See also Van Dusen-Harrington Co. v. Jungeblut, 75 Minn. 298, 74 Am. St. R. 463, where a custom of the particular market was held to justify it.

[8] Rochester v. Levering, 104 Ind. 562; Fisher's Appeal, 34 Pa. 29; Uhlich v. Muhlke, 61 Ill. 499; Burke v. Bours (Cal.), 26 Pac. 102.

[9] American Mortgage Co. v. Williams, — Ark. —, 145 S. W. 234.

[10] Rochester v. Levering, *supra*, citing: McCormick v. Malin, 5 Blackf. (Ind.) 509, 522; Cook v. Burlin, etc., Co., 43 Wis. 433; Porter v. Woodruff,

cipal, a court of equity, upon grounds of public policy, will nevertheless subject it to the severest scrutiny. Its purpose will be to see that the agent, by reason of the confidence reposed in him by the principal, secures to himself no advantage from the contract. When the transaction is seasonably challenged, a presumption of its invalidity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the strictest of faith imparted to his principal all the information concerning the property possessed by him. The confidential relation and the transaction having been shown, the *onus* is upon the agent to show that the bargain was fair and equitable; that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property; and that there was no suppression or concealment which might have influenced the conduct of the principal."

If, therefore, it does not appear that the principal was fully informed,[11] and *a fortiori* where the agent has practiced concealment, evasion, or misrepresentation, the transaction cannot stand.[12]

36 N. J. Eq. 174; Young v. Hughes, 32 N. J. Eq. 372; Farnum v. Brooks, 9 Pick. (Mass.) 212; Moore v. Mandlebaum, 8 Mich. 433.

[11] The burden is upon the agent to show that the principal had knowledge and gave his free consent. Tyler v. Sanborn, 128 Ill. 136, 15 Am. St. Rep. 97, 4 L. R. A. 218; Webb v. Marks, 10 Colo. App. 429; Rubidoex v. Parks, 48 Cal. 215; Alwood v. Mansfield, 59 Ill. 496; McKinley v. Williams, 74 Fed. 94, 20 C. C. A. 312; Boyd v. Jacobs, 7 Tex. Civ. App. 131; Wells v. Cochran, 84 Neb. 278; Ingle v. Hartman, 37 Iowa, 274; Green v. Peeso, 92 Iowa, 261; and cases cited in preceding note.

Purchase by agent who was not agent to sell.—In Collar v. Ford, 45 Iowa, 331, it was held that a person who had been requested by a nonresident owner of land to ascertain and report the amount of taxes due upon it, did not thereby become such an agent that, if he bought the land, he was bound to disclose its value. (See comments in Green v. Peeso, 92 Iowa, 261.)

And in Douglass v. Lougee, 147 Iowa, 406, it is held that one who was merely agent to lease and collect rents was not obliged, on buying the property of his principal, to disclose to the principal what he knew about its value. But this case is not very convincing, to say the least.

[12] Jansen v. Williams, 36 Neb. 869, 20 L. R. A. 207; Van Dusen v. Bigelow, 13 N. D. 277, 67 L. R. A. 288; Rogers v. French, 122 Iowa, 18; Clark v. Bird, 66 App. Div. (N. Y.) 284; McKinley v. Williams, *supra*.

An agent for sale of lands, by misrepresenting to his principal the value and prospect of sale, secured conveyance to himself of land and crops for much less than value. *Held*, sale may be set aside. Green v. Peeso, 92 Iowa, 261, relying particularly upon Savage v. Savage, 12 Ore. 459, and Rochester v. Levering, 104 Ind. 562.

See also Fisher v. Lee, 94 Iowa, 611, where sale to agent was set aside because he had not disclosed all the facts affecting value. So in Cornwell v. Foord, 96 Ill. App. 366, where agent purchased, not disclosing better offers which he had received.

§ 1222. Principal may ratify act.—It is not infrequently said, in discussing the questions now under consideration, that the agent's act is void. No more is meant by this, however, than that the act is voidable at the principal's election. The rule is designed for the principal's protection, and, like other similar rules, its benefit may be waived if the principal sees fit to do so.[13] If he is satisfied with the act, after full knowledge, no one else can complain. He may expressly approve and enforce the contract against the agent; or here, as in other cases, his ratification may be presumed if he does not repudiate it within a reasonable time after the facts come to his knowledge.[14]

It does not lie in the agent's mouth to say, when his principal elects to stand by the contract, that the contract was void because of his own default or breach of duty.

§ 1223. Gratuitous agents—Volunteers.—The fact that the agent acted gratuitously makes no difference in the application of these rules.[15] Neither does the fact that he was a volunteer whose services had been accepted.[16] In either case if he undertakes to act as agent, he must act with loyalty to the principal's interest. He must, however, actually be agent; otherwise no confidential relation will arise.[17]

§ 1224. Profits made in the course of the agency belong to the principal.—The well settled and salutary principle that a person who undertakes to act for another shall not, in the same matter, act for himself, results also in the other rule, that all profits made and advantage gained by the agent in the execution of the agency belong

[13] Boyd v. Jacobs, 7 Tex. Civ. App. 131; Bartelson v. Vanderhoff, 96 Minn. 184.

[14] Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. Ed. 482; Eastern Bank v. Taylor, 41 Ala. 72; Bassett v. Brown, 105 Mass. 551; Disbrow v. Secor, 58 Conn. 35; Wenham v. Switzer, 51 Fed. 351; U. S. Rolling Stock Co. v. Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am. Rep. 380; Anderson v. First Nat. Bank, 5 N. Dak. 451.

But full knowledge of the facts is indispensable. Boyd v. Jacobs, 7 Tex. Civ. App. 131, and long silence will not amount to a ratification where there was neither actual knowledge nor anything to arouse suspicion. Barnett v. Daw, 55 N. Y. App. Div. 202.

But where the principal with knowledge refuses to act while the matter is still executory, he cannot afterward complain. Bartelson v. Vanderhoff, 96 Minn. 184.

[15] Hunsaker v. Sturgis, 29 Cal. 142; Bergner v. Bergner, 219 Pa. 113; Rankin v. Porter, 7 Watts (Pa.), 387; Smitz v. Leopold, 51 Minn. 455; Thalman v. Canon, 24 N. J. Eq. 127; Battelle v. Cushing, 21 D. C. 59; Marshall v. Ferguson, 94 Mo. App. 175; Criswell v. Riley, 5 Ind. App. 496.

[16] Salisbury v. Ware, 183 Ill. 505; Dennis v. McCagg, 32 Ill. 429; Watson v. Steel Co., 15 Ill. App. 509; Kevane v. Miller, 4 Cal. App. 598; Satterthwaite v. Loomis, 81 Tex. 64. But compare Walton v. Dore, 113 Iowa, 1, cited *post*, § 1235.

[17] Brinson v. Exley, 122 Ga. 8; Walton v. Dore, *supra*.

to the principal. And it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent if it be the fruit of the agency. If his duty be strictly performed, the resulting profit accrues to the principal as the legitimate consequence of the relation; if profit accrues from his violation of duty while executing the agency, that likewise belongs to the principal, not only because the principal has to assume the responsibility of the transaction, but also because the agent cannot be permitted to derive advantage from his own default.[18]

It is only by rigid adherence to this rule that all temptation can be removed from one acting in a fiduciary capacity, to abuse his trust or seek his own advantage in the position which it affords him.

§ 1225. ——— It matters not how fair the conduct of the agent may have been in the particular case, nor that the principal would have been no better off if the agent had strictly pursued his authority, nor that the principal was not in fact injured by the intervention of the agent for his own benefit. The result is still the same. If the agent dealing legitimately with the subject-matter of his agency, acquires a profit; or if by departing from his instructions, he obtains a better result than would have been obtained by following them, the principal may claim the advantage thus obtained, even though the agent may have contributed his own funds or responsibility in producing the result. All profits and every advantage beyond lawful compensation, made by the agent in the business, or by dealing or speculating with the effects of his principal, though in violation of his duty as agent, and though the loss, if one had occurred, would have fallen on the agent, will, wherever they can be regarded as the fruit or the outgrowth of the agency, be deemed to have been acquired for the benefit of the principal.[19]

[18] See Graham v. Cummings, 208 Pa. 516; Humbird v. Davis, 210 Pa. 211, and cases cited in following note.

[19] Leake v. Sutherland, 25 Ark. 219; Forlaw v. Augusta Naval Stores Co., 124 Ga. 261; Jas. T. Hair Co. v. Dailey, 161 Ill. 379; Salsbury v. Ware, 183 Ill. 505; Snow v. Macfarlane, 51 Ill. App. 448; Lafferty v. Jelley, 22 Ind. 471; Ackburg v. McCool, 36 Ind. 478; Krhut v. Phares, 80 Kan. 515; Holmes v. Cathcart, 88 Minn. 213, 97 Am. St. R. 513, 60 L. R. A. 734; Snell v. Goodlander, 90 Minn. 533; Schick v. Suttle, 94 Minn. 135; Dodd v. Wakeman, 26 N. J. Eq. 484; Davoue v. Fanning, 2 Johns. (N. Y.) Ch. 252; Moore v. Moore, 5 N. Y. 256; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Dutton v. Willner, 52 N. Y. 312; Price v. Keyes, 62 N. Y. 378; Duryea v. Vosburgh, 138 N. Y. 621; Wilson v. Wilson, 4 Abb. (N. Y.) App. Dec. 621; Densmore v. Searle, 7 N. Y. App. Div. 45; Bartholemew v. Leech, 7 Watts (Pa.), 472; Simons v. Mining Co., 61 Pa. 202, 100 Am. Dec. 628; Coursin's Appeal, 79 Pa. 220; Graham v. Cum-

In such a case the principal may at his option compel the agent to account for or convey to him the profits thus acquired.[20] And even though the transaction was outside of the actual purview of the agency, yet if the agent at the time professed to act for the principal and in his behalf, the benefit of the transaction will inure to the principal.[21]

§ 1226. ——— Illustrations.—In accordance with this rule, where one who while pretending to act as the agent of the purchaser of certain real estate, was in reality acting as the agent of the seller, and received as his compensation from the seller a note given by the purchaser as part of the purchase price, it was held that he should be restrained from enforcing payment of the note, and that it should be delivered up and cancelled.[22]

And if the agent, while secretly negotiating a sale of his principal's land or other property to third persons for a large sum, by concealment of the facts as to the value and demand of the property, obtains from his principal a conveyance of it to himself for less than it is worth, and then conveys it to third persons, he will be held to account to his principal for the excess so received.[23]

mings, 208 Pa. 516; Moinett v. Days, 56 Tenn. (1 Baxter) 431; Ringo v. Binns, 10 Pet. (35 U. S.) 269, 9 L. Ed. 420; Sandoval v. Randolph, 222 U. S. 161, 56 L. Ed. 48; Keech v. Sandford, 3 Eq. Cas. Abr. (Eng.) 741; Hall v. Noyes, 2 Bro. Ch. (Eng.) 483; Crowe v. Ballard, 2 Bro. Ch. 117; York Buildings Co. v. McKenzie, 3 Paton (Scot.), 378; Herzfelder v. McArthur, [1908] Transv. L. R., S. C. 332.

[20] Greenfield Savings Bank v. Simons, 133 Mass. 415; Holman v. Holman, 66 Barb. (N. Y.) 222; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Dutton v. Willner, 52 N. Y. 312.

[21] Salsbury v. Ware, 183 Ill. 505; Dennis v. McCagg, 32 Ill. 429; Watson v. Union Iron & Steel Co., 15 Ill. App. 509.

[22] Moinett v. Days, 1 Baxt. (Tenn.) 431.

[23] Stoner v. Weiser, 24 Iowa, 434. Defendant undertook to act as agent for non-resident owners of land, supposed to be heavily encumbered with taxes and to be of small value. He assured them he would do for them "the same as he would for his own folks." Later he reported that he had an offer of $100 (probably mythical, the court thought) and advised plaintiffs to accept it. Acting on his advice, they did so, and, to facilitate the transfer as he claimed, made a deed to his wife. He sent the $100. The proposed sale did not go through, but defendant did not advise plaintiffs of this fact, and kept the deed. Two years later, he recorded this deed to his wife, and sold the land, which had greatly increased in value, to a *bona fide* purchaser for $6,588. Later he obtained from plaintiffs a new deed, without consideration, "to perfect the title of the purchaser" first reported. He did not advise plaintiffs of the new facts. *Held*, that he must account for the profits. Smits v. Leopold, 51 Minn. 455.

In Snell v. Goodlander, 90 Minn. 533, where the agent had taken in his own name the principal's contract to sell land, having represented to him that the real purchaser was buying also one-third of the standing crops, it was held that the agent was not

So if an agent who is authorized to sell land or other property at a given price, succeeds in realizing more than that price for it, the excess belongs to his principal;[24] or if, being authorized to purchase at a

entitled to the crops under the contract, after the land had been conveyed to the real purchaser.

So where an agent to buy land falsely represented that the seller insisted upon a deed to another lot owned by the principal and thereby secured the principal's signature to a deed made out to himself, it was held that the principal could set aside the deed. Calmon v. Sarraille, 142 Cal. 638.

An agent, having induced his principals to accept in exchange a piece of land which he grossly misrepresented as to value, secured that land, through confederates, and shared in the profits made by later trading of the land of the principals. *Held*, that the principals were entitled to the profits. Warren v. Burt, 7 C. C. A. 105, 58 Fed. 101.

See also, Duryea v. Vosburgh, 138 N. Y. 621; Prince v. Du Puy, 163 Ill. 417; Smith v. Tyler, 57 Mo. App. 668; Bain v. Brown, 56 N. Y. 285; Savage v. Savage, 12 Ore. 459; Northern Pacific R. R. Co. v. Kindred, 14 Fed. 77; Thompson v. Hallet, 26 Me. 141; Moseley v. Buck, 3 Munf. (Va.) 232, 5 Am. Dec. 508; Bell v. Bell, 3 W. Va. 183; Tate v. Aitken, 5 Cal. App. 505.

[24] Merryman v. David, 31 Ill. 404; Kerfoot v. Hyman, 52 Ill. 512; Lewis v. Dennison, 2 App. D. C. 387; Barbar v. Martin, 67 Neb. 445; Tilden v. Blackwell, 94 Ill. App. 605.

In Mulvane v. O'Brien, 58 Kan. 463, the stockholders of a corporation put their stock in the hands of the president with authority to sell at par. He so manipulated as to make a large profit. *Held*, that he must account to the stockholders for this profit.

In Merrill v. Sax, 141 Iowa, 386, the defendant was entrusted by a group of the stockholders, with the duty of selling their stock. He received an offer which his principals authorized him to accept. To facilitate the sale, the stock itself was assigned to the defendant. The defendant exacted from the purchaser a large bonus. *Held*, that he must account for this bonus and that the fact that the price was fixed, and that defendant acted gratuitously did not change the result.

See also, Graham v. Cummings, 208 Pa. 516, where the defendant was held to account for a large bonus which he had procured in selling out the stock of himself and the plaintiff to another corporation.

In Humbird v. Davis, 210 Pa. 311, several persons combined to raise a fund to buy a mine; the money was put in the hands of one of the group with authority to purchase. He bought and reported a purchase at a larger sum than, in fact, had been paid. *Held*, that the agent was bound to answer to his associates for this profit.

In Clifford v. Armstrong, — Ala. —, 58 So. 430, where the agent used the principal's bond of an insolvent company to pay the bonus required for refunding his own stock in the company, it was held that the new stock secured belonged entirely to the principal.

But in Illingworth v. De Mott, 59 N. J. Eq. 8, affirmed, 61 N. J. Eq. 672, it is held that if the agent of the seller fraudulently enters into the employment of the buyer, the latter, while he might rescind the contract or have an action against the agent for damages, can not recover from the agent the profits which the agent received from the seller. "To hold that the purchaser, defrauded by dishonesty of this kind in a person who assumed to act as his agent, can recover the profits fraudulently received as money which belongs to him as

given price, he makes the purchase for less;[25] or if being employed to settle a claim at a given sum, he obtains a reduction,[26] the amount saved belongs to the principal. The same thing is true where an agent to deal upon the best terms he can get, reports less favorable terms than those actually secured, and keeps the difference.[27]

So where the treasurer of a savings bank who was directed to sell certain rights for not less than a certain price, and to buy shares in a national bank with the proceeds, bought the rights for himself and others at the minimum price, although they could easily have been sold for more, it was held that he must account to his principal for the difference between the minimum price and the price for which they might have been sold.[28]

As has already been pointed out the fact that the agent acts gratuitously ordinarily makes no difference.[29]

§ 1227. ——— Further illustrations—Rebates, commissions, rewards, overcharges.—So where a purchasing agent secures from

principal, is to affirm as legal an agency which in its origin was illegal and dishonest. The remedy of the principal in such case is a rescission of the contract for fraud, or an action to recover the loss he has sustained by reason of the fraud. But he cannot recover as money belonging to him in his character as principal, the profits received by an agent who was the seller's agent, and afterwards fraudulently assumed to act as his agent."

[25] Bunker v. Miles, 30 Me. 431, 50 Am. Dec. 632; Kanada v. North, 14 Mo. 615; Dolinski v. First Nat. Bank, — Tex. Civ. App. —, 122 S. W. 276; Laurence v. Kilgore, 154 Cal. 310; Hutchinson v. Fleming, 40 Can. S. C. 134.

An agent to buy who, by misrepresentations to his principal as to the price asked by the seller, succeeds in getting a conveyance to himself and then selling to his principal at an advance, must account for the difference. Rorebeck v. Van Eaton, 90 Iowa, 82. To same effect see, Hindle v. Holcomb, 34 Wash. 336.

So where an agent permitted his principal to make an exchange of lands at a certain price, without informing him that the other party would take less for his land, and then bought the land given up by his principal from the other party on the basis of netting to the other party the lower price, thereby making a profit, it was held that the agent must account to the principal for that profit. Leonard v. Omstead, 141 Iowa, 485; White v. Leech (Iowa), 96 N. W. 709, is similar.

One who has undertaken to act as agent to purchase at not exceeding a certain price cannot then avail himself of a previous unexpired option and purchase the property himself at a less price, turn it over to his principal, and keep the difference as profit. Sandoval v. Randolph, 222 U. S. 161, 56 L. Ed. 142.

[26] *Ante*, § 467, and cases cited.

[27] Malden & Melrose Gas L. Co. v. Chandler, 211 Mass. 226; Sandoval v. Randolph, 222 U. S. 161, 56 L. Ed. 142 (where agent bought in Mexican money but reported in U. S. money).

[28] Greenfield Savings Bank v. Simons, 133 Mass. 415.

[29] Merrill v. Sax, 141 Iowa, 386; Smitz v. Leopold, 51 Minn. 455, and other cases cited, *ante*, § 1223.

those with whom his principal dealt, commissions in consideration of buying goods from them, the principal is entitled to recover from the agent the amount of the commissions thus received.[30]

Clearly, also, agents for the purchase of land or goods, or the letting of contracts, and the like, who have arranged with the sellers or bidders to increase the expected price and to pay to or divide with the agent this excess, may be compelled to account to the principal for the sums so received.[31]

In the former cases, where what the agent has received is money or property before then belonging to the other party, but which the law gives the principal the right to demand, the agent may be compelled to account for such property or money, but he cannot be charged as a trustee. In the latter cases, however, wherein the agent, through collusion with the other party, receives what was before the principal's property or money, he may be charged as a trustee, and the property or money may be followed as a trust fund.[32]

So money paid to the agents of the insured by the agents of the insurer, for taking out the insurance in the companies of the latter, belongs to the principal as a profit of the agency, even though the cost of the insurance to the principal was not thereby enhanced.[33]

And one who employs another to pursue and capture a horse thief and pays the person so employed for his services and expenses, will be entitled to receive a reward offered for the apprehension of the thief, which the agent earns by such apprehension.[34]

[30] Lister v. Stubbs, 45 Ch. Div. 1. See also, to same effect: Hay's Case, L. R. 10 Ch. 593; Archer's Case, [1892] 1 Ch. 322; Andrews v. Ramsay, [1903] 2 K. B. 635; Merrill v. Sax, *supra;* United States v. Carter, 217 U. S. 286, 54 L. Ed. 769; Findlay v. Pertz, 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188; Webb v. McDermott, 3 Ont. W. R. 365 (but see 5 id. 566).

The agent was also held to forfeit his commissions in several of these cases.

See also, Little v. Phipps, 208 Mass. 331, 34 L. R. A. (N. S.) 1046.

[31] United States v. Carter, 217 U. S. 286, 54 L. Ed. 769; Clinkscales v. Clark, 137 Mo. App. 12; Hogle v. Meyering, 161 Mich. 472; McMillan v. Arthur, 98 N. Y. 167; Weruth v. Lashmett, 82 Neb. 375.

An agent to trade land may be compelled to turn over "boot" money received from third party unless he satisfies the burden of proving that his principal with full knowledge consented. Wells v. Cochran, 84 Neb. 278.

[32] See Lister v. Stubbs, *supra;* United States v. Carter, *supra.* In Powell v. Jones, [1905] 1 K. B. 11, it is held that the principal cannot recover of the agent a commission which he has stipulated for but not yet received—at least, where the other party was not a party to the action.

[33] Patterson v. Missouri Glass Co., 72 Mo. App. 492.

[34] Montgomery County v. Robinson, 85 Ill. 174. In Mitchell v. Sparling,

§ 1228. ——— Profits must be fruits of the agency.—But in order to entitle the principal to the profits, they must, as stated, be the fruits of the agency. Of transactions outside the scope of the agency and not done as agent, the principal cannot demand the profits, nor charge the agent as a trustee. Even though the agent may have agreed not to do these outside acts, or that, if he did them, he would divide with his principal, he is not to be charged as a trustee. The remedy must be to recover damages for the breach of the contract.[35]

§ 1229. Whether principal entitled to agent's earnings.—Where the agent undertakes to give his entire time and energies to the principal's business, it will be a breach of duty for him, without the principal's consent, to use the time belonging to the principal in performing services for third persons.[36] If, nevertheless, the agent does so, the principal is clearly entitled to damages for any injury thereby caused to his business. Instead of damages, he is, it is held, entitled to receive what the agent has earned,[37] and may compel the agent to account to him for it.[38] But, as a universal rule, this may not be entirely free from doubt.[39]

3 Sask. L. R. 213, after an agent for the purchase of land had completed the purchase, the vendor gave the agent five acres of land. There was no proof of any agreement for it or of any corruption; nevertheless, the principal was allowed to recover the amount for which the agent had sold the five acres.

[35] Latta v. Kilbourn, 150 U. S. 524, 37 L. Ed. 1169; Sheppard Pub. Co. v. Harkins, 9 Ont. L. R. 504.

[36] Jackson v. Seevers, 115 Iowa, 370; Clarke v. Kelsey, 41 Neb. 766; Atlantic Compress Co. v. Young, 118 Ga. 868; Adams Express Co. v. Trego, 35 Md. 47; Gardner v. McCutcheon, 4 Beav. 534.

[37] Thompson v. Havelock, 1 Camp. 527; Stansbury v. United States, 1 Ct. of Cl. 123; Leach v. Hannibal, etc., R. R. Co., 86 Mo. 27, 56 Am. Rep. 408; Jaques v. Edgell, 40 Mo. 77.

[38] Jackson v. Seevers, *supra*; Clarke v. Kelsey, *supra*.

In Sumner v. Nevin, 4 Cal. App. 347, it is held that where an agent, under obligation to give his entire time to his principal, makes a contract for service with third persons, the principal may not compel an assignment of that contract to himself, or a holding of it in trust for himself, if it is based upon personal considerations; but he may compel the agent to account for his earnings under it.

Official salary received by agent.—An agent appointed postmaster through the efforts of the principal, and who maintains the postoffice in the principal's store without being charged for rent, heat or light, is, nevertheless, entitled, as against the principal, to the salary as postmaster. The law would not imply a contract that the principal should have the salary, and an express contract to that effect would ordinarily be opposed to public policy. Bailey v. Sibley Quarry Co., 166 Mich. 321.

[39] If the agent totally abandons the service and accepts service with some one else, the principal may have damages, but he could not recover the earnings in the new employment. If the agent remains in the service, but uses the principal's time to earn

Clearly, it would be a breach of duty for such an agent, without the principal's knowledge or consent, to carry on a business competing with the principal's, and thus to divert to himself the profits which otherwise might have accrued to the principal. If he does so, the principal may lawfully discharge him,[40] or may compel him to account for the profits of the business thus secretly carried on.[41]

Where, however, the other service is performed as a distinct undertaking, with the principal's knowledge and apparent consent, and especially where the principal is himself interested in having it performed, he will ordinarily not be permitted to recover the earnings.[42]

§ 1230. ——— **Work out of hours.**—Even if the rule were that the principal is entitled to the outside earnings of an agent who has undertaken to give him his entire time and effort, it would not, of course, apply to earnings made in time not fairly belonging to the principal, and in no way affecting his interests. As has been pointed out in one case,[43] there must, in practically every business, be seasons of leisure and circumstances under which the principal's business cannot be done. What the agent earns at such times, in no way competing with the principal, or injuring the service, the principal will not be entitled to recover.[44]

money for himself, the principal may certainly have damages, but may he, if he prefers, have the earnings? The reasons in favor of such a rule which seem strongest are the policy of the law to remove temptation from the agent to sacrifice the principal's interests to his own, and the difficulty under which the principal may labor in showing the loss to himself. Shall he be confined to the mere *pro rata* cost to him of the agent's time?

What would be said if the agent abandons the service for a day or two in order to do profitable work for some one else, and then resumes his original service? Shall the principal have the earnings or merely damages?

[40] Adams Express Co. v. Trego, *supra*.

[41] Where a manager of a company individually undertakes a contract which the company could and would have accepted, he must account to the company for the profits. Transvaal Cold Storage Co. v. Palmer, [1904] Transv. L. R. S. C. 4.

An agent under contract to sell only the goods of his principal, sold goods of his principal's competitors. *Held*, that he was liable to his principal for all the profits made on such sales. Nitedals Taendstikfabrik v. Buster, [1906] 2 Ch. 671; Reis v. Volck, 151 N. Y. App. Div. 613, 136 N. Y. Supp. 867.

[42] In Reid v. MacDonald, 4 Com. L. R. (Austra.), 1572, the plaintiff, who was manufacturer of ice making machines, employed defendant as manager, with the knowledge and without objection of plaintiff, the defendant promoted the formation of an ice skating rink company and became its consulting engineer. Through this connection, plaintiff was enabled to sell machinery to the skating rink company. When the work was completed, the latter company gave defendant for his services certain paid up shares in the company. Plaintiff claims these shares. *Held*, that he is not entitled to them.

[43] Geiger v. Harris, 19 Mich. 209.

[44] Hillsboro Nat. Bank v. Hyde, 7

§ 1231. ——— Gratuities.—So, the rule that all profits and advantage made by the agent in the course of his agency belong to the principal, does not apply to mere personal gratuities or gifts from third persons to the agent, which neither he nor the principal had any right to expect, and which did and could offer no inducement to the agent to violate his duty, although they were made in consideration of benefits incidentally derived from the performance of the agent.

This principle was applied where the agent of an insurance company had been presented with a sum of money by another company in recognition of the benefit the latter company had derived from an adjustment of a loss by the agent for his own company.[45]

N. D. 400; Jones v. Linde Refrig. Co., 2 Ont. L. R. 428.

And a clerk and book-keeper in an insurance office who, outside of business hours, and sometimes during business hours but with his employer's consent, performs the services of an accountant for a person other than his employer, may recover for such services. Wallace v. De Younge, 98 Ill. 638, 38 Am. Rep. 108. But see Atlantic Compress Co. v. Young, 118 Ga. 868.

An agent employed to give his full time to the purchase or leasing of property for his principal will not be allowed while so employed to take and keep title in himself unless he shows that he did so with the full knowledge and consent of his principal. Fox v. Simons, 251 Ill. 316.

[45] Aetna Ins. Co. v. Church, 21 Ohio St. 492. "Tips" given to an employee at a shoe polishing stand belong to him, and if he has mistakenly paid them over to the employer he may recover them back. Polites v. Barlin, 149 Ky. 376, 41 L. R. A. (N. S.) 1217; Zappas v. Roumeliote (Iowa), 137 N. W. 935. In The Blaireau, 2 Cranch (U. S.), 240, 2 L. Ed. 266, a master of a vessel was held not to be entitled to salvage awarded apprentices on the vessel. "The right of the master to the earnings of his apprentice, in the way of his business, or of any other business which is substituted for it, is different from a right to his extraordinary earnings which do not interfere with the profits the master may legitimately derive from his service. Of this latter description is salvage. It is an extra benefit, the reception of which does not deduct from the profits the master is entitled to from his service."

In Lamb Knit Goods Co. v. Lamb, 119 Mich. 568, an agent properly completed his undertaking. Later he received from the party with whom he had dealt as agent certain stock of the par value of $200, which was apparently given in recognition of a moral consideration arising out of other dealings. *Held*, that the principal was not entitled to it. To same effect, Ginn v. Almy, 212 Mass. 486.

In Gay v. Paige, 150 Mich. 463, agent was employed to go wherever directed to aid local agents in writing insurance. In an action by his employer to obtain a sum received by the agent from a certain solicitor, *held* that if it was a gratuity, given voluntarily and in good faith, agent might retain it. But in Mitchell v. Sparling, 3 Sask. L. R. 213, the principal was allowed to recover an alleged gratuity from the agent.

Property found by agent does not usually belong to principal. Burns v. Clark, 133 Cal. 634, 85 Am. St. Rep. 233, and cases.

Obviously, of course, the rule does not apply to gratuities received by the agent as his own, with the express or implied approval of the principal. If, for example, as seems to be common in these days, it is the expectation that a servant or agent shall receive part or all of his compensation in "tips" or gratuities from third persons, it could scarcely be contended that the principal or master has the right to demand them from the servant or agent. The established customs of the business, in accordance with which the parties have presumptively dealt, may work the same result.

§ 1232. Representing other principals—Exclusive service.—The amount of time which an agent is required to devote to his principal's interests in order to satisfy the requirement of loyalty, must, of course, depend upon the circumstances of the case. Where he has agreed to give his entire time, as in the cases referred to in the preceding sections, the rules applicable are those there considered. Where there is no such agreement, a general rule is difficult to state other than that there shall be a fair and reasonable devotion to the business of the principal. Loyalty on the part of an attorney does not require that the attorney shall refuse the business of any other client. A real estate agent may have many properties on his list and endeavor to sell all of them. An auctioneer need not spend his entire time in endeavoring to sell the goods of a single principal. A commission merchant or sales agent may receive and attempt to sell the goods of many principals. The mere fact that he is made the "exclusive" agent, or is given an "exclusive" territory, does not justify the inference that he is to give to any principal his entire time or effort.[46] On the other hand, a commercial traveler would not usually be deemed

[46] In Hichhorn v. Bradley, 117 Iowa, 130, the defendant was made sole distributor of a certain brand of plaintiff's cigars, and agreed to use his best efforts to promote the sale of them, but did not agree to give his exclusive efforts. Defendant was held not to have broken his contract by selling cigars of his own make while he was engaged in selling the cigars of the plaintiff.

In McGeehan v. Gaar, Scott & Co., 122 Wis. 630, plaintiff agent was given a territory in which he was to have exclusive right to sell defendant's threshing machines. Plaintiff was permitted to recover commissions for a sale made by an intruding agent, although plaintiff had before and during the term of employment been representing in like capacity other manufacturers of threshing machinery, and although in the very transaction for which commission is sought the plaintiff had also endeavored to sell a competitor's machine.

In Butterick Pub. Co. v. Boynton, 191 Mass. 175, the defendant dry goods merchants in consideration of being made "special agents" for distribution of plaintiff's patterns agreed: "to keep the patterns on the ground floor; to give proper attention to the sale of the patterns; to endeavor at all times to conserve the best interests of the agency; not to

justified in attempting to represent two or more houses in the same line, or even in carrying "side lines." In the former cases there is no contract for entire time, and the compensation usually takes the form of a commission. In the latter case there is usually a contract of hiring for a definite period, and the compensation is ordinarily a fixed salary.[47]

§ 1233. Remedies of the principal.—In most of the cases which have arisen in the field now being considered, the remedy which the principal has sought has been an equitable one, to rescind or set aside transfers, to obtain an accounting, or to charge the agent as a trustee. The principal's right to these remedies in a proper case is abundantly established, but there are other remedies also of which he may avail himself. And in cases in which specific property has been transferred to a *bona fide* purchaser, or has otherwise passed beyond recall, some other remedy is desirable. In practically every case wherein the principal has proximately suffered loss, the principal may sustain an action of tort against the agent based upon the latter's breach of duty.[48] In such an action he may join, as codefendants, third persons who have colluded or conspired with the agent to defraud the principal.[49] He may also recover back money which the agent has obtained from him in violation of his duty,[50] and where the agent has in his hands the

remove the stock from its original location nor to assign the agency." Defendants accepted the agency for a rival pattern company and plaintiff sought to enjoin defendants from selling any patterns except plaintiff's own. Injunction refused, "Conserving best interests" does not mean agreement not to act as agent for competitor.

In Amber Petroleum Co. v. Breech (Tex. Civ. App.), 111 S. W. 668, an agent who undertook to get "some" oil leases for a principal, and who obtained some for him but more for himself, was held not obliged to account for the latter.

[47] In Reis v. Volck, 136 N. Y. App. Div. 613, where a salesman on commission, who had agreed to give his exclusive services, sold a line of similar articles, it was held that the principal could recover the commissions earned on the competing line without proving special damage from the breach of contract.

[48] It is an actionable tort, for which the principal may recover damages, for a real estate broker to understate the purchaser's offer to the principal and appropriate the difference between the real offer and the offer as he stated it. Emmons v. Alvord, 177 Mass. 466. See also Pierce Co. v. Beers, 190 Mass. 199.

It is an actionable wrong for agent employed to purchase property at the lowest price obtainable, to misrepresent the price and retain the difference. Hindle v. Holcomb, 34 Wash. 336; Pouppirt v. Greenwood, 48 Colo. 405.

[49] Emmons v. Alvord, *supra;* Boston v. Simmons, 150 Mass. 461, 15 Am. St. Rep. 230, 6 L. R. A. 629; Rundell v. Kalbfus, 125 Pa. 123.

[50] McMillan v. Arthur, 98 N. Y. 167; Ritchey v. McMichael (Cal.), 35 Pac. 151; Kramer v. Winslow, 130 Pa. 484, 17 Am. St. Rep. 782.

proceeds of property wrongfully acquired and disposed of, the principal may waive the tort and recover as for money had and received to his use.[51] Where, before the principal can recover it, specific property to which the principal would be entitled has been conveyed by the agent or by his manipulation to a *bona fide* purchaser, so that the principal cannot recover it specifically, he may have compensation from the agent for its value.[52]

§ 1234. ——— In practically any case in which an action of tort for breach of duty might be maintained, an action of assumpsit could be used instead, based upon the theory that wherever a duty arises from the relation there is a promise, either implied in fact or created by mere operation of law, to perform that duty.[53]

[51] Chaliss v. Wylie, 35 Kan. 506.

[52] Moneta v. Hoffman, 249 Ill. 56; Dennis v. McCagg, 32 Ill. 429; Cornwell v. Foord, 96 Ill. App. 366.

[53] The syllabus in Reeside's Ex'r v. Reeside, 49 Pa. 322, 88 Am. Dec. 503, well shows the holdings of the court. It follows:

"1. Where a duty arises out of an implied undertaking to do an act requiring skill or fidelity, an action of *assumpsit* upon the special promise or an action upon the special case for the tort will lie for breach.

"2. If an agent who receives money from his principal to perform a certain trust wholly neglects to perform his duty and converts the money, he is liable to an action in form *ex delicto*, or to an action for money had and received to plaintiff's use.

"3. But neither action will lie against the agent for an alleged balance of moneys intrusted to be laid out in a special manner where he actually enters upon and performs the duties of his trusts; the remedy is by bill in equity or account render.

"4. The nature of the duty to be performed by the agent determines the form of action against him on the part of the principal: if the trust be to pay to him directly, then *assumpsit* is the proper action; but where it is one of outlay, requiring an exhibit of the sums expended, *assumpsit* will not lie until it be ascertained in an action of account render that a balance is due."

[The common-law action of account render is now obsolete in most states.]

Where an agent undertaking to sell the stock of a number of owners obtained a secret profit for himself, an action at law for money had and received may be maintained by each principal for his share, and he need not resort to equity. Graham v. Cummings, 208 Pa. 516.

(In this case, the court says that the "contract" is one arising *ex lege*.) But where several persons unite to create a joint fund which they put into the hands of an agent to buy property, all may unite in an action at law to recover a secret profit. Humbird v. Davis, 210 Pa. 311.

Where a sales agent makes sales to himself at a lower price than he was authorized to make them, under the false pretence that they were really made to a wholesale agent of the principal [which agent was entitled to a reduced rate] and there-

In practically any case, also, in which the agent has received money which equitably and in good conscience belongs to the principal, an action for money had and received might be maintained.[54]

In any case, also, in which the principal would have an action at law he may, instead of maintaining an action thereon as plaintiff, avail himself of it by way of defence if sued by the agent for compensation, reimbursement or the like.[55]

Moreover, as will be seen in a later section, the agent may often forfeit all right to compensation by his disloyalty; and, if the principal has paid him before discovering the facts, he may, upon discovery, maintain an action against the agent to recover back the amount so paid.[56]

It has been held in Illinois that where the principal has conveyed to the agent under such circumstances as to entitle the principal to rescind, he may do so by conveying to a third person, and that the latter may then maintain a bill against the agent to quiet the title.[57]

§ 1235. Agency must exist.—It must be constantly borne in mind that, in order to make the rules here dealt with applicable, the relation of agency must exist between the person claiming the benefit of the rule and the person against whom the rule is sought to be enforced.[58]

by induced the principal to receive lower payments than he was entitled to receive, the principal may maintain an action [in this case of contract with counts in tort] to recover the difference. Pierce Co. v. Beers, 190 Mass. 199.

[54] Sandoval v. Randolph, 222 U. S. 161, 56 L. Ed. 142; Reeside's Ex'r v. Reeside, *supra;* Graham v. Cummings, *supra;* Moore v. Petty, 68 C. C. A. 306, 135 Fed. 668; Boston Deep Sea Fishing Co. v. Ansell, 39 Ch. Div. 339.

"It would be a great scandal if a principal betrayed by his agent might not declare in *assumpsit* without relying upon fraud and deceit in an action for damages. * * * Neither is it contended that an agent who makes a secret profit in the execution of his agency may not be compelled to disgorge, and required to do so in an action upon an implied promise." Sandoval v. Randolph, *supra.*

See also McLain v. Parker, 229 Mo. 68.

[55] Shick v. Shuttle, 94 Minn. 135.

[56] See Little v. Phippa, 208 Mass. 331, 34 L. R. A. (N. S.) 1046; Andrews v. Ramsay, [1903] 2 K. B. 635; Myerscough v. Merrill, 12 Ont. W. R. 399; Webb v. McDermott, 3 Ont. W. R. 365; Pommerenke v. Bate, 3 Sask. L. R. 51; Hutchinson v. Fleming, 40 Can. Sup. Ct. 134. Many other cases are cited *post.*

[57] Prince v. Du Puy, 163 Ill. 417.

[58] Walton v. Dore, 113 Iowa, 1; Bartleson v. Vanderhoff, 96 Minn. 184; State v. State Journal Co., 75 Neb. 275, 9 L. R. A. (N. S.) 174, 13 Ann. Cas. 254.

In Walton v. Dore, *supra*, there was a judgment outstanding against plaintiff. The defendant, a stranger, proposed to buy it for plaintiff, saying he thought he could buy at a discount and would buy it as cheap as he could. Plaintiff "told him to go ahead and do so." Plaintiff gave

In general, with respect of interests acquired before the commencement of the agency, one will not be charged as a trustee, but such an interest may easily disqualify one from becoming an agent where such interest would conflict with interests of the principal; and the duty of disclosure may require that either interests or knowledge, acquired before the commencement of the agency, should be made known to the principal.[59]

With reference to what occurs after the agency is ended, it is, in general, true that the duty and responsibility of the agent terminate with the agency.[60] On the other hand, there is, as has been seen, a considerable class of cases in which it is held that an agent will not be permitted, after the termination of his agency, to take advantage of information which he acquired in a confidential capacity during the agency, respecting the principal's business, plans, or purposes, to obtain for himself rights or interests which he thus learned that the principal intended to acquire, and the acquisition of which by the agent would defeat the purposes of the principal. If the agent does so acquire them, he may be charged as trustee for the principal.[61]

defendant no money to pay for the judgment, did not promise to do so, and did not promise to take the judgment from defendant if he bought it. Defendant did buy it. Plaintiff seeks to have the benefit, upon reimbursing defendant. *Held*, that plaintiff is not entitled to it. There was no agency created, and defendant's promise to buy for plaintiff was without consideration. But compare this case with those cited *ante*, § 1223.

Agent or optionee.—In Robinson v. Easton, 93 Cal. 80, 27 Am. St. Rep. 167, where real estate agents were given authority to sell at a net price, to receive as commission all that they could get over that price, it was held that a contract of sale was made by them on their own account as purchasers and not as agents, and that they were under no duty to account for money received under it.

[59] In Larson v. Thoma, 143 Iowa, 338, a real estate broker who had a customer in view for a certain piece of land obtained employment from the owner, as agent to sell it. *Held*, that he was entitled to commissions for negotiating the sale. He was not the agent of the buyer, and he owed no duty to disclose to his principal the fact of his prospective buyer.

See also Pneumatic Weigher Co. v. Burnquist, 128 Iowa, 709, as to duties arising before the relation began.

[60] An agent to sell bought the land from his principal, and resold it next day at a profit. Principal was held not entitled to the profits, as the agent disclosed to his principal that he himself was buying, and had not obtained information of the purchaser, and had not opened negotiations for the second sale, until after his purchase from the principal. Rathke v. Tyler, 136 Iowa, 284.

[61] See *ante*, § 1210; Trice v. Comstock, 57 C. C. A. 646, 121 Fed. 620, 61 L. R. A. 176; Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609; Dennison v. Aldrich, 114 Mo. App. 700.

One person suggested to another that the latter act as the former's agent to get oil leases. The proposed agent took some of the former's

§ 1236 ——— **Other limitations.**—And not only must there be agency, but it must also be agency for the person who now claims protection as the principal.[62] Thus it has been held that the agent of one of two tenants in common cannot be charged as trustee for the other tenant, where he was not the agent of that tenant and his own principal consented to what he did.[63]

The agency also must be one which involves a duty having some reference at least to the subject-matter of the claim now made. If there be no agency, and hence no duty, with reference to that subject-matter, no duty of loyalty arises in respect of it, and no foundation of any rights growing out of that duty can be laid.[64]

§ 1237. ——— **Proof of the agency.**—That the agent was acting as such in the case in question, may be shown by the facts and circumstances, or result from the presumed continuance of a prior relation.[65]

Even though the alleged agent may contend that he never was, nor ever intended to be, agent in the transaction, his conduct, in leading the assumed principal to rely upon his undertaking to act as such, may estop him from denying it.[66] And where one who purports to act as

blanks and said "if he could he would get him some leases." He procured a number of leases, most of which he took in his own name and sought to keep; a few were taken in the principal's name. In an action by the principal to compel him to turn over the others. *Held*, that there was no exclusive agency and no duty to turn over all the leases. Amber Petroleum Co. v. Breech (Tex. Civ. App.), 111 S. W. 668.

[62] Illingworth v. De Mott, 59 N. J. Eq. 8, aff'd 61 N. J. Eq. 672.

[63] Hill v. Coburn, 105 Me. 437.

[64] In Kellogg Lumber Co. v. Webster Mfg. Co., 140 Wis. 341, the superintendent of a lumber company bought a tax title of land belonging to the company; it was not his duty to pay taxes. *Held*, that the act was not impeachable.

In Collar v. Ford, 45 Iowa, 331, it was held that a person who had been requested to ascertain and report to the owner, who lived in another state, the amount of taxes upon certain land did not thereby become such an agent that, upon buying the land of the principal, he owed him any duty to disclose its real value.

Douglass v. Lougee, 147 Iowa, 406, holds the same where one, who had been merely an agent to rent and collect rents, bought the land of the principal. *Sed quaere.*

[65] See Siers v. Wiseman, 58 W. Va. 340; Knupp v. Brooks, 200 Pa. 494; Gamble v. Hamilton, 31 Fla. 401.

[66] Walters v. Bray (Tex. Civ. App.), 70 S. W. 443; Siers v. Wiseman, *supra;* but in Brinson v. Exley, 122 Ga. 11, it was held that the principal could not maintain an action of deceit where the only agency possible was one by estoppel and where the conduct constituting the estoppel was negligent not fraudulent.

In Dennis v. McCagg, 32 Ill. 429, it is said that a volunteer agent is as much subject to the duties of the relation as any other agent, and many other cases are to the same effect. Salsbury v. Ware, 183 Ill. 505.

agent for a principal, receives a benefit intended for him, it is held that the principal may compel a transfer to himself.[67]

§ 1238. Against whom trust enforced.—As in other similar trusts, the trust in behalf of the principal, when such a trust exists, may be enforced, not only against the agent himself, but also against his heirs, creditors, legal successors, confederates and purchasers with notice.[68]

§ 1239. Principal must not have consented to, waived or condoned the act.—Finally, it must be observed that, in any case in which the principal complains of the misconduct or breach of loyalty of his agent, the principal cannot, even as against the agent, recover where he himself has consented to, waived or condoned the act. And where, while the whole matter still remains executory, he learns of the proposed act and does nothing to prevent it or even to object to it, he cannot afterwards, it is held, recover damages for it.[69] "To allow a person who has discovered the fraud, while the contract is still wholly executory, to go on and execute it, and then sue for the fraud, looks very much like permitting him to speculate upon the fraud of the

[67] Robertson v. Rawlins County, 84 Kan. 52. In Virginia Pocahontas Coal Co. v. Lambert, 107 Va. 368, 122 Am. St. Rep. 860, a person who was not agent, but who pretended to be agent of complainant to obtain from third persons conveyances of land, which they made because they supposed they were necessary to perfect titles previously conveyed by those persons to the complainant, was charged as a trustee *ex maleficio*, although it was held that there could be no ratification which would make him agent since he had not really acted as such. Rollins v. Mitchell, 52 Minn. 41, 38 Am. St. Rep. 519; and Hanold v. Bacon, 36 Mich. 1, were relied upon.

In Garvey v. Jarvis, 46 N. Y. 310, 7 Am. Rep. 335, it appeared that one Malcom had a judgment against Garvey. He offered to Garvey to discharge it for a certain sum less than its face, but Garvey did not accept. In this situation, it was alleged that defendant by falsely representing that he was a friend of plaintiff and acting for him, induced Malcom to assign the judgment to defendant for this smaller sum, and defendant then began to enforce the judgment against the plaintiff for the full amount. *Held*, that the only one who was injured was Malcom, and that plaintiff was not entitled to the benefit of the purchase.

[68] Trust enforced against heirs. Siers v. Wiseman, 58 W. Va. 340; Hudson v. Herman, 81 Kan. 627; Walters v. Bray (Tex Civ. App.), 70 S. W. 443.

Enforced against agent's widow to whom he had made a voluntary conveyance. Pansing v. Warner, 43 Wash. 531.

Against purchaser with notice. Young v. Iowa Protective Ass'n, 106 Iowa, 447.

Secret and roundabout purchase set aside. Carry v. King, 6 Cal. App. 568.

[69] Bartleson v. Vanderhoff, 96 Minn. 184. See also Webb v. McDermott, 5 Ont. W. R. 566.

other party. It is fraudulent to allow a man to recover for self-inflicted injuries." [70]

II.

NOT TO EXCEED HIS AUTHORITY.

§ 1240. Duty of agent not to exceed his authority.—It is the duty of the agent, in all of his acts and contracts, to keep within the limits of his authority, and he must, in general, indemnify his principal against the consequences of not doing so.[71] Where the failure to keep within the authority conferred upon him takes the form of a failure to obey instructions, the question is considered under a separate head;[72] where it takes the form of a negligence, that also is separately considered;[73] but there are many cases in which no specific instructions are given, and which can not be disposed of merely upon the ground of negligence in the execution of the authority and those are the cases which are considered here.

The measure of the authority as between the principal and third persons, as has already been seen in many places, is not by any means necessarily the measure as between the principal and the agent. To the actual authority as it exists between the latter, the principal may have added by his conduct. Personal estoppels may operate in favor of third persons which would not be available to the agent. Usages and appearances may as to third persons extend the apparent range of the authority to a point to which the agent knows it was not intended to go. The agent himself may also, in certain cases, by representations concerning extrinsic facts on which his authority depends, bind his principal even though in doing so he knowingly exceeds the authority with which he has actually been endowed.

§ 1241. Duty of principal to make clear extent of authority.—It is, of course, the duty of the principal, as between himself and his agent, to make clear to the latter the nature and extent of the authority he is to exercise. The principal usually takes the initiative; it is his will and his purpose which the agent is to execute; and the principal can ordinarily not complain that the agent has not kept within the scope of his authority if the principal himself has failed to make rea-

[70] Per Mitchell, J., in Thompson v. Libby, 36 Minn. 287.

[71] Pape v. Westacott, [1894] 1 Q. B. 272; Rush v. Rush, 170 Ill. 628; Holmes v. Langston, 110 Ga. 861.

[72] See *post*, § 1244 *et seq.*

[73] See *post*, § 1274 *et seq.*

sonably clear and certain what was the extent of the authority and the circumstances and conditions under which it was to be exercised.[74]

§ 1242. Duty of agent to know extent of authority.—It must also be the duty of the agent, ordinarily, to know the extent of his authority. Commonly there can be no excuse for not knowing. If there are doubts, the principal is usually where he can be communicated with, and the doubts may be removed. If new issues present themselves, the principal is ordinarily at hand to give new directions.

A number of considerations, however, may affect the matter. The authority may have been couched in ambiguous terms, and the ambiguity may not be patent. Emergencies may arise when the principal cannot be consulted. The proper construction of the authority may be uncertain, and may require expert or professional aid for its determination, which the agent cannot command.

The law, of course, in these cases will make no unreasonable requirements, much less impose impossible demands; and the agent will not be held responsible where he cannot be deemed at fault.

§ 1243. Liability of agent for exceeding his authority.—Where the agent, through a culpable failure to regard the limits set to his authority, has caused loss to his principal, he will be liable to the latter for the loss thereby sustained.[75] The measure of damages will ordinarily be the amount of the loss which is the natural and proximate result of the wrongful act complained of; but the circumstances may be such as to justify a recovery for other losses, if they can fairly be deemed to have been within the contemplation of the parties at the time the service was undertaken.

III.

TO OBEY INSTRUCTIONS.

§ 1244. Agent's duty to obey instructions.—It is also a fundamental duty of the agent to obey all of the reasonable and lawful instructions given him by his principal. That the agent shall, for the time being, put his own will under the direction of another, is one of the primary elements in the relation. It is the idea, the desire, the purpose, perhaps the mere whim or caprice of the principal, and not of the agent, that is to be executed; and it is ordinarily to be executed in the manner, although perhaps capricious, which the principal di-

[74] See *ante*, § 792.

[75] Pape v. Westacott, [1894] 1 Q. B. 272; Rush v. Rush, 170 Ill. 623; Cooper v. Cooper, 90 Neb. 209; Persons v. Smith, 12 N. Dak. 403.

rects. It is not within the province of the agent to call in question the prudence of the instructions, or to inquire as to the facts or motives which induced the principal to give them, provided the instructions are explicit and intelligible, and the principal furnishes him with the means necessary to execute them.[76] As said in one case,[77] "When an agent acts under a general authority, he is bound to act for his principal as he would act for himself; when he acts under a particular authority and for a special purpose he has no discretion. If he thinks fit to accept such a commission, he must perform that commission according to his duty."

§ 1245. Results of disobedience—Agent liable for losses caused by it.—It being thus the duty of the agent to obey the instructions of his principal, he should, in general, so long as the instructions are lawful, perform that duty and leave the consequences of performance to the principal. If he fails to perform, whether by exceeding, violating, or neglecting his instructions, he will, ordinarily, be liable to the principal for the loss sustained thereby, unless the violation has been waived or the wrongful act has been ratified.[78] The fact that the agent acted in good faith, or with the intention of benefiting the principal, is entirely immaterial.[79] Instructions may ordinarily be

[76] See Coker v. Ropes, 125 Mass. 577.

[77] Bertram v. Godfray, 1 Knapp Pr. C. 381.

So in Kraber v. Union Ins. Co., 129 Pa. 8, it was said, "Where an agent is charged with the performance of some particular duty or the conduct of some undertaking and is left without instructions as to the manner in which the work is to be done, he must exercise his own judgment in the premises, with good faith towards his principal. Porter v. Patterson, 15 Pa. 229; Conway v. Lewis, 120 Pa. 215, 6 Am. St. Rep. 600. But when the principal gives instructions, they are binding on the agent and he must follow them. He has no legal right to sit in judgment on the wisdom or the expediency of the directions that are given him. His duty as agent is to execute the orders of his principal, with reasonable promptness and with fidelity."

[78] Whitney v. Merchants Union Express Co., 104 Mass. 152, 6 Am. Rep. 207; Scott v. Rogers, 31 N. Y. 676; Wilts v. Morrell, 66 Barb. (N. Y.) 511; Adams v. Robinson, 65 Ala. 58; Dodge v. Tileston, 12 Pick. (Mass.) 333; Dickson v. Screven, 23 S. C. 212; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Frothingham v. Everton, 12 N. H. 239; Amory v. Hamilton, 17 Mass. 103; Harvey v. Turner, 4 Rawle (Pa.), 223; Brown v. Arrott, 6 Watts & S. (Pa.) 402; Blot v. Boiceau, 3 N. Y. 78, 51 Am. Dec. 345; Northern Assurance Co. v. Borgelt, 67 Neb. 282; Cave v. Lougee, 124 Ga. 135; McAnow v. Moore, 163 Mo. App. 598.

Infant agent—In Vasse v. Smith, 10 U. S. (6 Cranch) 226, it is held that infancy in the agent is a bar to liability for breach of instructions, but not for conversion.

See also *post*, Chapters on *Attorneys, Auctioneers, Brokers and Factors;* and see cases cited in notes to following section.

[79] Rechtsherd v. Bank, 47 Mo. 181; Dickson v. Screven, 23 S. C. 212.

obeyed at the risk of the principal; they will ordinarily be disobeyed at the risk of the agent.

§ 1246. ——— Where the agent refuses or neglects to follow the instructions given, one, or either, or both of two remedies may be open to the principal, as the peculiar circumstances of the case may determine. Thus if the disobedience be such as affects merely the *manner* of the execution but does not affect the *result*, and causes the principal no loss or injury, no substantial damages could be recovered from the agent, though he might be liable to nominal damages, unless the departure from the line marked out were so insignificant as to fall within the domain of the maxim *de minimis non curat lex*. The principal might, however, very properly refuse to longer continue the relation with an agent who habitually disregarded his instructions, even though no actual loss or injury had ensued.[80]

But if the disobedience be not such as affects the *manner* only, but results in actual loss or injury to the principal, the latter may, subject to the exceptions to be hereafter named, recover from the agent such substantial damages as he can show he has sustained by reason of such disobedience. He may also remove the agent from his trust.[81]

§ 1247. ——— **Illustrations.**—Thus if an agent who was instructed to collect a claim by the employment of certain methods, elects to pursue other methods and the claim is lost thereby, he will be liable for the loss, and it will be no defense that he used reasonable diligence in the prosecution of the claim according to the method of his own selection.[82]

So where an agent authorized to collect at a distant place, was instructed to remit the proceeds to his principal by express, but made the remittance by check of a third person who failed before payment, it was held that the loss must fall upon the agent;[83] and the same result was reached where such an agent, being instructed to send the money in fifty or one hundred dollar bills sent it in smaller bills, which were lost;[84] and where, being instructed to remit by draft, the agent sent the money in a letter which was lost.[85]

§ 1248. ——— So if, being instructed to ship goods at a certain time, or by a designated carrier, the agent ships at another time or by a different carrier, and loss thereby results, the agent will be liable.

[80] See *ante*, Chapter on *Termination of the Relation*.

[81] See *idem*.

[82] Butts v. Phelps, 79 Mo. 302.

[83] Walker v. Walker, 5 Heisk. (Tenn.) 425.

[84] Wilson v. Wilson, 26 Pa. St. 393.

[85] Foster v. Preston, 8 Cow. (N. Y.) 198; Kerr v. Cotton, 23 Tex. 411. See Buell v. Chapin, 99 Mass. 594, 97 Am. Dec. 58.

By pursuing his own notions in opposition to the express instructions of his principal, the agent will be held to have assumed the risks incident thereto and will be treated as an insurer of the goods.[86]

So if an agent is instructed and agrees to store goods in a warehouse for his principal at a particular place, but he stores them at another place, where, though without any negligence on his part, they are destroyed by fire, the agent will be responsible for their loss.[87]

§ 1249. ——— So if being expressly instructed to sell only to persons of undoubted responsibility, the agent sells to persons notoriously insolvent, the principal may recover of the agent for the loss thereby occasioned.[88] And in such a case it will be no defense to the agent that he acted in pursuance of an alleged custom among similar agents to rely upon the purchaser's statements as to his own responsibility, without making further inquiry.[89] But where the principal with knowledge of the facts has retained the notes taken by the agent for an unreasonable period, as for instance for two years, without complaint, he will not then be permitted to allege that the agent violated his instructions by selling to irresponsible parties.[90]

An agent instructed to sell for cash, who gives credit, or accepts a note or check payable, for example, the next day,[91] or ten days,[92] after the sale, will be liable for the loss, if the buyer does not pay or the drawer fails before the note or check can be paid.[93] And a local custom to give such credit,[94] or treat such checks as cash, will not avail him.[95]

He will also be liable where, being instructed not to deliver goods

[86] Johnson v. New York Cent. Transp. Co., 33 N. Y. 610, 88 Am. Dec. 416; Ackley v. Kellogg, 8 Cow. (N. Y.) 223.

See also, Buck v. Reed, 27 Neb. 67.

[87] Lilley v. Doubleday, 7 Q. B. Div. 510. The judges declined to consider whether he was liable for conversion; they treated it as a breach of contract.

[88] Robinson Machine Works v. Vorse, 52 Iowa, 207; Osborne v. Rider, 62 Wis. 235; Clark v. Roberts, 26 Mich. 506.

See also, Nichols v. Wadsworth, 40 Minn. 547; Tate v. Marco, 27 S. Car. 493; Robson v. Sanders, 25 S. Car. 116.

[89] Robinson Machine Works v. Vorse, *supra*.

[90] Piano Mfg. Co. v. Buxton, 36 Minn. 203.

[91] Hall v. Storrs, 7 Wis. 253.

[92] Harlan v. Ely, 68 Cal. 522.

[93] Pape v. Westacott, [1894] 1 Q. B. 272; Hall v. Storrs, *supra;* Harlan v. Ely, *supra;* Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467; Sheffield v. Linn, 62 Mich. 151.

An agent, authorized to sell his principal's land for money, who accepts bonds in payment, which afterwards prove worthless, is liable to the principal. Paul v. Grimm, 165 Pa. 139, 183 Pa. 330.

[94] Bliss v. Arnold, *supra*.

[95] Hall v. Storrs, *supra*.

until he receives payment or security, he permits the goods to be taken without either, whereby the principal sustains loss.[96]

If he be instructed not to sell for less than a certain price,[97] or to sell when the goods reach a certain price,[98] or to sell only in certain lots or quantities,[99] or to sell at a certain time,[1] and, without sufficient excuse, disobeys the instructions he will be liable to the principal for the resulting loss.

If the agent be instructed to take the goods for sale to a particular place or market, and does not take them at all, or takes them to a different place, he will be liable to the principal for a loss of market sustained, or for additional expense incurred.[2]

§ 1250. ——— An agent instructed to insure property, who neglects without sufficient reason to do so, or to give his principal timely information of his inability to effect the insurance, will be liable, if a loss occurs, for the full insurable value of the property less the amount of the premiums, unless the amount of insurance was limited to a less sum.[3] And where the agent of an insurance company was instructed by his principal to cancel a certain policy of insurance, but, without sufficient reason, delayed for a number of days to do so, in which time

[96] Case Threshing Machine Co. v. Folger, 136 Wis. 468.

But the agent would not be liable under the contract where the only sale made by him was made before he was appointed agent. Pneumatic Weigher Co. v. Burnquist, 128 Iowa, 709.

[97] Sargeant v. Blunt, 16 Johns. (N. Y.) 74; Dufresne v. Hutchinson, 8 Taunt. 117; Union Hardware Co. v. Plume Mfg. Co., 58 Conn. 219; Highland Buggy Co. v. Parker, 27 Ohio Cir. Ct. 115.

[98] Bertram v. Godfray, 1 Knapp, 381.

[99] Where a wholesale dealer consigned for sale a lot of about twenty-five tons of shells, with directions to sell at a certain price per ton for the "total consignment," the agent is not justified in selling four tons selected from the lot, even though he sells for more than the rate fixed, and the average value of the residue is not affected. By such a sale, which put it out of the agent's power to return the whole shipment, the agent was held to make himself liable for the whole shipment at the rate originally fixed. Levison v. Balfour, 34 Fed. 382.

Under a written contract to sell for the owner a team of horses with wagon and harness for a certain sum, and to forward the proceeds, less commissions and certain advances, within a certain time, the agent will be liable when he sells the horses to one person and the wagon and harness to another for sums aggregating less than the price fixed. Henry v. Buckner, 13 Colo. 18.

[1] Zimmerman v. Heil, 156 N. Y. 703.

[2] Fuller v. Ellis, 39 Vt. 345, 94 Am. Dec. 327.

[3] Park v. Hamond, 4 Camp. 344; Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645; DeTastett v. Crousillat, 2 Wash. (U. S. C. C.) 132; Thorne v. Deas, 4 Johns. (N. Y.) 84; Shoenfeld v. Fleischer, 73 Ill. 404; Sawyer v. Mayhew, 51 Me. 398; Kaw Brick Co. v. Hogsett, 73 Mo. App. 432.

See also Backus v. Ames, 79 Minn. 145.

the property was destroyed by fire and the company was compelled to pay the loss, it was held that the company could recover from the agent the amount so paid.[4] Other cases involving the same principle are cited in the notes.

§ 1251. ——— An agent to loan money with instructions to loan it to a particular person, or upon particular security, or upon stated terms, as to duration, rate of interest, and the like, must obey the instructions so given, and will be liable to the principal for any loss which he may proximately sustain by reason of their violation.[5]

So if, in taking security, he prejudices the principal by securing his own claim equally with that of the principal, and, *a fortiori,* if he gives preference to his own claim over that of the principal, he will be liable to the principal for any loss thereby sustained.[6] So where an agent, directed to foreclose a mortgage, and to purchase the property at the sale, unless third persons bid therefor a specified sum, permits the property to be sold for a less sum, he will be liable to the principal for the difference between the amount for which the property sold and its market value.[7]

§ 1252. ——— An agent for the purchase of goods of a certain sort who finds the purchase of such goods impracticable, is not thereby authorized, without having communicated with his principal, to purchase goods of an inferior sort; and if he does so he will be liable to his principal for a loss thereby sustained.[8]

[4] Phoenix Ins. Co. v. Frissell, 142 Mass. 513. See also to the same effect: Franklin Ins. Co. v. Sears, 21 Fed. 290; Kraber v. Union Ins. Co., 129 Pa. 8.

Same, where the instructions were to reduce the amount. Queen City F. Ins. Co. v. First Nat. Bank, 18 N. Dak. 603; British American Ins. Co. v. Wilson, 77 Conn. 559.

Same, where agent issued policy in violation of instructions and fraudulently failed to report it to the company. Continental Ins. Co. v. Clark, 126 Iowa, 274, citing many cases.

Agent held not liable where under ambiguous authority the company did not promptly direct cancellation. Mechanics Ins. Co. v. Rion (Tenn. Ch.), 62 S. W. 44.

See also, Franklin Fire Ins. Co. v. Bradford, 201 Pa. 32, 88 Am. St. R. 770, 55 L. R. A. 408, where an insurance agent was held liable for insuring a forbidden kind of property, through his sub-agent. In Bradford v. Hanover Ins. Co., 43 C. C. A. 310, 102 Fed. 48, 49 L. R. A. 530, the same agent was held not liable but upon the ground that the act of the sub-agent was not one for which he was responsible.

[5] Welsh v. Brown, 8 Ind. App. 421.

See also Bank of Owensboro v. Western Bank, 13 Bush. (Ky.) 526, 26 Am. Rep. 211.

[6] Marshall v. Ferguson, 78 Mo. App. 645, 94 Mo. App. 175, 101 Mo. App. 653.

See also, Knape v. Nunn, 81 Hun (N. Y.), 349 (aff'd 151 N. Y. 506); Lunn v. Guthrie, 115 Iowa, 501.

[7] Dazey v. Roleau, 111 Ill. App. 367.

[8] Lissberger v. Kellogg, 78 N. J. L. 85.

§ 1253. Form of action—When agent liable in trover.—The form of action in which the liability of the agent is determined is usually assumpsit or a special action on the case, but there are cases in which trover is the proper remedy, as where the conduct of the agent amounts to a conversion.

Conversion has been defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights.[9] A constructive conversion takes place when a person does such acts in reference to the goods of another as to amount in law to an appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or to interfere with the owner's dominion, is a conversion.[10]

In many cases it becomes difficult to determine whether the misconduct of the agent consists in a mere breach of instructions or amounts in law to a conversion; and the distinctions made in many cases seem to be exceedingly technical. A distinction is, nevertheless, to be made.

§ 1254. ——— Mere breach of instructions.—Thus it has been held that if property be delivered to an agent with instructions to sell it at a certain price, and he sells it for less than that price, he is not liable in trover as for conversion. In such a case the agent had a right to sell and deliver, and in that respect did no more than he was authorized to do. He disobeyed instructions as to price only, and was liable for misconduct but not for conversion of the property.[11] So where an agent was authorized to deliver goods on receiving sufficient security, but delivered them on inadequate security, it was held that trover would not lie.[12] So where an agent, instructed to sell for cash only, makes a sale on credit, it is held that there was a breach of instructions merely and not a conversion.[13] So where he is author-

[9] Adams v. Robinson, 65 Ala. 586; Myers v. Gilbert, 18 Ala. 467.

[10] Bouv. Law Dict. "Conversion;" Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184.

[11] Sarjeant v. Blunt, 16 Johns. (N. Y.) 74; Dufresne v. Hutchinson, 3 Taunt. 117; Palmer v. Jarmain, 2 M. & W. 282.

[12] Cairnes v. Bleecker, 12 Johns. (N. Y.) 300.

Text quoted with approval in Minneapolis Trust Co. v. Mather, 181 N. Y. 205.

[13] Loveless v. Fowler, 79 Ga. 134, 11 Am. St. R. 407. "Certainly not," the court added, "unless it appears that the purchaser had notice of the limitation in the agent's instructions." Clark v. Cumming, 77 Ga. 64, 4 Am. St. R. 72, was distinguished.

ized to sell, and is to account for the proceeds, it has been held that the mere failure of the agent to pay over or account to his principal, for the money received, will not constitute a conversion, since the agent is not bound to pay over the identical money received, and the transaction creates merely the relation of debtor and creditor between the agent and his principal.[14]

So where an agent, who is instructed to foreclose securities in his possession and, if necessary, bid in the property "for something near its present value," bids it in at an excessive price, so that the principal loses the benefit of any claim for deficiency, the agent is liable for the loss so sustained, but he is not liable as for a conversion of the securities.[15]

§ 1255. ——— **Conversion.**—On the other hand, where the agent has no right to debit himself with the proceeds, but the principal is entitled to receive, and the terms of employment of the agent require him to pay over, the very money received, and the agent fails to do so, it is held that an action of trover will lie for its conversion.[16]

So where a factor in Buffalo was directed to sell wheat at a certain specified price on a particular day, or if not so sold to ship to New York, and did not sell or ship it on that day, but sold it the next day at the price named, it was held to be a conversion.[17] So where an agent, intrusted with goods to sell when directed by his principal and account for the proceeds, wrongfully refuses to sell or account when directed, and wrongfully retains possession against the will of the principal, he is held liable for conversion.[18] So where goods were put into the custody of a bank to be delivered after a sale by the agent, only when the principal directed, and upon the actual receipt of the price by the bank, it was held that if the agent obtains possession of the goods without the consent of the principal and sells them for less than the

[14] Royce v. Oakes, 20 R. I. 418, 39 L. R. A. 845. See also, Borland v. Stokes, 120 Pa. 278; Vandelle v. Rohan, 36 N. Y. Misc. 239; Wright v. Duffie, 23 N. Y. Misc. 338; Greentree v. Rosenstock, 61 N. Y. 583; Walter v. Bennett, 16 N. Y. 250. But in New York, see now Britton v. Ferrin, 171 N. Y. 235, holding that where the money is received in a fiduciary capacity, an action of tort will lie under the code. See also, Jones v. Smith, 65 N. Y. Misc. 528.

[15] Minneapolis Trust Co. v. Mather, 181 N. Y. 205.

[16] Salem Light & Traction Co. v. Ansom, 41 Ore. 562; Farrelly v. Hubbard, 148 N. Y. 592.

See Bunger v. Roddy, 70 Ind. 26; Wells v. Collins, 74 Wis. 341, 5 L. R. A. 531.

This was held to be the situation here, where the defendant was agent to collect money due the plaintiff, but with no authority or duty except to turn it over to his principal.

[17] Scott v. Rogers, 31 N. Y. 676.

[18] Coleman v. Pearce, 26 Minn. 123. Laverty v. Snethen, *supra*, was relied upon.

price fixed, he is liable for conversion.[19] So where an agent who is entrusted with the possession of the property, but instructed not to sell until the price had been submitted to and approved by the principal, sells without such approval, he is held liable for conversion.[20]

§ 1256. ——— So where the plaintiff delivered to the defendant a promissory note to get it discounted, but with instructions not to let it go out of his hands without receiving the money; and the defendant, without wrongful intent, delivered it to F, who promised to get and return the money on it, but who, having obtained the money, appropriated it to his own use, it was held that the defendant was liable for the conversion of the note. The court said that the defendant had a right to sell the note, and if he had sold it for less than the price stipulated, he would not have been liable in trover, but he had no right to deliver it to F, to take away, any more than he had to pay his own debt with it.[21]

So where the principal entrusts money to an agent, to be loaned or invested by him in the principal's name, but the agent loans it in his own name and for his own benefit, he has been held liable for conversion.[22]

And so where an agent, who had collected money for his principal under directions to pay it to a third person, paid it neither to that person nor to the principal, but applied it to his own use, he was held liable for conversion.[23]

§ 1257. ——— **The rule stated—Intent immaterial.**—The result of the authorities may be said to be, that if the agent parts with the property in a way or for a purpose or upon an event not authorized, that is to say, if he makes a disposition of a kind not contemplated, or before his authority to make the disposition had matured,—as because a condition precedent had not been complied with,—or after it had

[19] Chase v. Baskerville, 93 Minn. 402.

[20] Comley v. Dazian, 114 N. Y. 161. "The agent," said the court, "did not simply depart from his instructions as to the manner of making the sale, but he had no right to sell at all until his principals had consented. His power to sell depended upon their consent, which he never received."

To like effect is Kennedy v. State Bank, — N. Dak. —, 132 N. W. 657, where an agent (the bank) was said to be liable in conversion for delivering a draft without receiving a deed and abstract showing good title.

[21] Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184. "If one man who is intrusted with the goods of another, put them into the hands of a third person contrary to orders, it is a conversion." Syeds v. Hay, 4 T. R. 260. Same point, Spencer v. Blackman, 9 Wend. (N. Y.) 167.

[22] Farrand v. Hurlbut, 7 Minn. 477.

[23] Wells v. Collins, 74 Wis. 341, 5 L. R. A. 531. See Kidder v. Biddle, 13 Ind. App. 653.

expired, he is liable for a conversion; but if he parts with it in accordance with his authority, that is to say, if he makes the very disposition of it that he was authorized to make, but makes it in a different manner, as where he sells it at a less price, or takes inadequate security, and *a fortiori* where the default was merely in the performance of that which he was to do after the disposition had been made, as where he misapplies the proceeds, he is not liable for a conversion of the property, but only in an action for damages on account of the misconduct.[24]

In such cases the question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is enough if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it.[25]

§ 1258. How when agency is gratuitous.—The rules heretofore laid down are those which apply to cases where the service is to be performed for a reward. Where, however, the service is to be gratuitous (meaning by gratuitous here, not merely where no compensation is to be paid, but where there is no other consideration to support a contract), certain other considerations become important.

If in such a case the agent refuses to enter upon and perform the service at all; if his default consists in the mere not doing of a thing which he had promised to perform, and it be not a case where the *law* imposes upon him the duty to perform it, the fact that the performance was to be gratuitous, that the promise to perform was entirely with-

[24] Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184. "Trover," says Bronson, J., "may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of the conversion may be made out by showing either a demand and refusal, or that the agent has without necessity sold or otherwise disposed of the property contrary to his instructions. Where an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own and may be treated as a tort feasor." McMorris v. Simpson, 21 Wend. (N. Y.) 610. See also, Galbreath v. Epperson (Tenn.), 1 S. W. 157.

In Comley v. Dazian, 114 N. Y. 161, *supra*, where the agent's instructions were not to sell until the price had been approved by the principal, the court said that the agent "did not simply depart from his instructions as to the manner of making the sale, but he had no right to sell at all until his principals had consented. His power to sell depended upon their consent, which he never received. His authority was limited to negotiating a sale, subject to their approval as to price and until that approval was obtained, he had no right to complete the sale or deliver the property. An unauthorized sale of personal property, with delivery of possession is a conversion."

[25] Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184; Scott v. Rogers, 31 N. Y. 676.

out consideration, will furnish a complete defense to a claim for damages on account of such default.[26] This is upon the familiar ground that the non-performance of a gratuitous executory contract constitutes no cause of action.

But where, on the other hand, the agent has entered upon the performance of the service, although it be gratuitous, it then becomes his duty to conform to the instructions given. If he were not willing to do so, he should have declined to serve; but having entered upon the performance of the service, he must obey instructions, and a failure to do so, will subject him to liability for the loss or damage occasioned thereby.[27]

§ 1259. Exceptions to rule requiring obedience.—This rule which requires adherence to the instructions of the principal is subject to certain exceptions, growing out of the nature of the duty to be performed, or the necessities or circumstances of the case. Thus—

§ 1260. ——— Agent not bound to perform illegal or immoral act.—The law will not lend its sanction to the commission of an illegal or immoral act. An agent therefore cannot be held responsible for the disobedience of instructions which required the performance of an act illegal or immoral in itself, or opposed to public policy or one whose natural and legitimate result would be of that nature.[28]

[26] Balfe v. West, 13 C. B. 466, 22 Eng. L. & Eq. 506; Elsee v. Gatward, 5 T. R. (Eng.) 143; Thorne v. Deas, 4 Johns. (N. Y.) 84; Spencer v. Towles, 18 Mich. 9; McGee v. Bast, 6 J. J. Marsh. (Ky.) 453; Fellowes v. Gordon, 8 B. Monroe (Ky.), 415.

See Nixon v. Bogin, 26 S. C. 611; Benden v. Manning, 2 N. H. 289.

[27] Passano v. Acosta, 4 La. 26, 23 Am. Dec. 470; Williams v. Higgins, 30 Md. 404; Short v. Skipwith, 1 Brock. (U. S. C. C.) 103, Fed. Cas. No. 12,809; Walker v. Smith, 1 Wash. (U. S. C. C.) 152, Fed. Cas. No. 17,086; Spencer v. Towles, 18 Mich. 9; McGee v. Bast, 6 J. J. Marsh. (Ky.) 453; Fellowes v. Gordon, 8 B. Monroe (Ky.), 415; Marshall v. Ferguson, 94 Mo. App. 175; Criswell v. Riley, 5 Ind. App. 496; Battelle v. Cushing, 21 D. C. 59.

Thus if a person undertakes, even voluntarily and gratuitously, to invest money for another, and disregards positive instructions given as to the specific character of the security to be taken, he is liable if the investment should fail on that account. Williams v. Higgins, 30 Md. 404. But where agency is gratuitous, an agent is not liable for not collecting without proof of negligence. Nixon v. Bogin, 26 S. C. 611.

In Baxter v. Jones, 6 Ont. L. R. 360, an insurance agent gratuitously undertook the care of plaintiff's insurance, and, in one instance, to get an increase of insurance; when this increase was obtained, plaintiff directed the agent to give notice thereof to other companies in which the plaintiff was insured, and which the agent represented. The agent did not give proper notices; and the plaintiff failed to recover on certain policies. *Held*, that the agent was liable.

[28] Brown v. Howard, 14 Johns. (N. Y.) 119; Davis v. Barger, 57 Ind. 54; Elmore v. Brooks, 6 Heisk. (Tenn.) 45.

§ 1261. ——— **Agent not bound to imperil his own security.**—So an agent, for example, a factor, who has made advances to his principal, or incurred obligations for him, upon the security of the principal's goods or property in the agent's possession, is not obliged to obey instructions to sell or otherwise dispose of the property in such a way as to imperil his security, if the principal fails to reimburse or indemnify him or to furnish him with other acceptable security.[29]

§ 1262. ——— **Departure from instructions may be justified by sudden emergency.**—Another exception to this rule is based upon the necessities of the case, as where, without the agent's fault or neglect, some sudden emergency or supervening necessity arises, or some unexpected event happens, which will not admit of delay for communication or consultation with the principal, and a literal adherence to instructions becomes impossible or would defeat the very object sought to be attained. In such a case if the agent, exercising prudence and sound discretion, in good faith adopts the course which seems best under the circumstances as then existing, he will be justified although subsequent events may demonstrate that some other course would have been better.[30]

Clearly, of course, if the performance of the agency in any way becomes wholly impossible, without the agent's fault, he will be excused.[31]

§ 1263. ——— The English cases [32] manifest a tendency to limit the doctrine rather more narrowly, perhaps, than the American. The

[29] See *post*, Book V, Chap. IV.

[30] See Milbank v. Dennistoun, 21 N. Y. 386; Greenleaf v. Moody, 13 Allen (Mass.), 363; Williams v. Shackleford, 16 Ala. 318; Bernard v. Maury, 20 Gratt. (Va.) 434; Jervis v. Hoyt, 2 Hun (N. Y.), 637; Shipmaster's, supercargoes and other similar cases. Forrestier v. Bordman, 1 Story (U. S. C. C.), 43, Fed. Cas. No. 4,945; Judson v. Sturges, 5 Day (Conn.), 556; Goodwillie v. McCarthy, 45 Ill. 186; Catlin v. Bell, 4 Camp. 183; Foster v. Smith, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; Dusar v. Perit, 4 Binn. (Penn.) 361; Drummond v. Wood, 2 Cai. (N. Y.) 310; Lotard v. Graves, 3 Cai. (N. Y.) 226; Lawler v. Keaquick, 1 Johns. Cas. (N. Y.) 175; Gould v. Rich, 7 Metc. (Mass.) 538.

Cases involving other agents. Greenleaf v. Moody, 13 Allen (Mass.), 363; Bartlett v. Sparkman, 95 Mo. 136, 6 Am. St. Rep. 35; Milbank v. Dennistoun, 21 N. Y. 386; Jervis v. Hoyt, 2 Hun (N. Y.), 637; Harter v. Blanchard, 64 Barb. (N. Y.) 617; Perez v. Miranda, 7 Martin N. S. (La.) 493.

[31] Weakley v. Pearce, 5 Heisk. (Tenn.) 401.

[32] Thus in Gwilliam v. Twist, [1895] 2 Q. B. 86, it was said by Lord Esher, "I am very much inclined to agree with the view taken by Eyre, C. J., in the case of Nicholson v. Chapman, 2 H. Bl. 254, and Hawtayne v. Bourne, 7 M. & W. 595, to the effect that this doctrine of authority by reason of necessity is confined to

case most commonly arising is that of a master of a ship who finds himself confronted with an emergency at a time when communication with his principal is impracticable. The rule, however, is not confined to such cases. Thus, where a messenger, sent in haste to procure a physician and told to call Dr. A., found that Dr. A was absent, and therefore summoned Dr. B., under circumstances making communication with the principal impracticable, and having reason to suppose that some physician rather than a particular one was needed, and having no reason to suppose that Dr. B. would not be acceptable, the employment of Dr. B. was held to be authorized.[33]

§ 1264. ——— **Limitations.**—But while extraordinary circumstances may thus justify the assumption of extraordinary powers, it does not necessarily follow that an agent may assume *any* or *all* extraordinary powers, and bind his principal by acts done under such assumed powers. The same general principles apply here that govern the implication of authority from circumstances in other cases. The powers assumed must not exceed the exigencies of the occasion. They must be limited both in nature and extent by the necessities of the case, and must bear as close relationship as possible to the authority actually conferred.[34]

Thus where an agent was employed to transfer wheat upon a river boat, and the boat sank in shallow water, it was held that, while the agent would have authority in such an emergency to take care of the wheat, and to employ hands or take such other steps as were necessary to preserve it, he was not justified in selling the wheat, and certainly

certain well-known exceptional cases, such as those of the master of a ship or the acceptor of a bill of exchange for the honor of the drawer;" and by Smith, L. J., "To constitute a person an agent of necessity he must be unable to communicate with his employer; he cannot be such an agent if he is in a position to do so. The impossibility of communicating with the principal is the foundation of the doctrine of an agent of necessity. I adopt the passage in Carver's Carriage of Goods by Sea, § 299, where he says in relation to the sale of cargo by the master of the ship as being an agent of necessity: 'If there is a fair expectation of obtaining directions, either from the owners of the goods or from agents known by the master to have authority to deal with the goods, within such time as would not be imprudent, the master must make every reasonable endeavor to get those directions, and his authority to sell does not arise until he has failed to get them.'"

See also Sims v. Midland Ry. Co., [1913] 1 K. B. 103. Authority by necessity has been discussed in several of the preceding sections. See § 320.

[33] Bartlett v. Sparkman, 95 Mo. 136, 6 Am. St. Rep. 35.

[34] Foster v. Smith, 42 Tenn. (2 Cold.) 474, 88 Am. Dec. 604.

not justified in selling it to the carrier in consideration of the small sum due to the latter for the transportation.[35]

§ 1265. Where the authority has been substantially pursued, agent not liable for immaterial departure.—As has been already stated, no substantial damages can be recovered from the agent for a purely circumstantial departure from instructions, not affecting the result.[36] Where it is shown that the instructions have not been followed and that a loss has ensued, the burden of proving that the departure from the course prescribed was immaterial and did not cause the loss, is upon the agent.[37] The very fact that the principal gave directions is evidence that he regarded them as material, and if the agent, except in the case of sudden emergency before referred to, voluntarily elects to disregard them and pursue a course of his own election, he must be prepared to show that the instructions were not in fact material. And it is evident from the very nature of the case that such proof is often difficult to make.

Thus in a case above referred to, if the agent had made his remittance in large bills as directed, the letter containing them *might* have been lost in the same manner that the more bulky package containing the larger number of small bills was lost; but it was obviously impossible to prove that as a matter of fact it *would* have been lost; and the court properly held that the agent was the insurer of the safety of the method which he adopted.[38] In such cases, it has been said, that every doubtful circumstance will be construed against the agent.[39] In short, as has been stated, instructions are followed at the principal's risk; they are violated at the risk of the agent.

§ 1266. ——— Where instructions are ambiguous, and agent acts in good faith.—If the principal desires his instructions to be pursued, it is obviously necessary that he should make them intelligible and clear. If however they are so ambiguous as to be fairly capable of two interpretations, and the agent in good faith and with due diligence adopts one of them, he cannot be held liable to the principal for a loss that may result, upon the latter's claim that he meant the other.[40]

[35] Foster v. Smith, *supra*. Compare Jervis v. Hoyt, 2 Hun (N. Y.), 637.

[36] See *ante*, § 1085.

[37] Wilson v. Wilson, 26 Pa. 393; Walker v. Walker, 5 Heisk. (Tenn.) 425.

[38] Wilson v. Wilson, *supra*.

[39] Adams v. Robinson, 65 Ala. 586.

[40] Bessent v. Harris, 63 N. C. 542; National Bank v. Merchants Bank, 91 U. S. 92, 23 L. Ed. 208; Shelton v. Merchants Dispatch Transp. Co., 59 N. Y. 258; Le Roy v. Beard, 8 How. (U. S.) 451, 12 L. Ed. 1151; Loraine v. Cartwright, 3 Wash. (U. S. C. C.) 151, Fed. Cas. No. 8,500; DeTastett v. Crousillat, 2 Wash. (U. S. C. C.) 132, Fed. Cas. No. 3,828; Pickett v. Pearsons, 17 Vt. 470; Minnesota Lin-

This subject has been discussed in a preceding section, and what is there said is applicable here.[41]

§ 1267. ——— "But," as is said in a recent case[42] "because an agent's instructions will admit of different interpretations, he is not thereby authorized to disregard them entirely, and substitute his own judgment in the place thereof. If he acts at all in such cases, he must follow one of the interpretations reasonably derivable from the uncertain terms of the instructions. In this case defendant did neither; but, on the contrary, substituted its own ideas of what was proper under the circumstances, thereby acting directly antagonistic to its instructions."

§ 1268. **How affected by custom.**—As has been already seen, it is not only within the agent's power, but it is also his duty, in the absence of countervailing circumstances, to conform to such valid and established usages and customs as apply to the subject-matter or the performance of his agency. One who makes a contract in the face of an established custom relating to the matter, will, in the absence of anything to the contrary, be presumed to have made it subject to the custom. So a person who employs another to act for him in a particular place or market, where he knows that local customs prevail, or where it is reasonable to anticipate that they may prevail, will be presumed, when nothing appears to indicate a different intent, as intending that the business to be done, will be done according to the usage or custom of that place or market.[43]

Custom cannot, however, as between the principal and his agent, override positive instructions to the contrary.[44] If, in such a case, the agent is not able, or does not wish, to conform to the instructions, he should refuse to accept, or should renounce the trust.

seed Oil Co. v. Montague, 65 Iowa, 67; Very v. Levy, 13 How. (U. S.) 345, 14 L. Ed. 173, 1 Myer's Fed. Dec. § 458; Mechanics' Bank v. Merchants' Bank, 6 Metc. (Mass.) 13; Foster v. Rockwell, 104 Mass. 167; Long v. Pool, 68 N. Car. 479; Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. Ed. 482; Anderson v. First Nat. Bank, 4 N. D. 182; Oxford Lake Line v. First Nat. Bank, 40 Fla. 349; Hopwood v. Corbin, 63 Iowa, 218; Berry v. Haldeman, 111 Mich. 667; Bevis v. Big Bend Abstract Co., 62 Wash. 513; Falsken v. Falls City Bank, 71 Neb. 29.

[41] See *ante*, §§ 792, 793.

[42] Oxford Lake Line v. First Nat. Bank, *supra*.

[43] Bailey v. Bensley, 87 Ill. 556; Lyon v. Culbertson, 83 Ill. 33, 25 Am. Rep. 349; United States L. Ins. Co. v. Advance Co., 80 Ill. 549; Byrne v. Schwing, 6 B. Mon. (Ky.) 199; De Lazardi v. Hewitt, 7 B. Mon. (Ky.) 697; White v. Fuller, 67 Barb. (N. Y.) 267; Smythe v. Parsons, 37 Kan. 79.

[44] Wanless v. McCandless, 38 Iowa, 20; Robinson Machine Works v. Vorse, 52 Iowa, 207; Osborne v. Rider, 62 Wis. 235; Greenstine v.

So, as has been seen, a custom, unless shown to have been known and assented to, will not justify the changing of the essential character of the relation between the principal and his agent,[45] nor can it operate to authorize the making of an invalid instead of a valid contract, or to bind the principal to take one thing when he has ordered another.[46]

But, as has already been stated, where no contrary instructions are given, it is the duty of the agent to conform to the custom, and failure to do so will subject him to liability for such losses as may result therefrom.[47]

§ 1269. ——— When presumption as to custom conclusive.— How far the presumption, that the parties had the custom in contemplation, is conclusive, is a question not always easy of determination. Some customs are so well established and so universally recognized as to have become a part of the law of the land and a party will not be heard to allege his ignorance of them. Others, however, are so restricted as to locality or trade or business, that ignorance of them is a valid reason why a party may not be held to have contracted in reference to them.

Not only the existence of such a custom, but whether knowledge of it exists in any particular case, are questions of fact for the jury. It is for them to determine, under proper instructions from the court, whether from the evidence as to the existence, duration and other characteristics of the custom, and as to the knowledge thereof by the parties, there is shown a custom of such age and character that the law will presume that the parties knew of, and contracted in reference to, it; or whether the custom is so local and particular that knowledge in the party to be charged must be affirmatively shown and may be negatived.[48]

Borchard, 50 Mich. 434, 45 Am. Rep. 51; Barksdale v. Brown, 1 Nott. & M. (S. C.) 517, 9 Am. Dec. 720; Hall v. Storrs, 7 Wis. 253; Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467; Hutchings v. Ladd, 16 Mich. 493; Leland v. Douglass, 1 Wend. (N. Y.) 490; Clark v. Van Northwick, 1 Pick. (Mass.) 343; Catlin v. Smith, 24 Vt. 85; Day v. Holmes, 103 Mass. 306; Parsons v. Martin, 11 Gray (Mass.), 112; Ledyard v. Hibbard, 48 Mich. 421, 42 Am. Rep. 474; Morton v. Morris, 27 Tex. Civ. App. 262.

[45] Robinson v. Mollett, L. R. 7 H. L. 802.

[46] Perry v. Barnett, 15 Q. B. Div. 388.

[47] Greely v. Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54.

[48] Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Williams v. Gilman, 3 Greenl. (Me.) 276; Bradley v. Wheeler, 44 N. Y. 500; Higgins v. Moore, 34 N. Y. 425; Dawson v. Kittle, 4 Hill (N. Y.), 107; Caldwell v. Dawson, 4 Metc. (Ky.) 121; Barnard v. Kellogg, 10 Wall. (U. S.) 383, 19 L.

§ 1270. No presumption of disobedience.—The law does not presume that the agent has not obeyed his instructions or that he does not intend to obey them. "It matters not what the intent or supposition of the principal may be, the law will presume that the agent obeyed the instructions that were given and as they were given, and if the contrary is alleged, it must be proved." [49]

§ 1271. Measure of damages.—The general rules applicable to the recovery of damages in other cases obtain here. Thus the losses for which damages are sought must not be too remote, nor of a purely speculative or problematical character. They must, in other words, be the natural and proximate result of the act complained of.[50] As is said by a learned judge: "It is the first duty of an agent whose authority is limited, to adhere faithfully to his instructions, in all cases to which they can be properly applied. If he exceeds, or violates, or neglects them, he is responsible for all losses which are the natural consequence of his act." [51]

Many illustrations have already been seen, and more will hereafter arise, especially in the case of brokers who have disregarded instructions to buy or sell.[52]

§ 1272. Ratification.—Even though the agent may have violated his instructions, it is still possible that the principal may so far ratify his act as to relieve the agent from liability.[53] This ratification may

Ed. 987; Martin v. Maynard, 16 N. H. 166; Dodge v. Favor, 15 Gray (Mass.), 82; Fisher v. Sargent, 10 Cush. (Mass.) 250; Stevens v. Reeves, 9 Pick. (Mass.) 200; Citizens Bank v. Graffiin, 31 Md. 507; 1 Am. Rep. 66; McMasters v. Pennsylvania R. R. Co., 69 Pa. 374, 8 Am. Rep. 264; Farnsworth v. Chase, 19 N. H. 534, 51 Am. Dec. 206; Randall v. Smith, 63 Me. 105, 18 Am. Rep. 200.

[49] Brewer, J., in Bangs v. Hornick, 30 Fed. 97. Citing Bartlett v. Smith, 13 Fed. 263; Kirkpatrick v. Adams, 20 Fed. 287.

[50] 3 Sutherland on Damages, 6.

[51] Colt, J., in Whitney v. Merchants Union Exp. Co., *supra*.

[52] See *post*, *Brokers*.

[53] Lunn v. Guthrie, 115 Iowa, 501; Evans v. Lawton, 34 Fed. 233; Plano Mfg. Co. v. Buxton, 36 Minn. 203.

Defendant, who was a salesman of plaintiff, collected, without authority, the price of certain goods sold. Plaintiff sued the customer, but, upon discovering that defendant had collected the bill, discontinued that action and brought this one against the salesman for a conversion. *Held*, that he was liable; that their suing him ratified his collection of the money only, but not his retention of it thereafter, and that it was his duty to pay to them the identical money he had collected. Schanz v. Martin, 37 N. Y. Misc. 492; Carver v. Creque, 48 N. Y. 385, was cited as being nearest in point.

But see Anderson v. First Nat. Bank, 5 N. D. 451, holding that waiving the tort and suing in *assumpsit* for a wrongful disposition of property is not to be deemed a ratification of the original act.

be express, or it may arise by implication as in other cases.[54] What the conditions are under which ratification may become effective, as between the principal and the agent, has already been considered in a previous section, and need not be repeated here.

§ 1273. Liability for sub-agents.—The same considerations apply to the agent's liability for breach of instructions by his sub-agents as in other cases.[55] If the sub-agent is the agent of the agent, the latter must answer for his disobedience where any other principal would be liable;[56] if he is the principal's agent, then the intermediate agent is not responsible where he is free from fault.[57]

IV.

NOT TO BE NEGLIGENT.

§ 1274. In general.—Many of the questions that might fall under this head would also properly be classed under the preceding. That is, the negligence complained of may be the result of a failure to observe positive instructions, as well as of a failure to perform the general duties, which pertain to the undertaking, but which were not the object of express directions. No harm can come, however, if strict lines of demarcation be not always drawn.

§ 1275. Agent bound to exercise ordinary and reasonable care.—It is the duty of every agent, when no other arrangement is made, to bring to the performance of his undertaking, and to exercise in such performance, that degree of skill, care and diligence which the nature of the undertaking and the time, place and circumstances of the performance ordinarily and reasonably demand. A failure to do this, whereby the principal naturally and proximately suffers loss or injury, constitutes negligence for which the agent is responsible.[58]

[54] Osborne v. Durham, 157 N. C. 262.

[55] See *ante*, § 333.

[56] So held in Cowley v. Fabien, 204 N. Y. 566. (There was also evidence of ratification and approval by the agent of the act of the subagent.) Franklin Fire Ins. Co. v. Bradford, 201 Pa. 32, 88 Am. St. Rep. 770. Compare Bradford v. Hanover Ins. Co., 43 C. C. A. 310, 102 Fed. 48, 49 L. R. A. 530, where, on the same facts, it was held that the agent was not liable, because the act of the subagent was not such an one as would make a principal liable.

[57] *Ante*, §§ 332, 333.

[58] Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Holly v. Boston Gaslight Co., 8 Gray (Mass.), 123, 69 Am. Dec. 233; Gaither v. Myrick, 9 Md. 118, 66 Am. Dec. 316; Whitney v. Martine, 88 N. Y. 535; Heinemann v. Heard, 50 N. Y. 35.

§ 1276. **Agent bound to exercise usual precautions.**—The agent is also bound to exercise and observe all the precautions ordinarily pursued in relation to the particular business in which he is employed,[59] and according to the known usages of the place, and the circumstances of the times, within which the business is to be transacted.[60] If, therefore, the usage of the business in which he is engaged imposes upon such an agent the performance of a certain duty, it will be presumed, in the absence of anything to indicate the contrary, that the duty existed in his case; and for failure to perform it, he will be liable to the principal for the loss thereby sustained.[61] The customs of the particular principal must also be observed, where the agent knows them, and was evidently expected to conform to them.[62]

§ 1277. ——— **But not liable for mere accident or mistake.**—But the agent is not liable for losses resulting from his action or non-action, if he was guilty of no negligence or other breach of duty. Mere accident or mistake, in this sense, imposes no liability upon the agent.[63]

§ 1278. ——— **Not bound to exercise highest care.**—Except in those cases in which he voluntarily and without sufficient reason, violates express instructions, the agent is not ordinarily an insurer.[64] Unless he expressly agrees to do so, he is not bound to exercise the highest possible degree of care. Unless he professes to be an expert, he is not ordinarily bound to bring his performance up to the standard of an expert. If he be, for example, a general practitioner in the country, he cannot be required to have and exercise that high degree

[59] In Williams Co. v. Dotterer, 111 La. 822, a receiver of a railroad who was given charge of plaintiff's goods to store pending further shipment, was held liable for surrendering the goods pursuant to an invalid order of stoppage in transit.

[60] Wright v. Central R. R. Co., 16 Ga. 38.

[61] An agent employed to take care of property, who neglected the precautions shown to be customary when buildings were vacant, held responsible to his principal for loss caused by the bursting of heating pipes and radiators in freezing weather. Cameron v. Real Estate Co., 76 Mo. App. 366.

[62] Beach v. Travelers' Insurance Co., 73 Conn. 118.

[63] "An agent is never liable to his principal for a mere mistake in the performance of a duty within the general scope of his authority." Briere v. Taylor, 126 Wis. 347.

[64] "It is the duty of an agent to obey the instructions of his principal, and exercise in his employment reasonable skill and ordinary diligence. But he is not an insurer, and is only liable for losses arising from a neglect of such duties." Rice v. Longfellow, 82 Minn. 154. To same effect: Norton v. Melick, 97 Iowa, 564; Willson v. Fertilizer Co., 67 S. Car. 467; Caruthers v. Ross (Tex. Civ. App.), 63 S. W. 911.

of skill to which the specialist of the metropolis attains, and which can only be reasonably expected from one in his position.[65]

§ 1279. ——— **Good faith—Reasonable diligence.**—But the agent is, in all cases, bound to act in good faith, and to exercise reasonable diligence, and such care and skill as are ordinarily possessed by persons of common capacity engaged in the same business.[66] As was said by Judge Cooley: "Whoever bargains to render services for another undertakes for good faith and integrity, but he does not agree that he will commit no errors. For negligence, bad faith or dishonesty, he would be liable to his employer; but if he is guilty of neither of these, the master or employer must submit to such incidental losses as may occur in the course of the employment, because these are incident to all avocations, and no one, by any implication of law, ever undertakes to protect another against them."[67]

Further than this, general statements of the principle cannot usefully go. The principle is not an uncertain one, though the question of what is reasonable in any given case is not one which can ordinarily be measured by any pre-established inflexible standard. There are cases, it is true, where a limit must be fixed, and one so fixed, though purely arbitrary, is to be observed. But there is a growing tendency on the part of courts, and it is in furtherance of justice, to measure each case by the more flexible standard of its own facts and circum stances. "Care and diligence should vary according to the exigencies which require vigilance and attention, conforming in amount and de-

[65] Small v. Howard, 128 Mass. 131, 35 Am. Rep. 363; Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388.

[66] Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388; Whitney v. Martine, 88 N. Y. 535; Heinemann v. Heard, 50 N. Y. 35; Gaither v. Myrick, 9 Md. 118, 66 Am. Dec. 316; Fletcher v. Boston & Maine R. R., 1 Allen (Mass.), 9, 79 Am. Dec. 695; Varnum v. Martin, 15 Pick. (Mass.) 440; Stimpson v. Sprague, 6 Greenl. (Me.) 470; Crooker v. Hutchinson, 1 Vt. 73; Holmes v. Peck, 1 R. I. 242; Wilson v. Russ, 20 Me. 421; Grannis v. Branden, 5 Day (Conn.), 260, 5 Am. Dec. 143; Landon v. Humphrey, 9 Conn. 209, 23 Am. Dec. 333; Howard v. Grover, 28 Me. 97, 48 Am. Dec. 478; Myles v. Myles, 6 Bush (Ky.), 237; Kempker v. Roblyer, 29 Iowa, 274; Stevens v. Walker, 55 Ill. 151; Chandler v. Hogle, 58 Ill. 46; Deshler v. Beers, 32 Ill. 368, 83 Am. Dec. 274; Phillips v. Moir, 69 Ill. 155; Babcock v. Orbison, 25 Ind. 75; Leverick v. Meigs, 1 Cow. (N. Y.) 645; Van Alen v. Vanderpool, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; Howatt v. Davis, 5 Munf. (Va.) 34, 7 Am. Dec. 681; Greely v. Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; Folsom v. Mussey, 8 Greenl. (Me.) 400, 23 Am. Dec. 522.

[67] In Page v. Wells, 37 Mich. 415. Agent may be held liable to principal for deceit. Miller v. John, 111 Ill. App. 56; Hindle v. Holcomb, 34 Wash. 336; Wood v. Blaney, 107 Cal. 291.

gree to the particular circumstances under which they are to be exerted."[68]

§ 1280. When agent warrants possession of skill.—Wherever the undertaking of the agent is one which in its nature requires the possession and exercise of professional skill, the law will presume, in the absence of anything to the contrary, an undertaking on the part of the agent that he possesses and will exercise a reasonable and competent degree of the skill required.[69]

And the same rule applies to any other case requiring special or peculiar skill. If the agent undertakes, for a reward, the performance of such a duty, without possessing a reasonable and competent degree of skill, of which fact the principal is ignorant, he will be liable to the principal for the loss or injury resulting therefrom.[70] If, however, the principal had notice or knowledge of the deficiency at the time of the employment, the agent who has not expressly promised more will not be so liable.[71] The same thing is true where the agent is employed out of the line of his known employment. If the principal sees fit to employ an auctioneer to conduct his case in court, he cannot complain of his attorney's want of skill, unless the latter expressly warranted that he possessed it.

§ 1281. How when agency is gratuitous.—Where the duty to be performed by the agent is purely voluntary in its nature, a somewhat different rule applies. Friends and neighbors are every day rendering mutual services for the accommodation and convenience of each other, with no thought of exacting or receiving a reward. These services, too, are often of such a nature that professional or skilled agents might well have been employed if they were accessible or within the means of the parties; as where, in rural districts, neighbors render for each other simple medical aid or give each other assistance, counsel or advice, in the transaction of their affairs.

[68] Merrick, J., in Holly v. Boston Gaslight Co., 8 Gray (Mass.), 131, 69 Am. Dec. 233.

[69] Wilson v. Brett, 11 M. & W. 113; Stanton v. Bell, 2 Hawks (N. C.), 145, 11 Am. Dec. 744; Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388; Varnum v. Martin, 15 Pick. (Mass.) 440; Stimpson v. Sprague, 6 Greenl. (Me.) 470; Crooker v. Hutchinson, 1 Vt. 73; Holmes v. Peck, 1 R. I. 242; Grannis v. Branden, 5 Day (Conn.), 260, 5 Am. Dec. 143; Howard v. Grover, 28 Me. 97, 48 Am. Dec. 478, and see cases cited in preceding section.

[70] Kirtland v. Montgomery, 1 Swan (Tenn.), 452; McDonald v. Simpson, 4 Ark. 523, 38 Am. Dec. 45; Wilson v. Brett, 11 M. & W. 113; Moneypenny v. Hartland, 1 Car. & P. 352, s. c. 2 Id. 378; McFarland v. McClees (Pa.), 5 Atl. 50, and see generally cases cited in preceding section.

[71] Felt v. School District, 24 Vt. 297.

a person conversant with and skilled in the use of horses. The trial court left it to the jury to say whether the nature of the ground was such as to render it a matter of culpable negligence in the defendant to ride the horse there; and instructed them, that under the circumstances the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it, and that if they found that the defendant had been negligent in going upon the ground where the injury was done, or had ridden the horse carelessly while there, they should find for the plaintiff, which they accordingly did. Upon appeal, this direction was approved.

§ 1284. Agent not liable for unforeseeable dangers.—It follows as a corollary from the principles above stated, that while the agent is bound to exercise, for the protection of the principal, a reasonable degree of care and skill, and will be liable for any loss or damage which the principal may sustain on account of a failure so to do, yet the agent can not be held responsible for unforeseen and unexpected losses or damage out of the ordinary course of business or of natural events, and which could not be guarded against by reasonable diligence or foresight.[82]

§ 1285. But liability increased if special risks disclosed.—But, on the other hand, the liability of the agent may be increased beyond that existing in the ordinary case, where the agent, at the time of undertaking the service, is informed of special circumstances demanding more than ordinary care or diligence. Frequent illustrations are found in the case of sheriffs and attorneys who undertake to serve process or collect claims in view of special exigencies disclosed to them, making delays dangerous. For similar reasons, a merchandise broker employed to enter goods at the custom house [83] or to bring suit for the recovery of excessive duties exacted,[84] and apprised of circumstances making unusual diligence necessary, may be held liable, even though he does all that would be required of him if no unusual circumstances were present. As pointed out in such a case, "the term negligence is a relative one, and whether or not it exists is to be decided by the situation of affairs at the time the defendant is required

[82] Johnson v. Martin, 11 La. Ann. 27, 66 Am. Dec. 193.

[83] In Vernier v. Knauth, 7 N. Y. App. Div. 57, brokers were held liable under rather extraordinary circumstances, for not entering a delayed cargo before a new tariff was to go into effect. They acted in the usual way, but the circumstances disclosed demanded unusual action. The result was a loss of $6,800.

[84] Bowerman v. Rogers, 125 U. S. 585, 31 L. Ed. 815.

to act. The degree of diligence which any contractor is called upon to exercise is proportionate to the duty imposed, and the existence of negligence depends upon the failure to exercise the degree of diligence which the peculiar conditions require. Whether in any given case a party has been guilty of negligence necessarily depends then upon what is required of him in the particular case, and it is a trite saying that what would be due diligence in one case might, under other conditions with regard to the same kind of business, be serious negligence." [85]

§ 1286. Agent presumed to have done his duty.—The law does not presume negligence on the part of the agent. On the other hand, it presumes that the agent has done his duty, until the contrary appears, and the burden of proof is upon him who alleges a misfeasance, to establish it.[86]

§ 1287. Agent not liable if principal also negligent.—The ordinary rules of contributory negligence apply to the question under consideration. If therefore the principal has by his own negligence, contributed to cause the injury, or if, by the use of reasonable diligence on his own part, he could have prevented the injury, the agent can not be held responsible for it.[87] Thus the failure of the principal to apprise the agent of the existence of special circumstances making unusual diligence necessary,[88] or the failure of the principal to give the agent correct information, where this information was to be the foundation of the agent's actions,[89] will relieve the agent from liability which might otherwise be incurred.

§ 1288. When agent liable for neglect of sub-agent.—The question of the liability of the agent for the misconduct of a sub-agent, has already been considered in an earlier portion of the work to which the reader is referred.[90] As has there been seen, the material question is, whose agent is the sub-agent. If, under the circumstances, the agent

[85] Vernier v. Knauth, 7 N. Y. App. Div. 57.

[86] Gaither v. Myrick, 9 Md. 118, 66 Am. Dec. 316; Lampley v. Scott, 24 Miss. 533.

See also, Emerson v. Turner, 95 Ark. 597.

[87] Sioux City, etc., R. R. Co. v. Walker, 49 Iowa, 273.

Contributory negligence of fellow servant—A servant is liable to his master for injuries caused by his negligence to the master's property, *e. g.*, for negligently felling a tree so that it injured the master's team, although the negligence of another servant, *e. g.*, the driver of the team, not joined in the action, contributed to produce the injury. Zulkee v. Wing, 20 Wis. 408, 91 Am. Dec. 425.

[88] Freeholder v. State Bank, 32 N. J. Eq. 467.

[89] Chapman v. Union Bank, 32 How. Pr. (N. Y.) 95.

[90] *Ante*, §§ 332, 333.

was authorized, either expressly or by implication, to employ sub-agents, on the principal's account, then the sub-agent is the agent of the principal only, and the agent is not responsible unless he has been negligent in the selection of the sub-agent. If, on the other hand, the sub-agent can be regarded as the employee of the agent only, then the latter is responsible to the principal for the negligence of the sub-agent.[91]

§ 1289. When agent liable for neglect of co-agent.—As has been seen in an earlier section,[92] the principal may often employ several agents to act independently respecting the same subject-matter, or, on the other hand, he may employ two or more agents who jointly and collectively undertake to perform the act in question. Where, as in the former case, they are merely co-agents, one is not ordinarily responsible to the principal for the neglect of his co-agent, if he is himself free from fault.[93]

But where they are joint agents a different rule applies. "It is familiar law," it is said in one case, "that where two or more persons undertake to execute a private agency together, they are jointly liable each for the acts of the other; nor is it any defense that one of them wholly transacted the business with the knowledge of the principal. Each is liable for the whole, if they jointly undertake the agency, notwithstanding an agreement between themselves to the contrary, or that one shall have all the profits."[94]

So although the relation would ordinarily appear to be that of co-agents or fellow servants merely, it may yet appear in the particular

[91] Appleton Bank v. McGilvray, 4 Gray (Mass.), 518, 64 Am. Dec. 92; Sexton v. Weaver, 141 Mass. 273; Campbell v. Reaves, 3 Head (Tenn.), 226; Commercial Bank v. Jones, 18 Tex. 811; Barnard v. Coffin, 141 Mass. 37, 55 Am. Rep. 443; Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582; Pownall v. Bair, 78 Penn. St. 403; Darling v. Stanwood, 14 Allen (Mass.), 504; Stephens v. Babcock, 3 B. & Adol. 354; McCants v. Wells, 4 S. C. 381; Hoag v. Graves, 81 Mich. 628; Davis v. King, 66 Conn. 465, 50 Am. St. Rep. 104; Morris v. Warlick, 118 Ga. 421. An agent is liable to his principal for funds received for the principal and misapplied by the agent's clerk. St. Louis, etc., Ry. Co. v. Smith, 48 Ark. 317.

[92] See *ante*, § 195.

[93] An agent employed by the trustees of an estate to collect its income is not responsible for the loss of funds through the misconduct of an assistant employed at the suggestion, with the consent, and by the authority of the trustees. The assistant was simply a fellow-agent and not defendant's agent. Nor was defendant liable because he failed to discover the default of his fellow-agent, as the responsibility for supervision was not on him but upon the trustees. Sergeant v. Emlen, 141 Pa. 580. To same effect: Regents v. Rose, 45 Mich. 284.

[94] Milwaukee Harvester Co. v. Finnegan, 43 Minn. 188.

case that one was charged with the duty of supervision and control over the other, or even that he was employed for the very purpose of protecting his principal from the negligence of the other, and in such a case responsibility for the negligence of the other, which proper supervision would have prevented, may well entail responsibility.[95]

§ 1290. **Effect of ratification upon the agent's liability.**—This question also has been already discussed in a previous chapter,[96] and nothing need be added here in reference to it, beyond recalling that by a ratification under the conditions there referred to, the principal absolves the agent from all responsibility to him for the loss or injury resulting from the unauthorized act.

§ 1291. **The measure of damages.**—The question of the measure of the damages to be recovered for the agent's neglect is substantially the same that arises where an injury has been sustained by reason of a violation of instructions. The principal is entitled to full compensation; to be put into that situation in which he would have been if the agent had performed his duty. In other words, he is entitled to recover such damages as naturally and proximately result from the wrongful act complained of. Profits which are possible or speculative merely, are not to be recovered, but at the same time, it is not necessary that the loss or damage should be directly or immediately caused by the default, if such loss or damage can fairly be considered as the natural result or just consequence of it.[97] Losses, however, cannot be included which were not the natural and proximate result of the default in question.[98]

The burden of showing loss is upon the principal, and more than nominal damages, at least, cannot be recovered without proof of actual injury.[99]

§ 1292. ——— **Judgments, costs, counsel fees.**—The principal may often be made liable in actions brought against him by third per-

[95] Memphis, etc., Railroad Co. v. Greer, 87 Tenn. 698, 4 L. R. A. 858. Here a conductor was held liable to the company for the amount of a judgment, recovered against the company, for the negligence of other servant causing injury to one permitted upon the train by the conductor in violation of his duty.

[96] See *ante*, § 491 *et seq.*

[97] Bell v. Cunningham, 3 Peters (U. S.), 69, 7 L. Ed. 606; Gilson v. Collins, 66 Ill. 136; Walker v. Walker, 5 Heisk. (Tenn.) 425; Memphis, etc., Railroad Co. v. Greer, 87 Tenn. 698, 4 L. R. A. 858; Wilson v. Wilson, 26 Pa. 393; First Nat. Bank v. Hayes, 64 Ohio St. 100.

[98] Hurley v. Packard, 182 Mass. 216. So if the servant has injured a third party, and the master makes a settlement for more than the actual damage, he can hold the servant only for the actual damage. Smith v. Foran, 43 Conn. 244, 21 Am. Rep. 647.

[99] Emerson v. Turner, 95 Ark. 597.

of the title; in the procuring of proper conveyances; in making the necessary records, and in the performance of those other acts which may be necessary under the circumstances to perfect and protect the security. If he fails in the performance of this duty, and loss thereby results to his principal, the agent is responsible for the amount of the loss.

Where the negligence complained of is the acceptance of forged securities, the agent may show that other persons who were careful business men were similarly deceived;[9] but where reliance upon securities insufficient in point of law was complained of, it was held incompetent to show that careful business men relied upon the same kind.[10]

The fact that the agent acted in good faith is no defence, because it

skill in business would esteem good." Bank of Owensboro v. Western Bank, 13 Bush (Ky.), 526, 26 Am. Rep. 211.

Clearly he is liable if he makes the loan without any security to an insolvent person. Hitchcock v. Cosper, 164 Ind. 633; Bronnenburg v. Rinker, 2 Ind. App. 391. Especially where he does so, and fails to enforce payment, in order to promote the payment of a claim due to himself. Samonset v. Mesnager, 108 Cal. 354. So if he loans without any other knowledge of the security than the borrower's own statement, when the borrower was a stranger to him. Van Cott v. Hull, 11 N. Y. App. Div. 89. So if he accepts the statements as to value of persons not shown to have any experience as land valuers or otherwise competent to make an estimate. Lowenburg v. Wolley, 25 Can. Sup. Ct. 51. So if he loans on second mortgage and fails to record it so that principal loses an opportunity to protect himself by not being notified of a foreclosure of the first mortgage. DeHart v. DeHart, 70 N. J. Eq. 774.

To loan $1,200 on land worth $2,300 and already mortgaged for $1,800, justifies a finding of negligence. Harlow v. Bartlett, 170 Mass. 584.

See also, Bannon v. Warfield, 42 Md. 22.

[9] Isham v. Post, 141 N. Y. 100, 38 Am. St. Rep. 766, 23 L. R. A. 90.

To the same effect: Rand v. Johns (Tex. Civ. App.), 15 S. W. 200 (where it was held competent to show that a bank whose officers were competent men had been deceived in the same way).

[10] Thus where the agent relied upon the security of the debtor's wife, who could not legally bind herself in that way, it was held incompetent to show that business men generally considered that the wife could be held. Murrah v. Brichta (Tex.), 9 S. W. 185.

Where all that the agent undertook to do for his principal was to exercise such care on the latter's loans as the agent was accustomed to take in his own, the agent will not be liable if he honestly does that, although a loss results. Goodwin v. Kraft, 23 Okla. 239. Here the agent was in the habit of passing upon the abstracts of title without professional advice, and in this case made a mistake as to the effect of the homestead laws.

In La Banque Provinciale v. Charbonneau, 6 Ont. L. R. 302, where the local manager of the plaintiff's branch bank altered a note in an endeavor to correct a prior error, but with the result that the parties thereto were discharged, it was held that he had not failed to exercise the skill required of one in his position.

is negligence and not bad faith which is imputed to him;[11] nor, as has been seen, is it a defence that he acted without compensation.[12]

Where the agent fraudulently makes misrepresentations to his principal concerning the security, it is no defense that the principal "had full opportunity to test their correctness by examining the land for herself."[13]

2. *Neglect of Agent to Effect Insurance.*

§ 1297. When duty to insure arises.—The same general rules apply to the case of an agent whose duty it is to insure the property of his principal. This duty may arise as has been seen,[14] from express instructions; but while, in other cases, the duty does not arise from the mere fact of agency, it will arise wherever the agent has in his possession property of his principal of a kind which it is the usage to insure,[15] or which it has been the agent's habit to insure,[16] or which reasonable care and prudence requires shall be protected against loss.[17]

Where a sales agent was, by his contract, required to effect insurance, but no time was fixed for its continuance, it was held that the agent was not obliged to continue the insurance after the normal sales period and into a time in which the principal might reclaim the goods at any time without reimbursing the agent for the premiums, even though the goods remained unclaimed in the possession of the agent.[18] And where an agent who had undertaken to insure failed to do so, and the principal thereupon took the matter into his own hands, the agent was held not liable for losses thereafter occurring.[19]

[11] Murrah v. Brichta (Tex.), 9 S. W. 185.

[12] See *ante*, § 1281; Isham v. Post, 141 N. Y. 100, 38 Am. St. R. 766, 23 L. R. A. 90; Murrah v. Brichta, *supra;* Samonset v. Mesnager, 108 Cal. 354.

[13] Rubens v. Mead (Cal.), 53 Pac. 432.

[14] § 1245.

[15] Kingston v. Wilson, 4 Wash. (U. S. C. C.) 310, Fed. Cas. No. 7,823; Shirtliff v. Whitfield, 2 Brev. (S. C.) 71, 3 Am. Dec. 701; Berthoud v. Gordon, 6 La. 579, 538; Ralston v. Barclay, 6 Martin (La.), 649, 12 Am. Dec. 483; Lee v. Adsit, 37 N. Y. 78; Shoenfeld v. Fleisher, 73 Ill. 404; Schaeffer v. Kirk, 49 Ill. 251; Brisban v. Boyd, 4 Paige (N. Y.), Ch. 17.

[16] Schoenfeld v. Fleisher, *supra;* Schaeffer v. Kirk, *supra;* Lee v. Adsit, *supra;* Brisban v. Boyd, *supra;* Ralston v. Barclay, *supra;* Berthoud v. Gordon, *supra.*

[17] *Ante*, §§ 1276, 1279.

[18] Milburn Wagon Co. v. Evans, 30 Minn. 89. But where the contract expressly required the agent to keep the property insured while in his custody, it was held that he must maintain insurance on property left in his control, even though the period of his agency had expired. Prichard v. Deering Harv. Co., 117 Wis. 97.

[19] Brant v. Gallup, 111 Ill. 487, 53 Am. Rep. 638.

§ 1298. What the duty requires.—The duty of the agent when not otherwise limited by express instructions, requires the exercise on his part of reasonable care and prudence in the selection of the insurer;[20] in the determination of the duration and amount of the risk; in procuring proper and sufficient policies[21] or contracts and in inserting such special stipulations and provisions as the circumstances of the case reasonably require.[22] But unless expressly instructed so to do, he would not be bound to insure against unusual and unforeseen dangers, but only against such as an ordinarily prudent man would select under the circumstances. If the agent is unable to procure the insurance,[23] or if after having been in the habit of insuring upon his own motion, he determines no longer to do so,[24] he should promptly notify his principal in order to give the latter an opportunity to insure. Failing in the performance of his duty, the agent is liable for the full amount of the insurance which he should have effected, less the premium.[25]

His duty is not performed if he selects underwriters who are notoriously in bad credit or insolvent;[26] or if he accepts of manifestly insufficient or invalid policies.[27] If the principal has by express instructions fixed the amount of the insurance and such amount might, by reasonable diligence, have been obtained, the agent who neglects to

[20] Strong v. High, 2 Rob. (La.) 103, 38 Am. Dec. 195.

[21] He must procure written policies and not expose his principal to the risks and uncertainties of oral contracts. Manny v. Dunlap, 1 Wool. 372, 16 Fed. Cas. p. 658.

[22] Mallough v. Barber, 4 Camp. 150.

[23] Callander v. Oelrichs, 5 Bing. N. C. 58; Smith v. Lascelles, 2 T. R. 187.

[24] Area v. Milliken, 35 La. Ann. 1150.

[25] Storer v. Eaton, 50 Me. 219, 79 Am. Dec. 611; Mallough v. Barber, 4 Camp. 150; Park v. Hamond, 4 Camp. 344; Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645; DeTastett v. Crousillat, 2 Wash. (U. S. C. C.) 132, Fed. Cas. No. 3,828; Thorne v. Deas, 4 Johns. (N. Y.) 84; Shoenfeld v. Fleisher, 73 Ill. 404; Callender v. Oelrichs, 5 Bing. N. C. 58; Gray v. Murray, 3 Johns. (N. Y.) Ch. 167.

Where the insurance fails because the agent who has taken charge of the matter, although acting gratuitously, fails to give notice of subsequent insurance, the agent will be liable to his principal for the loss. Baxter v. Jones, 6 Ont. L. R. 360.

In a tort action for the alleged negligence of an insurance broker in failing to replace two policies of fire insurance, *held*, that, until he had exhausted all reasonable efforts to replace the policies, the broker was under no duty to give notice to the principal of his inability to do so, and if the loss occurs before such time arrives, it would be idle for him to give notice. Backus v. Ames, 79 Minn. 145.

[26] Strong v. High, 2 Rob. (La.) 103, 38 Am. Dec. 195.

[27] Mallough v. Barber, *supra*.

insure is liable for that amount as on a valued policy.[28] Where no amount is so fixed, the agent should ordinarily procure insurance to the full insurable value.[29]

3. Neglect of Agent in Making Collections.

§ 1299. Liable for loss from negligence.—The liability of an agent employed to collect a demand, depends largely upon the nature of his undertaking. Such an agent may, undoubtedly, by express contract, impose upon himself the absolute duty to collect the demand in any event. In such a case he becomes, practically, a guarantor of the debt and is liable as such.

Where no such express contract is made, however, the agent by assuming the collection of the claim, undertakes that he will exercise reasonable care, skill and diligence in making the money. If he does this, and is unable to collect the demand, he is not liable; but if from his neglect to exercise this degree of care, skill and diligence, the claim or any part of it is lost, the agent is liable for the loss.[30]

This rule imposes upon the agent the duty to take all the precautions and avail himself of all the remedies, which are reasonable and proper under the circumstances,—which a reasonably prudent and careful man would avail himself of under like circumstances.[31]

§ 1300. Forms of negligence.—The forms in which the negligence of an agent, who has undertaken to make collections, may manifest itself, are obviously very numerous, and no attempt can be made to deal with all of them. The cases, however, which most commonly arise, have usually to do either with the medium of payment which the agent has accepted, or with the various steps and proceeding necessary to secure payment, and it is possible to classify most of the cases which arise with reference to this distinction.

[28] Miner v. Tagert, 3 Binn. (Pa.) 204.

An instruction to secure a policy covering "all risks" means one which actually and not merely one so described by insurance agents. Yuill v. Robson, [1907] 1 K. B. 685.

[29] Beardsley v. Davis, 52 Barb. (N. Y.) 159; Betteley v. Stainsby, 12 C. B. (N. S.) 499; Douglass v. Murphy, 16 U. C. Q. B. 113.

[30] Allen v. Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; Buell v. Chapin, 99 Mass. 594, 97 Am. Dec. 58; Reed v. Northrup, 50 Mich. 442; Fick v. Runnels, 48 Mich. 302; Capitol State Bank v. Lane, 52 Miss. 677; Oil Well Supply Co. v. Exchange Nat. Bank, 131 Pa. 100. In order to recover against the agent for failure to collect it is sufficient to show that debtor was solvent, and that with proper exertion, claim could have been collected. Wiley v. Logan, 95 N. C. 358.

[31] Allen v. Suydam, *supra*.

§ 1301. Negligence as to medium of payment.—It has been seen in an earlier section [32] that an agent authorized to receive payment or to collect debts, has ordinarily no implied authority to receive anything but money in satisfaction of the demand. He cannot, therefore, usually bind his principal by accepting checks, notes, drafts and similar documents, on the one hand, or merchandise or property of any kind, on the other. In most cases, the result of the agent's violation of his duty in this regard, would simply be that the demand was not paid, and the principal could proceed to enforce his original claim without reference to such an unauthorized attempt to discharge it.[33] There may be cases, however, in which the principal has parted with some right, waived some claim, or surrendered some security, upon such an unauthorized payment, in such a form that his original demand is extinguished, and he will have no remedy unless he can find it against the defaulting agent.

§ 1302. ——— Illustrations.—Thus, as a typical and not uncommon case, if an agent who is authorized to sell and deliver goods for cash, sells the goods to an irresponsible purchaser and delivers them for a check which proves to be worthless, so that both the goods and the price are lost to the principal, the agent will be liable.[34] So if an agent who is authorized to deliver a conveyance, release a lien, give a consent, execute a license, and the like, only upon receiving payment, does so upon the receipt of a worthless check, note or other security, and the principal sustains loss, the agent will be responsible.[35] So, for like reasons, if an agent authorized to collect a check or note or draft, surrenders it to the principal's detriment, upon receiving some other check or note or draft, instead of the money, he will be answerable to the principal for the loss.[36] So, if the agent takes goods in payment and turns them into money at a loss, he must answer for the loss.[37]

[32] *Ante*, § 946.

[33] See Western Brass Mfg. Co. v. Maverick, 4 Tex. Civ. App. 535.

[34] Harlan v. Ely, 68 Cal. 522; Hall v. Storrs, 7 Wis. 253.

[35] Pape v. Westacott, [1894] 1 Q. B. 272. In this case a landlord had agreed to consent to an assignment of the lease upon the payment of a certain amount of rent. He executed the consent and put it into the hands of an agent to be delivered upon the receipt of the money. The agent delivered the consent upon receipt of a check which proved to be worthless, and the agent was held liable.

[36] Fifth National Bank v. Ashworth, 123 Pa. 212, 2 L. R. A. 491; Hazlett v. Commer. Nat. Bank, 132 Pa. 118; Merchants' Nat. Bank of Philadelphia v. Goodman, 109 Pa. 422, 58 Am. Rep. 728; Marine Bank v. Fulton Bank, 2 Wall. 252, 17 L. Ed. 785; Gowling v. American Express Co., 102 Mo. App. 366.

[37] Rush v. Rush, 170 Ill. 623. See also, Holmes v. Langston, 110 Ga. 861.

§ 1303. Negligence in proceedings.—If certain proceedings are, by law, required to be taken, for the protection of his principal, the agent must see that these requirements are complied with. Thus it is the duty of an agent who receives negotiable paper to collect, to so act as to secure and preserve the liability thereon of all parties prior to his principal; and if he fails in this duty, and thereby causes loss to his principal, he becomes liable for such loss.[38] Such an agent must therefore present the bill or note for acceptance without delay and present it for payment at maturity. If the bill or note be not duly accepted or paid, he must cause it to be immediately protested, where protest is necessary, and cause notice to be duly given of its dishonor.

Whether the agent shall give notice of the dishonor to prior parties directly, or to his principal only, but in time to enable him to give such notice to prior parties, is a question upon which the authorities are not harmonious. The weight of authority, however, seems to be that the agent is only bound to notify his principal.[39] For the purposes of notice, therefore, a banker or other agent to whom a note or bill has been transmitted for collection, is to be considered as though he were the real holder, and his principal a prior indorser. The agent may therefore notify his principal only, and the latter has the same time to notify prior parties.[40]

§ 1304. ——— But this is not the utmost limit of the agent's duty and liability. He may so act as to charge all of the parties to the paper, and yet become liable to his principal for a loss occasioned by his negligence. The rule which will measure the diligence which is exacted of a *holder* of such paper in order to charge the prior parties,

[38] First National Bank of Meadville v. Fourth National Bank of N. Y., 77 N. Y. 320, 33 Am. Rep. 618; Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; Chapman v. McCrea, 63 Ind. 360; Oil Well Supply Co. v. Exchange Nat. Bank, 131 Pa. 100; City Nat. Bank v. Clinton County Bank, 49 Ohio St. 351; Borup v. Nininger, 5 Minn. 523; Jagger v. National Germ.-Am. Bank, 53 Minn. 386; West v. St. Paul Nat. Bank, 54 Minn. 466; Roanoke Nat. Bank v. Hambrick, 82 Va. 185.

[39] Colt v. Noble, 5 Mass. 167; First Nat. Bank of Lynn v. Smith, 132 Mass. 227; United States Bank v. Goddard, 5 Mason (U. S. C. C.), 366, Fed. Cas. No. 917; Farmers' Bank v. Vail, 21 N. Y. 485; Bank of Mobile v. Huggins, 3 Ala. (N. S.) 206; Mead v. Engs, 5 Cow. (N. Y.) 303; Phipps v. Millbury Bank, 8 Metc. (Mass.) 79; Howard v. Ives, 1 Hill (N. Y.), 263; Seaton v. Scovill, 18 Kan. 433, 26 Am. Rep. 779. *Contra*, Thompson v. Bank of South Carolina, 3 Hill (S. Car.), Law, 77, 30 Am. Dec. 354; Smedes v. Bank of Utica, 20 Johns. (N. Y.) 372; Merchants' Bank v. Stafford Bank, 44 Conn. 565; McKinster v. Bank of Utica, 9 Wend. (N. Y.) 46.

[40] Seaton v. Scovill, 18 Kan. 433, 26 Am. Rep. 779, and cases, *supra*.

will not always measure the diligence which is required of a collecting agent in the discharge of his duty to his principal.[41]

Thus it is said by a learned judge: "Suppose an agent receives for collection from the payee, a sight draft. No circumstance can make it his duty, in order to charge the drawer, to present it for payment until the next day. He has entered into no contract with the drawer, is not employed or paid by him to render him any service, and owes him no duty to protect him from loss. What is required to be done to charge the drawer is simply a compliance with the condition attached to the draft, as if written therein; and that condition is in all cases complied with by presentation, demand and notice on the next day after receipt of the draft. But suppose the agent, on the day he receives the draft, obtains reliable information that the drawee must fail the next day, and that the draft will not be paid unless immediately presented; what then is the duty he owes his principal whose interests, for a compensation, he has agreed with proper diligence and skill, to serve, in and about the collection of the draft? Clearly, all would say, to present the draft at once; and if he fails to do this, and loss ensues, he incurs responsibility to his principal; and yet the drawer would be charged if it was not presented until the next day. Where an agent receives a bill for collection, payable some days or months after date, in order to charge the drawer, he need not present it for acceptance until it falls due; and if he then presents it and demands payment, and protests it and gives the notice, the drawer is held; and yet in such a case he owes his principal the duty to present the bill for acceptance at once, and if he fails in such duty and loss ensues to his principal he becomes liable for such loss." [42]

§ 1305. ——— In accordance with these principles it was held that an agent intrusted, for collection, with a draft or bill payable on a particular day, is liable for any unnecessary delay in presenting it for acceptance, although it may not be yet due.[43] So the defendant, a bank in New York, received for collection a draft upon a firm in that city upon the morning of a certain day and, upon presentation, received in payment the drawee's check upon another bank in the same city, and delivered up the draft. The check, however, was not presented until the next day, and then through the clearing house.

[41] First National Bank v. Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690, again reported in 52 N. Y. 545.

[42] First Nat. Bank v. Fourth Nat. Bank, *supra*.

[43] Allen v. Suydam, *supra*.

On that day, and before it was presented for payment, the drawers of the check failed and payment was refused. The defendant thereupon returned the check to the drawers, got back the draft, made a formal demand for its payment, caused it to be protested, and, on the next day, gave due notice of its dishonor. It appeared that the bank upon which the check was drawn paid all of the drawer's checks down to the time of the failure, and that the check would have been paid if presented, as it might easily have been, for payment upon the day it was given. Upon this state of facts it was held that, though the action of the defendant bank might have been sufficient to charge prior parties, it was negligent in not securing payment of the check on the day that it was drawn, and hence was liable for the loss.[44] Indeed, as has been seen,[45] there is no implied authority, in an agent to collect, to receive a check in payment at all. It is, undoubtedly, a common practice among business men in their own transactions, to give and receive checks in payment of demands. This is, however, a matter of convenience only, and the check does not constitute payment unless expressly received as such. But this practice falls short of a usage applying to the collection of drafts for absent parties. And it is not a reasonable usage that one who undertakes to collect a draft for an absent party should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties upon the mere receipt of a check which may turn out to be worthless.[46]

§ 1306. ——— And not only must the agent, as has been seen, duly present the paper for acceptance in proper cases, but he must also exercise reasonable care, at least, to see that the acceptance is in proper form and so executed as to bind the drawee.[47] For negligence in ascertaining the identity of the parties,[48] or in determining the au-

[44] First Nat. Bank v. Fourth Nat. Bank, *supra*.

A collecting bank accepted from the debtor a check on another bank in the same city. That night, at close of banking hours, the second bank suspended payment. It was held to be the duty of the collecting bank to present checks so received for payment within banking hours of the day received; failing to do so, it is liable to the drawer thereof. Morris v. Eufaula Nat. Bank, 106 Ala. 383, s. c. 122 Ala. 580, 82 Am. St. Rep. 95.

[45] *Ante*, § 949.

[46] Whitney v. Esson, 99 Mass. 308, 96 Am. Dec. 762.

[47] "Where the holder of a bill of exchange transmits it to his agent for presentment to the drawee, such agent has no right to receive anything short of an explicit and unequivocal acceptance, without giving notice to the holder, as in case of non-acceptance; and he will be liable for any loss the holder may sustain in consequence of his neglect so to do." Walker v. The Bank of the State of New York, 9 N. Y. 582.

[48] A bank sent paper for collection

thority of one who assumes to act for the drawee, he would also be liable. *A fortiori* would he be liable where he takes an acceptance from one known by him to have no authority to bind the drawee, and gives the principal no notice so that he may otherwise protect himself.[49]

§ 1307. Neglect to give principal notice of material facts.—It is also the duty of the agent here, as in other cases, to give the principal timely notice of facts within the agent's knowledge and essential for the principal's protection. Thus if unexpected contingencies arise, if unusual delays occur, if the usual and expected course cannot be pursued, and the like, it is the duty of the agent to give notice to the principal, so that he may either take the steps necessary for his own protection, or give fresh instructions to the agent in view of the altered circumstances. For a failure in this respect, from which the principal suffers loss, the agent will be responsible.[50]

It must be borne in mind, however, in dealing with this question that, unlike the case of giving notice of dishonor, this is not a matter concerning which the law has prescribed any particular time within which notice shall be given. It is simply a question of what should reasonably have been done under the circumstances of the case; and among these circumstances the general usage in such cases and even at times the custom of the particular place, may be material.[51]

§ 1308. Neglect in granting or permitting delays, extensions or forbearances.—The agent also will clearly be liable where loss has happened to the principal because the agent has failed to press the collection with due diligence, has granted unauthorized extensions or permitted other unjustifiable delays. Thus where a bank which had received a draft for acceptance and collection was authorized to grant an extension for twenty days, but granted an extension for thirty

to its correspondent bank, knowing there was another person of the same name as the endorser in that vicinity, but not informing its correspondent of the fact. *Held*, that the bank having the information and not divulging it, is liable for the loss incurred through the mistake. Borup v. Ninginger, 5 Minn. 523.

But where a bank received for protest a note indorsed by one John Becker, and notice of protest was sent to one John Becker, who lived in that vicinity and was the only person of that name known to the bank or its officers. *Held*, that the bank is not liable for loss occasioned through no notice of protest being sent to the indorser. Mount v. First Nat. Bank, 37 Iowa, 457.

[49] Kirkeys v. Crandall, 90 Tenn. 532.

[50] See Omaha Nat. Bank v. Kiper, 60 Neb. 33; Dern v. Kellogg, 54 Neb. 560; Mound City Paint Co. v. Commercial Nat. Bank, 4 Utah, 353; Krafft v. Citizens' Bank, 139 N. Y. App. Div. 610; Selz v. Collins, 55 Mo. App. 55.

[51] See Sahlien v. Bank, 90 Tenn. 221; Bank of Washington v. Triplett, 1 Pet. (U. S.) 25, 7 L. Ed. 37.

days, without notice to or authority from the principal, mislaid and ignored the draft for a number of days and took no steps to collect until after the drawee had failed, not even notifying the principal of his failure until more than a week after it occurred, it was held that the bank was properly chargeable for the loss sustained.[52]

So where a bank permitted a draft sent to it for collection, to lie unaccepted and unpaid from February 19 until March 7, without notice to the principal, and then before the principal had been heard from, took a conveyance to itself of all the debtor's property to secure other claims, the bank was likewise held.[53]

So where a bank held a sight-draft without any notification to the principal and without taking any steps to collect it, for forty-seven days, during which time it might probably have been collected, and then returned it as uncollectible, the bank was held.[54] And so, again, where the collecting bank sent the paper directly to the drawee, by a letter which actually miscarried, but which otherwise should have been heard from in two days, and the bank waited nineteen days without any inquiry and until the drawee had failed, the bank was held liable.[55]

§ 1309. Neglect in keeping the money.—The agent having received the money, question may arise respecting his liability if the money be lost while yet under his control. If the money were kept in violation of express instructions or a clear duty to remit it to his principal or to make some other disposition of it, the agent would ordinarily be liable for the loss. But if the agent were not thus in default, and no special arrangement respecting its care existed, the agent would not be responsible except for failure to exercise reasonable and ordinary care.[56]

If, however, having received the money for the principal the agent

[52] Omaha Nat. Bank v. Kiper, 60 Neb. 33.

[53] Dern v. Kellogg, 54 Neb. 560. The court said it was an act of charity to designate the defendant's conduct as negligence; "a harsher term might be more appropriate."

[54] Mound City, etc., Co. v. Commercial Nat. Bank, 4 Utah, 353.

[55] First Nat. Bank of Trinidad v. First Nat. Bank of Denver, 4 Dill. (U. S. C. C.) 290, Fed. Cas. No. 4,810.

[56] The agent of a railroad received money which he was unable to send in on the day collected because the last train had gone before it was received. On leaving at the end of the day, he locked it up in the office safe, provided by the company, and fastened the windows and locked the door of the office. *Held*, not answerable to his principal for a loss occasioned by burglary that night. Louisville, etc., R. C. v. Buffington, 131 Ala. 620. In American Express Co. v. Stuart, 134 Ill. App. 390, it was held that a druggist, who sold plaintiff's money orders, was not liable for a loss which occurred through the theft by a drug clerk who had learned the combination of the safe, where it was kept.

without the principal's authority, returns it to the payer upon a claim which proves to be unfounded, he must answer for it to the principal.[57]

And where the agent, a bank, having received money for a non-resident principal, was served with garnishment or attachment process respecting it, at the suit of an adverse claimant, and gave to the principal such misleading and indefinite information respecting the proceedings that the principal's money was lost, the agent was held liable.[58]

§ 1310. Neglect in making remittances.—Where, as has been seen, the principal directs his agent to send the money in a certain way or through a particular channel, transmitting it in a different mode is evidence of disobedience.[59] But unless so bound by express instructions, the agent is held only for reasonable skill and diligence in sending the money.[60]

Thus where the principal sent a claim of about sixty dollars to his agent by mail, with instructions to the agent to "forward" the proceeds, it was held that the agent was warranted in believing that he was authorized to transmit the proceeds in the same way.[61] Said Gray, J.: "There is no rule of law that the postoffice established by the government for the purpose of carrying letters is a less safe or appropriate means of forwarding money than a private carrier or banker. Whether it is so in any particular case is a question of fact, depending upon the amount to be sent, the proportionate expense of different modes of transmission, the time and distance intervening, the prevailing usage in similar cases, and other circumstances surrounding the transaction, all of which are proper for the consideration of the jury." [62]

Where the agent in ordinary course remits by bill or draft bought by him for that purpose without negligence, and in so doing indorses it, he is not, as between himself and his principal, liable upon his indorsement.[63]

[57] An agent sold land and received a deposit from the purchaser; purchaser claimed that the principal's title was imperfect, and agent returned the deposit after notification by the principal not to do so; agent held liable to the principal for the amount of the deposit, principal's title being perfect. Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. R. 122.

[58] Krafft v. Citizens' Bank, 139 N. Y. App. Div. 610.

[59] *Ante*, § 1247.

[60] Buell v. Chapin, 99 Mass. 594, 97 Am. Dec. 58; Kingston v. Kincaid, 1 Wash. (U. S. C. C.) 454, Fed. Cas. No. 7,822; Mechanics' Bank v. Merchants' Bank, 6 Metc. (Mass.) 26.

[61] Buell v. Chapin, *supra;* Morgan v. Richardson, 13 Allen (Mass.), 410.

[62] In Buell v. Chapin, *supra.*

[63] Sharp v. Emmet, 5 Whart. (Pa.) 288, 34 Am. Dec. 554; Byers v. Harris, 66 Tenn. (9 Heisk.) 652.

§ 1311. Liability for neglect of correspondents and sub-agents.—As has been already stated, the principle which runs through the cases, is that if an agent employs a sub-agent for his principal and by his authority, express or implied, then the sub-agent is the agent of the principal and is responsible directly to the principal for his conduct. In such a case the agent is not liable for the negligence of the sub-agent, unless he has failed to exercise due care in the selection of such sub-agent. But where the agent, having undertaken to do the business for his principal, employs a servant or sub-agent on his own account to assist him in what he has undertaken, then the sub-agent or servant is the representative of the agent only, and is responsible to him for his conduct, and the agent is responsible to the principal for the manner in which the business has been done, whether by himself or by his servant or agent.[64] In the latter case, the agent stands in the position of an independent contractor, at liberty to perform the undertaking by the agencies of his own selection, and is responsible to his principal for the due execution of the enterprise by the means he has selected. As has been seen, the authority of the agent to employ a sub-agent on his principal's account, may, in certain cases, be implied.[65] The application of these principles to the case of collecting agents has not been altogether harmonious, yet the preponderance of authority is believed to be in accordance with them.

§ 1312. Liability of banks.—There can be no question of course, that the bank is liable for the neglect of its own immediate officers and servants;[66] these are the direct executive actors of the bank through whom all of its transactions must necessarily be performed.

But when it becomes necessary to employ an independent agency, such as a notary public to protest the paper, or another bank when the demand is payable in a distant town, other questions arise.

§ 1313. ——— For the neglect of the notary.—The doctrine was established in New York at an early period and has since been maintained, that a bank receiving negotiable paper for collection, in the absence of an express agreement or recognized custom limiting its liability, stands in the attitude of an independent contractor, and that if, in the course of the performance, it employs a notary to present the paper for payment and give the proper notice to charge the parties, the notary is the agent of the bank and not of the depositor or owner

[64] See *ante*, § 333.

[65] See *ante*, § 314 *et seq.*

[66] Bank is liable also for defaults of its branch banks. Bird v. Louisiana State Bank, 93 U. S. 96, 23 L. Ed. 818.

of the paper at least so far as those acts are concerned which, like mere presentment and notice, may be done by unofficial agents.[67] The bank is therefore liable for his negligence. The same rule formerly prevailed in Louisiana [68] and South Carolina,[69] but has since been overruled. It appears to be approved in Indiana [70] and is unqualifiedly indorsed in New Jersey.[71] It is also approved in Kansas.[72]

But the weight of authority is believed to be that if the notary is employed in the line of his office—even though an official act, like protest, is not indispensable—and the bank exercises due care in the selection of a competent notary, it is not liable for his neglect in the performance of the duty entrusted to him.[73] Where, however, the bank employs a notary by the year, and takes from him a bond for the faithful discharge of his duties, he is to be regarded as an officer of the bank, and the bank will be liable for his negligence or default.[74]

And where the president and manager of the bank himself acts as the notary, the bank will be responsible for his default.[75]

§ 1314. ——— For the neglect of a correspondent bank.—The same conflict of authority exists as to the liability of a bank which receives, in the ordinary manner, a note or bill payable at a distant place, and sends it to its correspondent there for collection. It is well estab-

[67] Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489.

[68] Miranda v. City Bank, 6 La. 740, 26 Am. Dec. 493, overruled in Hyde v. Planters' Bank, 17 La. 560, 36 Am. Dec. 621; Baldwin v. Bank of Louisiana, 1 La. Ann. 13.

[69] Thompson v. Bank of South Carolina, 3 Hill L. 77, 30 Am. Dec. 354.

[70] American Express Co. v. Haire, 21 Ind. 4, 83 Am. Dec. 334. The point was not directly involved, but the court seems to approve the doctrine of the New York cases. The question at issue was the liability of an express company, which, having undertaken the collection of a bill of exchange caused it to be protested too soon. It was held to be liable. See Tyson v. State Bank, 6 Blackf. (Ind.) 225.

[71] Davey v. Jones, 42 N. J. L. 28, 36 Am. Rep. 505.

[72] Bank of Lindsborg v. Ober, 31 Kan. 599.

[73] Tiernan v. Commercial Bank, 7 How. (Miss.) 648, 40 Am. Dec. 83; Agricultural Bank v. Commercial Bank, 7 Smedes & M. (Miss.) 592; Bowling v. Arthur, 34 Miss. 41; Third National Bank v. Vicksburg Bank, 61 Miss. 112, 48 Am. Rep. 78; Bellemire v. Bank of U. S., 4 Whart. (Pa.) 105, 33 Am. Dec. 46; Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582; Stacy v. Dane County Bank, 12 Wis. 629; Britton v. Nichols, 104 U. S. 757; Bank v. Butler, 41 Ohio St. 519, 52 Am. Rep. 94; Citizens' Bank v. Howell, 8 Md. 530, 63 Am. Dec. 714; First National Bank v. German Bank, 107 Iowa, 543, 70 Am. St. R. 216, 44 L. R. A. 133.

See also, May v. Jones, 88 Ga. 308, 30 Am. St. R. 154, 15 L. R. A. 637.

[74] Gerhardt v. Boatmen's Savings Inst., 38 Mo. 60, 90 Am. Dec. 407.

[75] Wood River Bank v. First Nat. Bank, 36 Neb. 744.

lished in New York[76] that in such a case the correspondent bank is the agent of the bank from which it received the paper, and not of the depositor or owner of the paper. The transmitting bank is, therefore, liable for the neglect or default of the correspondent bank in making the collection and transmitting the proceeds. This rule prevails also in Georgia,[77] Kansas,[78] Louisiana,[79] Michigan,[80] Minnesota,[81] Montana,[82] New Jersey,[83] Ohio,[84] the supreme court of the United States[85] and in England.[86] It is based upon the principle that the home bank having undertaken the collection of the paper stands in the attitude of an independent contractor who is left at liberty to select and does select his own agents and correspondents, and is, therefore, liable for their default.[87]

But in the majority of the states, however, a different rule prevails, and it is held that the liability of the home bank, in the absence of instructions or an agreement to the contrary, extends merely to the selection of a suitable and competent agent at the place of payment and the transmission of the paper to such agent with proper instructions, and does not involve responsibility for the default or misconduct of the correspondent bank. This rule was early established in Massachusetts, and is often called the Massachusetts rule.[88] It is

[76] Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Bank of Orleans v. Smith, 3 Hill (N. Y.), 560; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Commercial Bank v. Union Bank, 11 N. Y. 212; Allen v. Suydam, 22 Wend. (N. Y.) 321, 32 Am. Dec. 555; Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289.

[77] Baillie v. Augusta Savings Bank, 95 Ga. 277, 51 Am. St. R. 74.

[78] First Nat. Bank v. Craig, 3 Kan. App. 166.

[79] Martin v. Hibernia Bank, 127 La. 301.

[80] Simpson v. Waldby, 63 Mich. 439.

[81] Streissguth v. Nat. Germ. Am. Bank, 43 Minn. 50, 19 Am. St. Rep. 213, 7 L. R. A. 363.

[82] Power v. First Nat. Bank, 6 Mont. 251. This case contains a very full resume of the cases.

[83] Titus v. Mechanics' Nat. Bank, 35 N. J. L. 588.

[84] Reeves v. State Bank, 8 Ohio St. 465. See this case discussed and explained in Bank v. Butler, 41 Ohio St. 519, 52 Am. Rep. 94.

[85] Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, limiting Britton v. Niccolls, 104 U. S. 757, 26 L. Ed. 917; Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392. At the Circuits see Kent v. Dawson Bank, 13 Blatchf. 237, Fed. Cas. No. 7,714; Taber v. Perrot, 2 Gall. 565, Fed. Cas. No. 13,721; First Nat. Bank of Trinidad v. First Nat. Bank, 4 Dill. 290, Fed. Cas. No. 4,810; Hyde v. Bank, 7 Biss. 156, Fed. Cas. No. 6,970.

[86] Mackersy v. Ramsays, 9 Clark & F. 818 (House of Lords); Van Wart v. Woolley, 3 B. & C. 439.

[87] See Exchange National Bank v. Third National Bank, *supra*.

[88] Dorchester, etc., Bank v. New England Bank, 1 Cush. (Mass.) 177; Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330, 34 Am. Dec. 59.

adopted also in Connecticut,[89] Illinois,[90] Indiana,[91] Iowa,[92] Maryland,[93] Mississippi,[94] Missouri,[95] Nebraska,[96] Pennsylvania,[97] South Dakota,[98] Tennessee,[99] and Wisconsin.[1]

This rule is based upon the theory that, from the nature of the case, there is necessity for the appointment of a sub-agent, that the principal impliedly authorizes the appointment of one on his account, and that in this, as in other cases, the agent fulfills his duty when he uses due care in the selection of the sub-agent.[2]

A bank, however, does not exercise due care in the selection of its correspondent when it sends the paper for collection to the debtor himself, as, for example, to the very bank upon which the check or draft is drawn. In such a case the bank is liable for a loss occasioned by the failure of the drawee.[3]

And where a note is, by its terms, payable at the banking office of the bank to which it is sent for collection, that bank, it is held, has no implied authority to send it on for collection to another bank nearer

[89] Lawrence v. Stonington Bank, 6 Conn. 521; East Haddam Bank v. Scovil, 12 Conn. 303.

[90] Aetna Ins. Co. v. Alton City Bank, 25 Ill. 243, 79 Am. Dec. 328.

[91] Irwin v. Reeves Pulley Co., 20 Ind. App. 101.

[92] Guelich v. National State Bank, 56 Iowa, 434, 41 Am. Rep. 110.

[93] Jackson v. Union Bank, 6 Har. & J. (Md.) 146; Citizens' Bank v. Howell, 8 Md. 530, 63 Am. Dec. 714.

[94] Tiernan v. Commercial Bank, 7 How. (Miss.) 648, 40 Am. Dec. 83; Agricultural Bank v. Commercial Bank, 7 Sm. & M. (Miss.) 592; Bowling v. Arthur, 34 Miss. 41; Third National Bank v. Vicksburg Bank, 61 Miss. 112, 48 Am. Rep. 78.

[95] Daly v. Butchers' & Drovers' Bank, 56 Mo. 94, 17 Am. Rep. 663.

But in Landa v. Traders' Bank, 118 Mo. App. 356, it was held that where there was an agreement to collect for a consideration, the other rule applied.

[96] First Nat. Bank v. Sprague, 34 Neb. 318, 33 Am. St. Rep. 644, 15 L. R. A. 498.

[97] Merchants' National Bank v. Goodman, 109 Pa. 422, 58 Am. Rep. 728; Bank v. Earp, 4 Rawle (Pa.), 386; Bellemire v. Bank of U. S., 4 Whart. (Pa.) 105, 33 Am. Dec. 46; Wingate v. Mechanics' Bank, 10 Pa. 104.

[98] Plymouth County Bank v. Gilman, 9 S. Dak. 278, 62 Am. St. Rep. 868; Fanset v. Garden City Bank, 24 S. Dak. 248.

Compare Sherman v. Port Huron Engine Co., 8 S. Dak. 343.

[99] Bank of Louisville v. First National Bank, 8 Baxt. (Tenn.) 101, 35 Am. Rep. 691.

[1] Stacy v. Dane County Bank, 12 Wis. 629.

[2] See Guelich v. National State Bank, 56 Iowa, 434, 41 Am. Rep. 110.

[3] Drovers' National Bank v. Anglo-American, etc., Co., 117 Ill. 100, 57 Am. Rep. 855; Merchants' National Bank v. Goodman, 109 Pa. 422, 58 Am. Rep. 728; Farwell v. Curtis, 7 Biss. C. C. 162, Fed. Cas. No. 4,690; First Nat. Bank of Evansville v. Bank of Louisville, 56 Fed. 967; German Nat. Bank v. Burns, 12 Colo. 539, 13 Am. St. Rep. 247; Anderson v. Rodgers, 53 Kan. 542, 27 L. R. A. 248.

See also, McIntosh v. Tyler, 47 Hun (N. Y.), 99. The case of Indig v. National City Bank, 80 N. Y. 100, as

to the residence of the maker, in such wise as to constitute the latter the agent of the payee, or to make a payment to the latter bank a payment to the payee.[4]

§ 1315. Liability of attorneys.—The liability of an attorney for the neglect or default of other attorneys or agents employed by him in the collection of claims, depends upon the nature of his undertaking. He is, of course, liable for the neglect or default of his own immediate clerks or agents, employed by him to assist him in the collection. And where he undertakes *the collection* of a claim at a place distant from that in which he does business, his liability usually extends to the neglect or default of another attorney or agent to whom he transmits the claim for collection, and is not limited to the selection of, and transmission to, a suitable and proper agent. In this respect his liability differs from that which, as has been seen, is, by a majority of the courts, imposed upon banks for the defaults of their correspondents, though many of the cases which have arisen have turned upon the peculiar language of the engagements entered into. He may, of course, in such a case limit his liability by express agreement, but in the absence of such an agreement, an attorney taking a claim "for collection" is looked upon as an independent contractor, and is therefore liable for the default of his correspondent.[5]

§ 1316. Liability of mercantile or collection agencies.—The same rules which have been applied to attorneys who undertake the collection of claims, apply to the so-called commercial or collection agencies, through which a large portion of the collection business is now transacted. In a leading case[6] upon this subject the defendants gave the

interpreted by Judge Scholfield in Drovers' National Bank v. Anglo-American, etc., Co., *supra*, is not in conflict with the statement in the text; nor as interpreted by the judge who wrote the opinion and by the court which pronounced it, in the later case of Briggs v. Central National Bank, 89 N. Y. 182, 42 Am. Rep. 285, does it conflict.

[4] Sherman v. Port Huron Engine Co., 8 S. Dak. 343.

[5] Cummins v. Heald, 24 Kan. 600, 36 Am. Rep. 264; Walker v. Stevens, 79 Ill. 193; Abbott v. Smith, 4 Ind. 452; National Bank v. Old Town Bank, 112 Fed. 726; Lewis v. Peck, 10 Ala. 142; Riddle v. Poorman, 3 Pa. 224; Cox v. Livingston, 2 Watts & Serg. (Pa.) 103, 37 Am. Dec. 486; Krause v. Dorrance, 10 Pa. 462, 51 Am. Dec. 496; Rhines v. Evans, 66 Pa. 192, 5 Am. Rep. 364; Pollard v. Rowland, 2 Blackf. (Ind.) 22; Cummins v. McLain, 2 Ark. 402; Wilkinson v. Griswold, 12 Smedes & Marsh. (Miss.) 669. See also, Bradstreet v. Everson, 72 Pa. 124, 13 Am. Rep. 665, and Sanger v. Dun, 47 Wis. 615, 32 Am. Rep. 789; Dale v. Hepburn, 11 N. Y. Misc. 286; cited in the following section.

[6] Bradstreet v. Everson, 72 Pa. 124, 13 Am. Rep. 665. To same effect see Hoover v. Wise, 91 U. S. 308, 23

plaintiffs a receipt stating that certain claims had been received "for collection." Defendants sent the claims to their agent in Memphis, who collected the money but failed to pay over the proceeds. The court held the defendants liable, saying, "It is argued, notwithstanding the express receipt 'for collection,' that the defendants did not undertake for themselves to collect, but only to remit to a proper and responsible attorney, and made themselves liable only for diligence in correspondence, and giving the necessary information to the plaintiffs; or in briefer terms, that the attorney in Memphis was not their agent for the collection, but that of the plaintiffs only. The current of decision, however, is otherwise as to attorneys at law sending claims to correspondents for collection, and the reasons for applying the same rule to collection agencies are even stronger. They have their selected agents in every part of the country. From the nature of such ramified institutions we must conclude that the public impression will be, that the agency invited customers on the very ground of its facilities for making distant collections. It must be presumed, from its business connections at remote points, and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason, therefore, to hold that such an agency is liable for collections made by its own agents, when it undertakes the collection by the express terms of the receipt. If it does not so intend, it has it in its power to limit responsibility by the terms of the receipt."

§ 1317. ——— Limitations of the kind indicated by the court in the passage just cited are valid. Thus in an action[7] brought against a similar agency it appeared that the defendants had given and the plaintiffs had accepted a receipt for the claim, stating that it was to be transmitted to an attorney by mail for collection or adjustment, at the risk and on the account of the plaintiffs. Plaintiffs had also signed a memorandum to the same effect upon the defendants' books. It was contended on behalf of the plaintiffs not only that the receipt was not sufficient in terms to limit the defendant's liability to a mere transmitter of the claim, but that even if it would bear this construction it would permit the defendants to take advantage of their own wrong and was void as opposed to public policy, and that therefore the defendants were liable for the negligence or misconduct of the attorney

L. Ed. 392; Weyerhauser v. Dun, 100 N. Y. 150.

A person who puts claim in charge of collection agency for collection is not responsible for the fees of an attorney employed by the agency. Dale v. Hepburn, 11 N. Y. Misc. 286.

[7] Sanger v. Dun, 47 Wis. 615, 32 Am. Rep. 789.

whom they employed and who had collected the money and appropriated it to his own use. In answer to this contention the court said: "It well may be that such would be the responsibility of the defendants, were it not for the restrictive clause in the receipts. But that clause, if any effect is given to it, clearly limits that liability; for it provides that the account is to be transmitted to an attorney for collection at the risk of the plaintiffs. Such being the case, we think the defendants are not liable for the acts or default of the attorney employed by them, unless in the selection of such attorney they were guilty of gross negligence; for it seems to us it was competent for the parties, by express contract, to limit the liability which the law would otherwise impose upon the defendants for the acts of the attorney employed by them to make the collection. We are not aware of any principle of law or public policy which condemns such a contract."

§ 1318. ——— Where, however, the agency retains the right to control the means and methods of collection, it will be held liable for the faithful performance of the sub-agencies it employs, in the absence of such a stipulation to the contrary. Thus where the claim was taken "to be forwarded by us for collection by suit or otherwise, at our discretion," the agency was held liable for the default of its sub-agent.[8]

§ 1319. **Liability of express companies.**—The same general principles are applied to express companies which undertake the collection of demands. Thus where the plaintiff at Brockport, New York, delivered to the American Express Co. a note made by a resident of San Francisco, with instructions to take it to San Francisco, demand payment, and, if not paid, to have suit instituted at once for its collection (the plaintiff supposing the company's line to extend to San Francisco, although in fact it did not), and the express company carried the note to the termination of its line and there delivered it to another company, whose line extended the remainder of the distance, with the instructions, to be by the latter company carried out, it was held that the first company was responsible for a loss occurring from the negligence of the latter company in making the collection.[9]

So where an express company having undertaken the collection of a bill, delivered it to a notary for protest, it was held that the company was responsible for a loss occasioned by the notary's protesting it too soon.[10]

[8] Morgan v. Tener, 83 Pa. 305.
[9] Palmer v. Holland, 51 N. Y. 416, 10 Am. Rep. 616.
[10] American Express Co. v. Haire, 21 Ind. 4, 83 Am. Dec. 334.

§ 1320. The measure of damages for agent's negligence.—The measure of damages in an action against an agent for negligence in collection is the actual loss sustained.[11] The negligence being established, and it appearing with reasonable probability that but for such negligence the loss would not have happened, that loss *prima facie* is the amount of the claim,[12] but the agent may show that, notwithstanding his negligence, the principal has suffered no loss, and the recovery can then be for nominal damages only. Thus he may show in reduction of damages that if he had used the greatest diligence, the debt could not have been collected;[13] or that the principal's claim against the debtor is delayed only and not lost,[14] or that he is wholly or partially protected by securities which he holds,[15] or that though the principal's claim against certain of the parties is lost, there are still others liable who are amply responsible, from whom the debt can be collected.[16]

The burden of making such showing seems to rest upon the agent. Thus in a recent case to recover damages against a bank for negligence, it was said: "It is claimed that there was no proof of damages; that is, that it was not shown that had the bank been diligent the drafts could have been collected. In such cases it is usually impossible to show with certainty that if due care had been observed the collection would have been made. The law is not so rigid in its requirements for the protection of the negligent agent. It is only necessary to show a reasonable probability that with due care the collection would

[11] Paul v. Grimm, 183 Pa. 330. Here an agent for the sale of land accepted in payment bonds which proved to be worthless. *Held*, that the amount named in the deed as the consideration received was not conclusive of the amount of the loss, and that the agent might show that the amount so named had been inflated in view of the doubtful character of the bonds.

[12] Allen v. Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; Durnford v. Patterson, 7 Mart. (La.) 460, 12 Am. Dec. 514; Miranda v. City Bank, 6 La. 740, 26 Am. Dec. 493; Bank of Washington v. Triplett, 1 Pet. (U. S.) 25, 7 L. Ed. 37; First National Bank v. Fourth National Bank, 77 N. Y. 320, 33 Am. Rep. 618; Dern v. Kellogg, 54 Neb. 560; Omaha Nat. Bank v. Kiper, 60 Neb. 33; Fahy v. Fargo, 17 N. Y. Supp. 344; First Nat. Bank of Trinidad v. First Nat. Bank of Denver, 4 Dillon (U. S.), 290, Fed. Cas. No. 4,810.

But compare Fox v. The Davenport Bank, 73 Iowa, 649; Collier v. Pulliam, 13 Lea (Tenn.), 114; Bruce v. Baxter, 7 Lea (Tenn.), 477; Sahlien v. Bank, 90 Tenn. 221.

[13] First National Bank v. Fourth National Bank, 77 N. Y. 320, 33 Am. Rep. 618.

[14] Van Wart v. Woolley, 3 Barn. & Cress. 439.

[15] Borup v. Nininger, 5 Minn. 523.

[16] First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618.

have resulted. The burden then rests on the defendant to show that there was no damage." [17]

§ 1321. Principal's right of action against sub-agent.—Whether the principal may hold the sub-agent directly responsible is a question upon which there is also much conflict of authority. The question may present itself in two forms: I. Whether the principal may hold the sub-agent directly liable for his negligence, and II. Whether the principal may recover from the sub-agent the proceeds of the collection then in his hands.

I. The determination of first form must depend largely upon the view which shall be taken of the general relations of the parties as discussed in the preceding sections. If the sub-agent is to be treated as the agent of the agent only, then there is no privity between them upon which such an action can be based; [18] but if on the other hand the sub-agent is to be treated as the agent of the principal, the principal may proceed against him directly for his default.[19] This conclusion is in accordance with the general principles governing the appointment of sub-agents which have been heretofore stated.

II. The determination of the second form must also rest upon the same general principles, so far as the remedy sought depends upon privity of contract between the principal and the sub-agent; but privity of contract is not always required. The fact of the negotiable or non-negotiable character of the claim is also material. The decisions of the courts have not been harmonious, nor have the decisions of the same court always been in harmony upon both forms of the question. It is therefore difficult to extract uniform principles from them, but the following may be said to be supported by a preponderance of authority, most of the cases being those in which the claim was in the form of negotiable paper:

[17] Dern v. Kellogg, 54 Neb. 560. Quoted and followed in Omaha Nat. Bank v. Kiper, 60 Neb. 33. To same effect: Allen v. Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; Miranda v. City Bank, 6 La. 740, 26 Am. Dec. 493; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Fahy v. Fargo, 17 N. Y. Supp. 344.

In Talcott v. Cowdry, 17 N. Y. Misc. Rep. 333, it was said that "very slight evidence of the collectibility of the whole of the plaintiff's demand would be sufficient to throw upon the collecting agents the burden of showing that the amount was not collectible."

But compare Fox v. The Davenport Bank, 73 Iowa, 649; Collier v. Pulliam, 13 Lea (Tenn.), 114; Bruce v. Baxter, 7 Lea (Tenn.), 477; Sahlien v. Bank, 90 Tenn. 221.

[18] See *ante*, § 333.

See also Steenkamp v. Du Toit, [1910] Transv. L. R. 171.

[19] See *ante*, § 333.

1. That where, by special arrangement or custom of dealing between the owner of the paper and the bank or the agent undertaking the collection, the latter at once places the amount thereof to the credit of the owner, upon which he thereupon draws or is entitled to draw as cash, this works a transfer of the title to the paper in such a way as to prevent the owner from following the paper or its proceeds into the hands of a third party who has received the paper in good faith and due course of business from the agent for collection.[20]

2. That, except as above, the bank or agent actually making the collection may be held responsible directly to the true owner, unless, before receiving notice of the owner's claim, it has paid over the proceeds to the bank or agent from which it received the paper, or unless it has made advances or given credit to the bank or agent from which it received the paper in such a way as to make it a *bona fide* holder of the paper for value.[21] Unless it be a *bona fide* purchaser of it for

[20] Ayres v. Farmers' & Merchants' Bank, 79 Mo. 421, 49 Am. Rep. 235. In this case the plaintiff deposited with the Mastin bank for collection and credit on his account a check drawn on defendant in favor of a third person. Under an express arrangement the amount of the check was immediately passed to the credit of the plaintiff, who drew upon it the same day. The Mastin bank sent the check to defendant who charged it to the maker and credited the Mastin bank. The Mastin bank in the meantime had failed, but defendant did not know it. Plaintiff then sued defendant to recover the amount of the check, but was held not entitled to recover. The arrangement between the plaintiff and the Mastin bank was held by the court to amount to a purchase of the paper by the latter.

[21] Thus bank A, the owner of a check drawn on bank D, indorsed and transmitted it for collection and credit on its account to bank B. Bank B did not, however, give bank A credit for the check, but entered it on its collection register merely, and indorsed and transmitted it for collection to bank C, with directions to credit bank B with the proceeds. Bank B on the same day failed in debt to bank A. Bank C collected the check and credited the proceeds to bank B, which was in debt to bank C. Before the collection the cashier of bank C had heard of bank B's failure, but did not inform bank D, which was ignorant of it. The United States band examiner having taken charge of the affairs of bank B, without the knowledge of bank A, credited bank A and charged bank B with the amount on the books of bank B. Bank A sued bank C to recover the amount of the check.

Upon this state of facts it was held that bank C was the agent of bank B for the purposes of the collection; that the form of the indorsement from bank A to bank B was sufficient to apprise bank C that bank B was not the owner of the check, but an agent for collection merely; that the insolvency of bank B, of which bank C had notice, was sufficient to revoke the authority conferred by bank A upon bank B, to mingle the proceeds with the general funds of bank B, by entering the amount to the credit of bank A, even if it did not revoke bank B's authority to collect altogether; that bank A was therefore entitled to recover the proceeds from

value or for advances made upon it in good faith without notice of any defect in the title, the bank or agent actually making the collection acquires no better title to the paper or its proceeds than was possessed by the bank or agent from whom it was received.[22]

3. That in the last mentioned case, the sub-agent cannot be deemed to be such a *bona fide* holder where the paper bears upon its face evidence that the bank or agent from which it was received was an agent for collection merely.[23]

bank C, and that the fact that bank C had credited the amount on its books to bank B did not defeat the recovery. "No objection," said the court, "can be successfully made on the ground of want of privity. There is some discrepancy in the decisions as to whether the collecting agent, or the subagent, should be sued by the holder of paper for the failure of the subagent to perform some duty, or for some negligence whereby the debt is lost. See 1 Dan. Neg. Inst. § 344 and notes. But the rule scarcely admits of an exception that where one has in his hands money which rightfully belongs to another, the latter may sue for and recover it." First National Bank of Crown Point v. First National Bank of Richmond, 76 Ind. 561, 40 Am. Rep. 261, citing Hall v. Marston, 17 Mass. 574. In Hyde v. First Nat. Bank, 7 Biss. C. C. 156, Fed. Cas. No. 6,970, the rule laid down in subdivision 2 of the text is thought to be overruled by Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392, but in First National Bank of Chicago v. Reno County Bank, 3 Fed. Rep. 257, Judge McCrary reaches the opposite conclusion as to the effect of Hoover v. Wise, and announces the same rule as is laid down in Indiana, saying, "I fully approve the doctrine announced by the Supreme Court of Massachusetts in Hall v. Marston, 17 Mass. 574, as follows: 'Whenever one man has in his hands the money of another which he ought to pay over, he is liable in this action (*assumpsit*) although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable grounds for retaining it, the law creates the privity and the promise.' This doctrine is not in conflict with the decision of the Supreme Court in Hoover v. Wise."

The doctrine of the text has since been recognized and applied by the Supreme Court of the United States. Evansville Bank v. German Am. Bank, 155 U. S. 556, 39 L. Ed. 259; Commercial Bank v. Armstrong, 148 U. S. 50, 37 L. Ed. 363. To the same effect: Armstrong v. National Bank of Boyertown, 90 Ky. 431, 9 L. R. A. 553; The National Butchers, etc., Bank v. Hubbell, 117 N. Y. 384, 15 Am. St. Rep. 515, 7 L. R. A. 852; Manufacturers' Bank v. Continental Bank, 148 Mass. 553, 12 Am. St. Rep. 598, 2 L. R. A. 699; Freeman's Bank v. National Tube Works, 151 Mass. 413, 21 Am. St. Rep. 461, 8 L. R. A. 42; Commercial National Bank v. Hamilton National Bank, 42 Fed. 880.

See also Wallis v. Shelly, 30 Fed. 747; Elliott v. Swartwout, 10 Pet. (U. S.) 137, 9 L. Ed. 373; Gaines v. Miller, 111 U. S. 395, 28 L. Ed. 466; Milton v. Johnson, 79 Minn. 170, 47 L. R. A. 529.

[22] Dickerson v. Wason, 47 N. Y. 439, 7 Am. Rep. 455; McBride v. Farmers' Bank, 26 N. Y. 450; Stevenson v. Fidelity Bank, 113 N. C. 485.

[23] First National Bank of Crown Point v. First National Bank of Richmond, 76 Ind. 561, 40 Am. Rep. 261; City Bank v. Weiss, 67 Tex. 333, 60 Am. Rep. 29; First National Bank v. Bank of Monroe, 33 Fed. Rep. 408; *In re* Armstrong, 33 Fed. Rep. 405;

4. That the bankruptcy of the bank or agent which has taken the paper for collection and credit when collected, before it has received the funds from the sub-agent, terminates the authority to so receive the proceeds and credit them to the account of the owner.[24]

§ 1322. Del credere agents—How liable to principal.—Whenever an agent, in consideration of additional compensation, guarantees to his principal the payment of the debts that become due through his agency, he is said to act under a *del credere* commission.

Whether the legal effect of such a commission is to make the agent primarily liable in all events for the proceeds of the goods as for goods sold to him, or whether he is a mere surety for the vendee to pay for the goods if the latter does not, is a question upon which there has been great conflict of authority. After much vacillation, the doctrine is settled in the English courts that he is not liable to his principal in the first instance, but is only to answer for the solvency of the vendee and to pay the money if the vendee does not.[25]

But the prevailing doctrine in the United States seems to be in accordance with the more stringent rule, that he is absolutely liable in the first instance for the payment of the price of the goods sold by him, to the same extent and in the same manner as if he were himself the purchaser.[26] His liability is thus made an original and not a collateral one, and his undertaking is not, therefore, a promise to answer for the debt of another within the contemplation of the Statute of Frauds and void if not in writing.[27]

Evansville Bank v. German American Bank, 155 U. S. 556, 39 L. Ed. 259; Commercial Bank v. Armstrong, 148 U. S. 50, 37 L. Ed. 363; Armstrong v. National Bank of Boyertown, 90 Ky. 431, 9 L. R. A. 553; National Butchers, etc., Bank v. Hubbell, 117 N. Y. 384, 15 Am. St. Rep. 515, 7 L. R. A. 852; Manufacturers' Bank v. Continental Bank, 148 Mass. 553, 12 Am. St. Rep. 598, 2 L. R. A. 699; Freeman's Bank v. National Tube Works, 151 Mass. 413, 21 Am. St. Rep. 461, 8 L. R. A. 42; Commercial National Bank v. Hamilton National Bank, 42 Fed. 880; Milton v. Johnson, 79 Minn. 170, 47 L. R. A. 529.

[24] See cases cited in preceding note.

[25] Hornby v. Lacy, 6 Maul. & Sel. 166; Morris v. Cleasby, 4 Maul. & Sel. 566; Couturier v. Hastie, 8 Ex. 40; Peele v. Northcote, 7 Taunt. 558. See earlier cases, *contra*, Grove v. Dubois, 1 T. R. 112; Mackenzie v. Scott, 6 Bro. P. C. 280; Houghton v. Matthews, 3 Bos. & Pul. 489.

[26] Lewis v. Brehme, 33 Md. 412, 3 Am. Rep. 190; Wolff v. Koppel, 2 Denio (N. Y.), 368, 43 Am. Dec. 751; Swan v. Nesmith, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; Cartwright v. Greene, 47 Barb. (N. Y.) 16; Sherwood v. Stone, 14 N. Y. 268; Leverick v. Meigs, 1 Cow. (N. Y.) 645; Blakely v. Jacobson, 9 Bosw. (N. Y.) 140.

Contra, Thompson v. Perkins, 3 Mason (U. S. C. C.), 232, Fed. Cas. No. 13,972.

[27] Wolff v. Koppel, 5 Hill (N. Y.), 458; Swan v. Nesmith, *supra;* Sherwood v. Stone, *supra;* Bradley v. Richardson, 23 Vt. 720.

4. Neglect of Agent in Making Sales.

§ 1323. Nature of duty.—It is, of course, the duty of the agent charged with the sale of goods or other property to exercise reasonable care, skill and diligence in the performance of his undertaking. Often and perhaps usually his course will be governed by express instructions with which it is his duty to conform, and many illustrations of his liability for a failure to do so have been given in another place. Where no such instructions have been given, the general duty of reasonable care and diligence will apply as to all various aspects of time, place, quality, price, terms, parties, and the like.[28] Most of these require no separate consideration; but one question arises so frequently as to justify more extended treatment in the following section.

§ 1324. When agent liable for selling to irresponsible parties.—It is the duty of an agent, intrusted with goods to be sold, to sell them, in the absence of a usage or of authority to the contrary, for cash only;[29] and even when authorized to sell upon credit, he is bound to exercise reasonable care and prudence in selling only to responsible purchasers. For a loss occurring from his failure to observe his duty in this regard, the agent is liable.[30]

Contracts for the employment of sales agents not infrequently contain minute and precise provisions respecting the class of persons to whom the agent shall sell, the terms upon which he may extend credit, and the kinds of securities which he is permitted to receive. Such provisions it is, of course, in general, the duty of the agent to observe, and for a loss occasioned by his failure to do so, he will be responsible to the principal.[31] Thus if under the agent's contract it is his duty to sell for cash if possible, but if he gives credit at all, to do so only to those who are good and responsible, and to take no paper but that

[28] *Loss of order because countermanded before sent in by agent.* Where a salesman neglected to write out a complicated order until fourteen days after it had been taken and it was in the meantime countermanded by the buyer, it was held that even if this was negligent, the countermanding was not an event which was reasonably foreseeable, so he was not liable. Hurley v. Packard, 182 Mass. 216.

[29] See *ante*, § 353.

[30] Tate v. Marco, 27 S. C. 493; Frick v. Larned, 50 Kan. 776; Morris v. Bradley, 20 N. Dak. 646; Singmaster v. Beckett, 86 Kan. 494.

See Phillips v. Moir, 69 Ill. 155, where the agent was held to have exercised reasonable care and was therefore not liable.

The delivery man of a laundry is not liable for giving credit to customers where that was the custom of all other delivery men of the principal to the latter's knowledge. Shovelin v. Hanson, 30 Quebec S. C. 360.

[31] Tate v. Marco, *supra;* Frick v. Larned, *supra;* Clark v. Roberts, 26 Mich. 506; Osborne v. Rider, 62 Wis. 235; Robinson Machine Works v. Vorse, 52 Iowa, 207; Harlow v. Bartlett, 170 Mass. 584.

which is good and collectible, he will be liable if he negligently takes the notes of purchasers who are not responsible.[32] So if he is required to obtain property statements or to verify those received, he will be responsible for a loss resulting from his failure to comply.[33] Where the contract requires him to verify the statements, he cannot escape his responsibility for not doing so by offering to show a general custom among such agents, to rely upon the buyer's statement without further inquiry.[34]

§ 1325. Conditions of agent's liability.—In such a case, however, if the principal would take advantage of the agent's negligence or disobedience, he must act within a reasonable time, and if he does not, he cannot afterwards complain.[35]

So where the agent under his contract with the principal agreed that, upon request of the principal, he would receive back for collection any of the notes taken by him, and the principal took control of the notes and made efforts of his own to collect them, but neither offered to return them to the agent nor requested him to collect them, it was held that the agent could not be charged with the amount remaining uncollected.[36] And so, under a similar contract, which the court construed as making the agent a guarantor of collection rather than a surety, it was held that if the principal retained the notes and neither returned them to the agent nor authorized him to collect them, and if while so retained by the principal they might with due diligence have been collected, the agent could not afterwards be held responsible for their amount.[37]

[32] Clark v. Roberts, 26 Mich. 506; Osborne v. Rider, *supra;* Frick v. Larned, *supra;* Robinson Machine Works v. Vorse, *supra;* McCormick Harvesting Co. v. Carpenter, 1 Neb. (Unoff.) 273.

[33] Frick v. Larned, *supra;* Osborne v. Rider, *supra;* Robinson Machine Works v. Vorse, *supra.*

An agent who agrees to verify the purchaser's property statement from the public records, and who endorses on the statement that he has made such personal examination will be bound to the principal as though he had done so. Avery Planter Co. v. Murphy, 6 Kan. App. 29.

[34] Osborne v. Rider, *supra;* Robinson Machine Works v. Vorse, *supra.*

[35] Plano Mfg. Co. v. Buxton, 36 Minn. 203. In this case it was held that the principal who had for two years retained notes taken by the agent could not complain that he had sold to irresponsible parties.

[36] Tate v. Marco, 27 S. C. 493.

See also, McCormick Harvesting Machine Co. v. Haug, 88 Ill. App. 674.

[37] Piedmont Mfg. Co. v. Morris, 86 Va. 941. An agent who has agreed to be responsible for all goods sold by him during his conduct of the principal's business, is not a surety but a guarantor, and therefore is not discharged from that liability by the fact that the principal renews a note taken by the agent during his con-

5. Neglect of Agent in Making Purchases.

§ 1326. Nature of duty.—Similar considerations control the question of negligence on the part of a purchasing agent. He owes a duty of reasonable care in securing goods or other property of the kind, amount, quality, and condition which he is authorized to purchase; in agreeing upon price, terms, and conditions; in examining into the matter of the seller's title and freedom from incumbrances where this is involved in the purchase; in looking after the question of securing delivery of the property purchased, and at the time and place, and under the conditions, agreed upon wherever he is relied upon to receive the delivery; and generally in doing all of those acts which are confided to him and which are necessary to be done in order to properly safe-guard the principal's interests.[38]

V.

TO ACCOUNT FOR MONEY AND PROPERTY.

§ 1327. In general.—It may be stated as a general rule that the agent is bound to account to his principal for all money and property which may come into his hands by virtue of the agency.[39] This rule embraces not only such money and property as may be received directly from the principal, but also that which comes into the agent's hands for the principal as the result of his agency. As has been seen in a previous section,[40] to the principal ordinarily belong all profits and advantages made by the agent, beyond lawful compensation,

duct of the business, it not being contended that either note has been paid. Buelterman v. Meyer, 132 Mo. 474.

[38] Agent for the purchase of land who contracted for the assumption of incumbrances as part of the purchase without ascertaining essential terms affecting their amount, *held* liable to the principal for his negligence. Hinricks v. Brady, 20 S. D. 599.

Broker for the purchase of bonds is liable for negligence in buying bonds which are subject to so many prior liens that they must be deemed "a hopeless speculative purchase." Hopkins v. Clark, 158 N. Y. 299.

Agent instructed to purchase is not liable to his principal for doing so after revocation of his authority but before he was notified of it. Dart v. Coward Inv. Co., (Manitoba) 14 West. L. R. 52.

[39] Baldwin v. Potter, 46 Vt. 403; Taul v. Edmonson, 37 Tex. 556; Bedell v. Janney, 4 Gilm. (Ill.) 193; Armstrong v. Smith, 3 Blackf. (Ind.) 251; Heddens v. Younglove, 46 Ind. 212; Jett v. Hempstead, 25 Ark. 462; Whitehead v. Wells, 29 Ark. 99; Haas v. Damon, 9 Iowa, 589; Robson v. Sanders, 25 S. C. 116; Hartmann v. Schrugg, 113 App. Div. 254, affirmed 188 N. Y. 617; Wasey v. Whitcomb, 167 Mich. 58; Coffin v. Craig, 89 Minn. 226.

[40] *Ante*, §§ 1224–1228.

whether such profit or advantage be the fruit of the performance or of the violation of the agent's duty, or whether they are the result of transactions within or beyond the scope of his authority, provided the acts from which they accrue were assumed to be done in the behalf and for the benefit of the principal.[41] The principal, in such cases, may by ratification, make the act his own, and he is then entitled to its proceeds as though he had originally authorized it.[42] If, however, he repudiates the act, he cannot claim its proceeds, but must seek his remedy against the agent in some other form.[43]

Money or property put into the agent's hands to be used for a purpose which failed or was abandoned or countermanded by the principal before the agent had parted with or become liable to third persons for the property or money, is also clearly within the rule.[44] So also is money or property put into the agent's hands for a certain use and appropriated by him to some unauthorized use.[45]

§ 1328. Account only to principal—Joint principals.—As a rule, the agent is bound to account to his principal only,[46] and where there are several common principals he will not be held to account to each separately.[47] He may, however, either expressly or by implication assume the duty to account to each separately, and in that event each may demand an accounting for his respective interest.[48]

§ 1329. Accounting by joint agents.—Where two or more agents have jointly undertaken to act, the duty to account lies usually as much upon one as upon another.[49] But one will not ordinarily be liable for the default of another which he did not sanction and did not

[41] Graham v. Cummings, 208 Pa. 516; Sherman v. Morrison, 149 Pa. 386; Salsbury v. Ware, 183 Ill. 505; Hindle v. Holcomb, 34 Wash. 336; McClendon v. Bradford, 42 La. 160; Aultman v. Loring, 76 Mo. App. 66; Beale v. Barnett, 23 Ky. L. R. 1118, 64 S. W. 838; Kimball v. Ranney, 122 Mich. 160, 80 Am. St. Rep. 548, 46 L. R. A. 408.

[42] Thus where an agent for the collection of a note, took in settlement thereof certain horses, and his principal ratified the transaction, it was held that the latter could maintain an action against the agent to recover them. Hormann v. Sherin, 6 S. D. 82. (Compare Antiseptic Fiber Package Co. v. Klein, 119 Mich. 225.) See also, Snow v. Carr, 61 Ala. 363, 32 Am. Rep. 3; Miltenberger v. Beacom, 9 Pa. St. 198; Anderson v. First Nat. Bank, 4 N. D. 182.

[43] Perkins v. Hershey, 77 Mich. 504.

[44] See § 1447.

[45] Where principal gives money to an agent to buy certain property and the agent buys other property, the principal is not obliged to accept the latter and may recover the amount from the agent. Allison v. Byrne, 8 Vict. L. R. 155.

[46] Attorney-General v. Chesterfield, 18 Beav. 596.

[47] Trustees, etc., v. Dupuy, 31 La. Ann. 305.

[48] Lawless v. Lawless, 39 Mo. App. 539.

[49] Mason v. Wolkowick, 80 C. C. A. 485, 150 Fed. 699, 10 L. R. A. (N. S.) 765.

participate in, and which was not made possible by any neglect of his own.[50]

§ 1330. Sub-agents—Account to whom.—The principles governing in this case have already been referred to in preceding sections. Wherever the appointment of the sub-agent is by the express or implied consent of the principal, such a privity exists between them as makes the sub-agent liable directly to the principal.[51] Where, however, the sub-agent is to be regarded as the agent only of one who stood in the relation of independent contractor to the principal, there, as has been said, there is ordinarily no privity by virtue of which the sub-agent can be held accountable to the principal.[52] Yet even in this case, as has also been seen, where funds of the principal come into the hands of a sub-agent or other third person who has no duty in respect to them but to pay them over to the person to whom they belong, the principal, by timely information as to his claim, may recover them directly from such sub-agent or other third party.[53]

§ 1331. Agent may not dispute his principal's title.—It is a general principle in the law of agency that the agent may not dispute his principal's title. Having assumed the performance of the agency by virtue of which he has received the property or money of his principal, he will not be permitted, when called upon by his principal to account for the property or money so received, to deny his principal's title to it.[54] This general principle, however, is subject to certain ex-

[50] See (cases of co-trustees), Colburn v. Grant, 16 App. D. C. 107; Barroll v. Forman, 88 Md. 188, 12 Am. St. Rep. 764; Bruen v. Gillett, 115 N. Y. 10, 4 L. R. A. 529; Graham's Estate, 218 Pa. 344.

[51] *Ante*, § 333. Guelich v. National State Bank, 56 Iowa, 434, 41 Am. Rep. 110; Sergeant v. Emlen, 141 Pa. 580. Agents employed to secure a loan for a commission, with the consent of their principal, employed a subagent to assist them and promised to divide the commission with him. The subagent knew the fact of the agency. The subagent secured the loan, and also received from the lenders a secret bonus. *Held*, that there was privity between the principals and the subagent, but even if there were none there was such a fiduciary relation between the principals and the subagent that the former could compel the latter to account to them for this bonus. Powell v. Jones, [1905] 1 K. B. 11.

[52] *Ante*, § 333. Guelich v. National State Bank, *supra;* Sergeant v. Emlen, *supra;* New Zealand, etc., Land Co. v. Watson, 7 Q. B. Div. 374.

[53] *Ante*, § 1321.

[54] Monongahela Nat. Bank v. First National Bank, 226 Pa. 270, 26 L. R. A. (N. S.) 1098; Collins v. Tillou, 26 Conn. 368, 68 Am. Dec. 398; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Marvin v. Ellwood, 11 Paige (N. Y.), 365; Roberts v. Ogilby, 9 Price, 269; Kieran v. Sandars, 6 Ad. & El. 515; Day v. Southwell, 3 Wis. 657; Von Hurter v. Spengeman, 17 N. J. Eq. 185; Witman v. Felton, 28 Mo. 601; Hungerford v. Moore, 65 Ala. 232; Wilt v. Redkey, 29 Ind. App. 199.

ceptions as well settled as the principle itself. It is always competent for the agent to show in his own defense that he has been divested of the property by, or has yielded to, a title paramount to that of his principal.[55] He may also show that since the delivery to him the title of his principal has been terminated[56] or that the principal has transferred his interest or title to another under whom the agent claims.[57]

Where the principal demands an accounting from the agent, of moneys received from a third person, the agent may show that it was paid to him under a mistake and that he has returned it to the payer upon the latter's demand.[58]

§ 1332. May not allege illegality of transaction to defeat principal's claim.—An agent who has received money from, or in behalf of, his principal, can not defeat an action brought by the principal to recover it, upon the ground that the contract under which the money was paid, or the transaction from which it was realized, or the purpose to which it was to be devoted, was illegal, if the alleged illegal transaction was separate and distinct and the maintenance of the action in no wise involves the enforcement or recognition of the illegal act.[59] The agent, having received the money under an express or implied promise to pay it to his principal, will not be allowed to keep it for himself by alleging that it was unfit for the principal to receive because its source was tainted.

[55] Moss Merc. Co. v. First Nat. Bank, 47 Oreg. 361, 2 L. R. A. (N. S.) 657, 8 Ann. Cas. 569; Western Transportation Co. v. Barber, 56 N. Y. 552; Biddle v. Bond, 6 Best & Smith 224; Bliven v. Hudson River R. R. Co., 36 N. Y. 406; Doty v. Hawkins, 6 N. H. 247, 25 Am. Dec. 459; Burton v. Wilkison, 18 Vt. 186, 46 Am. Dec. 145; King v. Richards, 6 Wharton (Pa.), 418, 37 Am. Dec. 420; Bates v. Stanton, 1 Duer (N. Y.), 79.

[56] Marvin v. Ellwood, 11 Paige (N. Y.), 365.

[57] Duncan v. Spear, 11 Wend. (N. Y.) 56; Harker v. Dement, 9 Gill (Md.), 7, 52 Am. Dec. 670; Snodgrass v. Butler, 54 Miss. 45; Roberts v. Noyes, 76 Me. 590.

[58] See *post*, §§ 1432, 1433.

An agent of an insurance company when called upon by the latter to pay over premiums collected cannot defend upon the ground that the company has not performed a term of the contract with him, namely, to advance money to him to be used as a deposit, where the agent has incurred no personal liabilities, and the company is unquestionably financially responsible. Equitable Mut. F. Ins. Co. v. McCrae, 156 Ill. App. 467.

[59] O'Bryan v. Fitzpatrick, 48 Ark. 487; First Nat. Bank v. Leppel, 9 Col. 594; Crescent Ins. Co. v. Bear, 23 Fla. 50, 11 Am. St. Rep. 331; Snell v. Pells, 113 Ill. 145; Daniels v. Barney, 22 Ind. 207; Reed v. Dougan, 54 Ind. 307; Wilt v. Redkey, 29 Ind. App. 199, and other Indiana cases there cited; Chinn v. Chinn, 22 La. Ann. 599; Gilliam v. Brown, 43 Miss. 641; Decell v. Hazelhurst, 83 Miss. 346; Souhegan Bank v. Wallace, 61 N. H. 24; Supervisors v. Bates, 17 N. Y. 242; Murray v. Vanderbilt, 39 Barb. (N. Y.) 140; Boehmer v. Schuylkill, 46 Pa. 452; Monongahela Nat. Bank v. First Nat.

Thus a collector of taxes cannot deny the right of his principal to receive them on the ground that they were illegally levied;[60] an agent who in unlawful speculations has received money belonging to his principal can not refuse, on that ground, to pay it to him;[61] nor can an agent who has received money from his principal to be employed for an unlawful purpose, but who has not so employed it, refuse to return the money to his principal because of the illegality of the purpose contemplated.[62]

Where, however, the duty to account arises out of or was a part of the illegal transaction itself, so that to require an accounting involves the recognition and enforcement of the illegal contract, the courts will give no aid.[63]

§ 1333. When may maintain interpleader.—An agent being bound to recognize and respect his principal's title can not, in general, compel his principal to interplead with a stranger who claims, by a paramount and adverse title, the property or funds intrusted to the agent by the principal.[64] Where, however, the third person claims under a

Bank, 226 Pa. 270, 26 L. R. A. (N. S.) 1098; Baldwin v. Potter, 46 Vt. 402; Cheuvront v. Horner, 62 W. Va. 476; Kiewert v. Rindskop, 46 Wis. 481, 32 Am. Rep. 731; Brooks v. Martin, 2 Wall. (69 U. S.) 70, 17 L. Ed. 732; Gilbert v. American Surety Co., 57 C. C. A. 619, 121 Fed. 499, 61 L. R. A. 253; *In re* Dorr, 108 C. C. A. 322, 186 Fed. 276; Cambridge Corporation v. Sovereign Bank, 18 Que. K. B. 423.

See also De Leon v. Trevino, 49 Tex. 88, 30 Am. Rep. 101, with criticisms in the note.

See also the cases next cited.

[60] Placer County v. Astin, 8 Cal. 303; Clark v. Moody, 17 Mass. 145; Hammond v. Christie, 5 Robt. (N. Y.) 160; Galbaith v. Gaines, 10 Lea (Tenn.), 568. So a county treasurer receiving money from an illegal sale of bonds. Boehmer v. Schuylkill, 46 Pa. 452; Indianapolis v. Skeen, 17 Ind. 628.

[61] Norton v. Blinn, 39 Ohio St. 145; Bridger v. Savage, L. R. 15 Q. B. D. 363; (money won on bets made as plaintiff's agent); Lovejoy v. Kaufman, 16 Tex. Civ. App. 377; O'Bryan v. Fitzpatrick, 48 Ark. 487.

[62] Kiewert v. Rindskopf, 46 Wis. 481, 32 Am. Rep. 731; Clarke v. Brown, 77 Ga. 606, 4 Am. St. Rep. 98; Gilbert v. American Surety Co., 57 C. C. A. 619, 121 Fed. 499, 61 L. R. A. 253; Ware v. Spinney, 76 Kan. 289, 13 L. R. A. (N. S.) 267, 13 Ann. Cas. 1181.

[63] Leonard v. Poole, 114 N. Y. 371, 11 Am. St. 667, 4 L. R. A. 728; Central Trust Co. v. Respass, 112 Ky. 606, 99 Am. St. Rep. 317, 56 L. R. A. 479; Lemon v. Grosskopf, 22 Wis. 447, 99 Am. Dec. 58; Buck v. Albee, 26 Vt. 184, 62 Am. Dec. 564.

It is not unlawful or immoral for a principal, desiring to secure concessions from a foreign government, to pay the legitimate expenses involved; and if he puts money into the hands of his agents for that purpose but the agent does not so apply it, the principal may require the agent to account for it. Allen v. O'Bryan, 118 App. Div. 213.

[64] Crawshay v. Thornton, 2 My. & Cr. 1; Smith v. Hammond, 6 Sim. 10; Atkinson v. Manks, 1 Cow. (N. Y.) 691; United States Trust Co. v. Wiley, 41 Barb. (N. Y.) 477; Lund v. Sea-

[illegible] by the latter's [illegible] with the possession [illegible] lien made or [illegible] parties to interplead [illegible] or title; the [illegible]

[illegible] accounts.—As a necessary [illegible] it is his duty to keep [illegible] prudence, true and [illegible] which he is intrusted [illegible] and evidences of dealings [illegible] the details of the [illegible] future liability [illegible] settlement between the [illegible]

[illegible]

[illegible] Brown v. Southern R. Co., [illegible] Smith v. Hammond, [illegible] Wright v. Ward, 4 Russ. [illegible] Crawford v. Fisher, 1 Hare, 436 [illegible] European Bank, L. R. 1 [illegible]

[illegible] v. Hartlett, 118 Ga. 883, [illegible] was said to be "the duty of the [illegible] to keep and render to his principal an account of all receipts and [illegible] and, whenever reasonably requested to do so, to make and render to his principal a full and accurate statement of his dealings and the state of the account between them."

In Chicago Title & Trust Co. v. [illegible], 112 Ill. App. 227, it is said that "it is the duty of an agent to keep and preserve true and correct accounts between himself and his principal, and to furnish him [illegible] and itemized statements of [illegible] and expenditures. The statements must be of such a character as to enable the principal to make some reasonable test of their honesty and accuracy."

To same effect see Brigham v. New [illegible], 140 La. 250; In re Pierson's Estate, 13 N. Y. App. Div. 478; Rich v. Bank, 57 S. C. 98; Boyce v. Boyce, 124 Mich. 696; Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600; Eliss v. Damon, 8 Iowa, 589; Clark v. Moody, 17 Mass. 145; Kerfoot v. Hyman, 52 Ill. 512; Matthews v. Wilson, 27 Me. 155; Dunwidie v. Kerley, 6 J. J. Marsh. (Ky.) 501; Schedda v. Sawyer, 4 McLean (U. S. C. C.), 181, Fed. Cas. No. 12,443; Ridder v. Whitlock, 12 How. (N. Y.) Pr. 208; Chinn v. Chinn, 22 La. Ann. 599; Holmes v. Murdock, 125 La. 916.

Principal's right to inspect agent's books—The agent's duty to keep and render proper accounts "involves the right of the principal to assure himself that the accounts are proper and correct. Measures taken in good faith by the principal to secure a proper accounting and to assure himself of its propriety, are there-

Technical nicety of bookkeeping is not, of course, in general to be expected. What is a reasonable fulfillment of the agent's duty in this case as in others, depends upon the particular circumstances requiring care and diligence.[67]

So while it is thus the agent's duty to keep correct accounts yet if the principal himself has by his own interference or looseness of methods created, or so contributed to, such confusion as to render an absolutely satisfactory accounting impossible, the agent ought not to be held to the most rigid rule;[68] and where the principal has, either expressly or by implication, assured the agent or reasonably led him to believe that no formal accounts would be required, or that a particular method of accounting would be satisfactory, he cannot complain that the agent, if he has acted in good faith, has not kept the accounts with the strictness which might otherwise have been required.[69]

The duty to keep correct accounts of course includes the requirement that they shall be true and honest. The agent who knowingly renders false accounts, charging his principal with more than the true amount or crediting him with less, is guilty of such disloyalty as to justify his discharge and to forfeit his right to compensation.[70]

§ 1335. Duty to keep principal's property and funds separate from his own—Liability for commingling.—It is the duty of the agent to keep the property and funds of his principal separate from his own. If, without necessity, he has so commingled the goods or funds of his principal with his own that he cannot discriminate between the two, the whole mass so undistinguishable must be held to belong to the principal.[71] If, without authority, he commingles in his dealings the goods of his principal and of himself, the principal will have the first charge upon the proceeds.[72] So if he mingles the funds of his prin-

fore not in violation of the contract, although they may not be within its express terms." Walker v. Hancock Mut. L. Ins. Co., 80 N. J. L. 342, Ann. Cas. 1912 A, 526, 35 L. R. A. (N. S.) 153.

[67] Makepeace v. Rogers, 34 L. J. Ch. 367.

[68] Robbins v. Robbins (N. J. Eq.), 3 Atl. 264; Macauley v. Elrod (Ky.), 28 S. W. 782.

[69] See Carrau v. Chapotel, 47 La. 408; Succession of Borge, 44 La. 1; Hamilton v. Hamilton, 15 N. Y. App. Div. 47.

[70] See *post*, Book IV, Chap. IV. Little v. Phipps, 208 Mass. 331, 34 L. R. A. (N. S.) 1046; Boston Deep Sea Fishing Co. v. Ansell, 39 Ch. Div. 339; Hutchinson v. Fleming, 40 Can. Sup. Ct. 134.

[71] Hart v. Ten Eyck, 2 Johns. (N. Y.) Ch. 62; Jewett v. Dringer 30 N. J. Eq. 291; Atkinson v. Ward, 47 Ark. 533; Allsopp v. Hendy Machine Works, 5 Cal. App. 228; First Nat. Bank v. Schween, 127 Ill. 573, 11 Am. St. Rep. 174; Lance v. Butler, 135 N. Car. 419.

[72] Kennesaw Guano Co. v. Wappoo

title derived from the principal and created by the latter's own act subsequently to the time the agent was intrusted with the possession—as through an assignment, sale, mortgage or lien made or given by the principal—the agent may compel the parties to interplead.[65] In this case, there is no denial of the original right or title; the only dispute is as to the effect of the subsequent act.

§ 1334. Agent's duty to keep correct accounts.—As a necessary consequence of the agent's duty to account, it is his duty to keep and preserve and at all proper times to be ready to produce, true and correct accounts and statements of the business with which he is intrusted, together with all such receipts, vouchers and evidences of dealing as may be necessary to fully and fairly disclose the details of the transaction and not only to protect the principal from future liability, but also to furnish the means for the complete settlement between themselves.[66]

man's Bank, 37 Id. 129; Vosburgh v. Huntington, 15 Abb. (N. Y.) Pr. 254; Bank v. Bininger, 26 N. J. Eq. 345; Tyus v. Rust, 37 Ga. 574, 95 Am. Dec. 365; Hatfield v. McWhorter, 40 Ga. 269; Crane v. Burntrager, 1 Ind. 165.

[65] Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Bechtel v. Sheafer, 117 Pa. 555; McFadden v. Swinerton, 36 Ore. 336; Sammis v. L'Engle, 19 Fla. 880; Roselle v. Farmers Bank, 119 Mo. 84; Hechmer v. Gilligan, 28 W. Va. 750; Brock v. Southern R. Co., 44 S. C. 444; Smith v. Hammond, 6 Sim. 10; Wright v. Ward, 4 Russ. 215; Crawford v. Fisher, 1 Hare, 436; Tanner v. European Bank, L. R. 1 Exch. 261.

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[67] Makepeace v. Rogers, 34 L. J. Ch. 367.

[68] Robbins v. Robbins (N. J. Eq.), 3 Atl. 264; Macauley v. Elrod (Ky.), 28 S. W. 782.

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[72] Kennesaw Guano Co. v. Wappoo

title derived from the principal and created by the latter's own act subsequently to the time the agent was intrusted with the possession—as through an assignment, sale, mortgage or lien made or given by the principal—the agent may compel the parties to interplead.[65] In this case, there is no denial of the original right or title; the only dispute is as to the effect of the subsequent act.

§ 1334. Agent's duty to keep correct accounts.—As a necessary consequence of the agent's duty to account, it is his duty to keep and preserve and at all proper times to be ready to produce, true and correct accounts and statements of the business with which he is intrusted, together with all such receipts, vouchers and evidences of dealing as may be necessary to fully and fairly disclose the details of the transaction and not only to protect the principal from future liability, but also to furnish the means for the complete settlement between themselves.[66]

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cipal with his own and the whole is lost, the loss must fall upon the agent.[73]

This rule is of frequent application in cases where the agent has deposited money of his principal in a bank. In case it becomes necessary to make such a deposit, the agent will escape personal liability if he deposits it in the name of his principal in a bank of good credit, or if he so distinguishes it on the books of the bank as to indicate in some way that it is the money of his principal.[74] If on the contrary he deposits it in his own name, or with his own funds, he will, in case of a failure of the bank, be liable to the principal for his money.[75]

This rule has been carried to the extent of holding that an attorney who deposits his client's money in a solvent bank in his own name, though in a separate account, but with no indication of the trust, is liable for a loss occasioned by the subsequent failure of the bank, notwithstanding he was prevented from transmitting the money by garnishment proceedings against him.[76]

§ 1336. At what time agent should account.—Where at the creation of the agency the time of accounting is expressly agreed upon, or where, from the circumstances of the case, an agreement to account at a particular time is to be implied, such agreement will of course govern. In the absence of such an express or implied agreement, the time when an accounting should be made will depend largely upon the facts of each case. In general terms, however, it may be said that an agent is ordinarily bound to account upon demand, and in all events within a reasonable time.[77]

It is the duty of an agent who has received goods to sell for his

Mills, 119 Ga. 776; Simmons v. Looney, 41 W. Va. 738.

[73] *In re* Hodges Estate, 66 Vt. 70; Mass. Life Ins. Co. v. Carpenter, 32 N. Y. Super. 734; Pinckney v. Dunn, 2 S. C. 314; Cartmell v. Allard, 7 Bush (Ky.), 482, and cases cited in following notes.

In Bartlett v. Hamilton, 46 Me. 435, it is said that at least the burden of proof is on the agent to show that the identical money of the principal was lost.

Where an agent takes a single note running to himself for the combined proceeds of the sale of his own and his principal's goods commingled, he is chargeable at least with a technical conversion of his principal's goods. Kennesaw Guano Co. v. Wappoo Mills, *supra*.

[74] Norwood v. Harness, 98 Ind. 134, 49 Am. Rep. 739; State v. Greensdale, 106 Ind. 364, 55 Am. Rep. 753.

[75] Williams v. Williams, 55 Wis. 300, 42 Am. Rep. 708; Norris v. Hero, 22 La. Ann. 605; Mason v. Whitthorne, 2 Cold. (Tenn.) 242; Jenkins v. Walter, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539; State v. Greensdale, 106 Ind. 364, 55 Am. Rep. 753; Naltner v. Dolan, 108 Ind. 500, 58 Am. Rep. 61; Cartmell v. Allard, 7 Bush (Ky.), 482.

[76] Naltner v. Dolan, 108 Ind. 500, 58 Am. Rep. 61.

[77] Leake v. Sutherland, 25 Ark. 219.

principal, to account for the proceeds within a reasonable time, and without demand in cases where a demand would be impracticable or extremely inconvenient, so that factors abroad or at a distance who have received goods to sell, without special instructions as to the mode of remittance, are bound, it is held, according to the course of business, to render an account of their sales or pay over the proceeds thereof within a reasonable time, and if they neglect to do this such negligence is a breach of contract and subjects them to an action.[78]

§ 1337. ——— It is the duty of an agent who has collected money for his principal to give him notice thereof within a reasonable time after its receipt.[79] This affords the principal opportunity to give such directions in regard to its transmission as he may desire. Such directions are, indeed, usually given at the time of the employment of the agent, and whenever they are given, it is the duty of the agent, as has been seen, to observe them.

Where no such instructions are given, it has been said that good faith on the part of the agent requires that he should, after deducting his commission, remit the money to his principal by some safe and appropriate means within a reasonable time;[80] but where he acts for a foreign principal, he is not bound to take the risk of the remittance by methods of his own selection, but having advised the principal of the collection, the agent may await the principal's directions as to the manner in which the remittance shall be made.[81]

§ 1338. ——— Upon the termination of the agency, it would be the duty of the agent to return or otherwise properly account for all of the property, equipment and the like, which belongs to the principal and which came into the agent's possession because of the agency.[82] The same rule would apply to land which the agent or servant was allowed to use as such, but which he did not hold as a tenant.[83]

[78] Eaton v. Welton, 32 N. H. 352; Clark v. Moody, 17 Mass. 145. But see Cooley v. Betts, 24 Wend. (N. Y.) 203; Green v. Williams, 21 Kan. 64; Lyle v. Murray, 4 Sandf. (N. Y.) 590.

[79] Jett v. Hempstead, 25 Ark. 463; Whitehead v. Wells, 29 Ark. 99; Dodge v. Perkins, 9 Pick. (Mass.) 368; Williams v. Storrs, 6 Johns. (N. Y.) Ch. 353, 10 Am. Dec. 340.

[80] Bedell v. Janney, 9 Ill. (4 Gilm.) 193; Lillie v. Hoyt, 5 Hill (N. Y.), 395, 40 Am. Dec. 360.

[81] Ferris v. Paris, 10 John. (N. Y.) 285, 286; Lyle v. Murray, 4 Sandf. (N. Y.) 590; Henbach v. Rother, 2 Duer (N. Y.), 227; Clark v. Moody, 17 Mass. 145.

[82] Applied to a license taken out in the agent's name but belonging to the principal. Levian v. Fabian, 28 New Zeal. L. R. 569.

[83] Principal may require servant or agent to leave his premises upon discharge, and may use reasonable force to eject him if he refuses to go upon proper demand. Noonan v. Luther, 206 N. Y. 105, 41 L. R. A. (N. S.) 761; Foye v. Sewell, 21 Abb. N. Cas. 15 (domestic servants).

The fact that the relation was terminated without right by the principal would ordinarily be immaterial.[84] Only where the agent had a lien or a power coupled with an interest, or some right of that sort, would the case be otherwise.

§ 1339. Necessity for demand before action.—No action can, ordinarily, be maintained against an agent for money received by him for his principal until after a demand has been made upon him for its payment, with which he has refused or neglected to comply.[85] The agent is not as such a mere debtor. He ordinarily holds the property or money for the principal and subject to his order. It may fairly be supposed that he is ready to pay or deliver upon demand.

Such a demand and refusal or neglect to pay are therefore essential averments in the declaration or complaint, without which the action cannot ordinarily be sustained.[86]

"As a general rule in such cases, it may be presumed," it has been

Same doctrine applies to discharged clergyman. Conway v. Carpenter, 80 Hun (N. Y.), 428. Farm servant occupying house on farm. Bowman v. Bradley, 151 Pa. 351, 17 L. R. A. 213; Hayward v. Miller, 3 Hill (N. Y.), 90. Minister occupying parsonage. Chatard v. O'Donovan, 80 Ind. 20, 41 Am. Rep. 782. Compare Bristor v. Burr, 120 N. Y. 427, 8 L. R. A. 710.

See also Hanford v. People, 7 N. Y. Weekly Dig. 528; Kerrains v. People, 60 N. Y. 221.

[84] Hayward v. Miller, *supra;* Conway v. Carpenter, *supra;* Clark v. Vannort, 78 Md. 216.

[85] Cummins v. McLain, 2 Ark. 412; Sevier v. Holliday, 2 Ark. 512; Palmer v. Ashley, 8 Ark. 75; Taylor v. Spears, 6 Ark. 381, 44 Am. Dec. 519; Warner v. Bridges, Id. 385; Roberts v. Armstrong, 1 Bush (Ky.), 263, 89 Am. Dec. 624; Baird v. Walker, 12 Barb. (N. Y.) 298, 301; Colvin v. Holbrook, 2 N. Y. 130; Williams v. Storrs, 6 Johns. (N. Y.) Ch. 353, 10 Am. Dec. 340; Haas v. Damon, 9 Iowa, 589; Burton v. Collin, 3 Mo. 315; Waring v. Richardson, 11 Ired. (N. C.) L. 77; Cockrill v. Kirkpatrick, 9 Mo. 688; Cole v. Baker, 16 S. D. 1; Armstrong v. Smith, 3 Blackf. (Ind.) 251; Judah v. Dyott, Id. 324, 25 Am. Dec. 112; English v. Devarro, 5 Id. 588; Hannum v. Curtis, 13 Ind. 206; Jones v. Gregg, 17 Ind. 84; Black v. Hersch, 18 Ind. 342, 81 Am. Dec. 362; Catterlin v. Sommerville, 22 Ind. 482; Bougher v. Scobey, 23 Ind. 583; Nutzenholster v. State, 37 Ind. 457; Heddens v. Younglove, 46 Ind. 212; Pierce v. Thornton, 44 Ind. 235; Terrell v. Butterfield, 92 Ind. 1; Claypool v. Gish, 108 Ind. 424; State v. Sims, 76 Ind. 328. But see *contra*, Lillie v. Hoyt, 5 Hill (N. Y.), 395, 40 Am. Dec. 360.

[86] Claypool v. Gish, *supra*. This averment is so essential that a motion to arrest will be sustained on account of its absence. Pierce v. Thornton, *supra;* Eberhart v. Reister, 96 Ind. 478.

In King v. Mackellar, 109 N. Y. 215, no demand was alleged in the complaint, but demand was proved without objection; *held*, "that the omission of the averment was not available as an objection" in the Appellate Court; "also that it would have been competent for the court to admit evidence of demand on the trial if objection had been raised, allowing an amendment of the complaint."

The demand may be informal. Egerton v. Logan, 81 N. Car. 172.

See also, Judith Inland Transp. Co. v. Williams, 36 Mont. 25.

said, "that payment has been delayed by reason of the want of safe and convenient means of transmission or of some other good and sufficient cause, and that the recipient of the money, still considering himself entitled to no more than enough to reasonably compensate him for his services in collecting, will pay it over on demand." [87] This rule, however, presupposes that the agent has duly performed his duty of notifying the principal of the receipt of the money.[88]

But where he has not given such notice, and so long a time has elapsed since the collection of the money as to rebut the presumption above referred to, "he may well be considered as having appropriated it to his own use, and then neither law nor reason requires that before he can be sued for his non-feasance, he should be requested to do what his conduct sufficiently indicates his determination not to do." [89]

§ 1340. ——— **Exceptions.**—But if the rule requiring demand be based upon the assumption that until such demand the agent does not know the principal's pleasure, and therefore can be subject to no duty to pay over, many circumstances may exist which would show the existence of such a duty without an expressed demand. Thus if it be the established course of business to pay over without waiting for a demand,[90] or if the agent has agreed to pay upon receipt or at a particular time,[91] or if he has been instructed by his principal so to pay,[92] the agent's course is clear, his duty is independent of demand, and no demand is necessary.

The general rule is also said to be subject to the exception that no demand is necessary where it would be impracticable or extremely inconvenient, as in the case above referred to, of a factor resident abroad,[93] though there are cases to the contrary.[94]

[87] Bedell v. Janney, 9 Ill. 193.

[88] Jett v. Hempstead, 25 Ark. 463; Haas v. Damon, 9 Iowa, 589; Ferris v. Paris, 10 Johns. (N. Y.) 285; Cooley v. Betts, 24 Wend. (N. Y.) 203; Drexel v. Raimond, 23 Pa. 21.

[89] Bedell v. Janney, *supra*.

[90] Brown v. Arrott, 6 W. & S. (Pa.) 402. So, in the case of an agent to sell goods, after the lapse of a reasonable time from the receipt of goods and a neglect to account for them, the fair presumption is that the goods have been sold and the money received for them, and an action for money had and received may be maintained without a demand. Clark v. Moody, 17 Mass. 145; Langley v. Sturtevant, 7 Pick. (Mass.) 214; Eaton v. Welton, 32 N. H. 352.

[91] Brown v. Arrott, *supra;* Haebler v. Luttgen, 2 N. Y. App. Div. 390; affirmed, 158 N. Y. 693; Mast v. Easton, 33 Minn. 161; Campbell v. Roe, 32 Neb. 345; Stacy v. Graham, 14 N. Y. 492; Campbell v. Boggs, 18 Pa. 524.

[92] Clark v. Moody, 17 Mass. 145; Ferris v. Paris, 10 Johns. 285; Haas v. Damon, 9 Iowa, 589.

[93] Clark v. Moody, 17 Mass. 145; Eaton v. Welton, 32 N. H. 352.

[94] See Cooley v. Betts, 24 Wend. (N. Y.) 203; Green v. Williams, 21 Kan. 64.

So no demand is required where the agency is denied, or a claim is set up exceeding the amount collected, or the agent's responsibility is disputed.[95]

Demand is also unnecessary where the agent violates instructions as to the disposition of the property or money, and appropriates it to an unauthorized or wrongful use.[96]

Although the death of the principal, as has been seen, ordinarily terminates the relation, yet if after his death the agent collects money and converts it to his own use, the personal representative of the principal may recover it.[97] The mere fact that the agent has once tendered the money will not relieve him if, upon a subsequent proper demand, he refuses or neglects to pay it over.[98]

§ 1341. When agent liable for interest.—An agent may become liable to his principal for interest upon moneys in his hands by virtue of an express or implied promise to pay such interest. But he will also be chargeable with interest upon all moneys in his possession which he has neglected or refused to pay over, or to apply to the purpose for which he received it, and such interest will be computed from the time of such neglect or refusal. Interest in these cases is allowed upon the ground that the agent has retained in his possession money, of which it was his duty to make some other disposition.[99]

Thus, as has been seen, it is the duty of an agent who has collected money for his principal, to give him notice of that fact within a reasonable time. Failing in this duty, he is properly chargeable with interest from the time when such notice should have been given, even though he has acted in good faith.[1] *A fortiori* is he chargeable with interest where, having collected money, he neglects or refuses upon proper demand to pay it over, or converts it to his own use.[2]

So if he has received money to be devoted to a specific purpose, as to make an investment, and, contrary to his duty, retains and applies

[95] Waddell v. Swann, 91 N. C. 108; Wiley v. Logan, 95 N. C. 358; Hammett v. Brown, 60 Ala. 498; Judith Inland Transp. Co. v. Williams, 36 Mont. 25.

[96] Bartels v. Kinnenger, 144 Mo. 370; Haas v. Damon, 9 Iowa, 589; Allsopp v. Hendy Mach. Works, 5 Cal. App. 288.

[97] Clegg v. Bamberger, 110 Ind. 536.

[98] Clegg v. Bamberger, *supra*.

[99] See cases following.

[1] Dodge v. Perkins, 9 Pick. (Mass.) 368; Clark v. Moody, 17 Mass. 145; Thorp v. Thorp, 75 Vt. 34.

[2] Anderson v. State, 2 Ga. 370; Bedell v. Janney, 9 Ill. 193; Miller v. McCormick Co., 84 Ill. App. 571; Beugnot v. Tremoulet, 111 La. 1; Board of Justices v. Fennimore, 1 N. J. L. 242; People v. Gasherie, 9 Johns. (N. Y.) 71, 6 Am. Dec. 263; Harrison v. Long, 4 Desau. (S. Car.) 110; Hill v. Williams, 6 Jones (N. Car.), Eq. 242.

See also, Pearse v. Green, 1 Jac. & W. 135; Harsant v. Blaine, 56 L. J.

it to his own use, he will be charged with interest from the time of is receipt.[3]

Where, however, the agent is entitled to retain the money, as by virtue of some lien or charge upon it, he can not be chargeable with interest during the period of such retention.[4] So if the principal voluntarily permits the money to remain in the hands of his agent, who holds himself in readiness to pay over upon demand, the agent will not be chargeable with interest,[5] unless he has been able to so invest or use the money as to make it earn interest, for which he would be chargeable.[6]

§ 1342. Form of action.—The determination of the form of the action which the principal may pursue against the agent for the recovery of the property or money to which he may be entitled, depends upon a great variety of circumstances. In many cases, an action for the breach of an express or an implied contract to pay or deliver will be appropriate.[7] Where the agent has received money which it is his duty to pay or account for to the principal, an action for money had and received may be maintained.[8] As has been seen in an earlier section,[9] an agent who applies his principal's property or funds to an end or purpose not authorized may often be held liable for conversion.[10] In such cases, the principal will often have an option to sue either for

Q. B. 511; Bayne v. Stephens, 8 Comw. L. R. (Austral.) 1.

[3] Hill v. Hunt, 9 Gray (Mass.), 66; Schisler v. Null, 91 Mich. 321.

[4] Thompson v. Stewart, 3 Conn. 171, 8 Am. Dec. 168.

[5] Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484; Nisbet v. Lawson, 1 Ga. 275; Hackleman v. Moat, 4 Blackf. (Ind.) 164; Gordon v. Zachaire, 15 La. Ann. 17; Wheeler v. Haskins, 41 Me. 432; Hyman v. Gray, 4 Jones (N. Car.), L. 155; Rowland v. Martindale, 1 Bailey (S. Car.), Ch. 226; Hauxhurst v. Hovey, 26 Vt. 544.

[6] Bassett v. Kinney, 24 Conn. 267, 63 Am. Dec. 161; Williams v. Storrs, 6 Johns. (N. Y.) Ch. 353, 10 Am. Dec. 340; Landis v. Scott, 32 Pa. 495.

Where agent mixes principal's money with his own by depositing it in a general bank account, he may be charged with interest. Blodgett's Estate v. Converse's Estate, 60 Vt. 410.

[7] Walter v. Bennett, 16 N. Y. 250; Conaughtey v. Nichols, 42 N. Y. 83; Greentree v. Rosenstock, 61 N. Y. 583; Wright v. Duffie, 23 (N. Y.) Misc. 338; Robson v. Sanders, 25 S. Car. 116.

[8] Gordon v. Hostetter, 37 N. Y. 99; Kidder v. Biddle, 13 Ind. App. 653; Harr v. Roome, 28 App. D. C. 214. Where an agent violates his instructions and misappropriates money an action for money had and received will lie for its recovery. Guernsey v. Davis, 67 Kan. 378.

[9] See *ante*, § 1253.

[10] See Wells v. Collins, 74 Wis. 341, 5 L. R. A. 531; Salem, etc., Co. v. Anson, 41 Oreg. 562; Coleman v. Pearce, 26 Minn. 123; Chase v. Baskerville, 93 Minn. 402; Scott v. Rogers, 31 N. Y. 676; Greentree v. Rosenstock, 61 N. Y. 583; Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184; Comley v. Dazian, 114 N. Y. 161; Jones v. Smith, 65 Misc. 528; Bridgeport Organ Co. v. Snyder, 147 N. C. 271.

the breach of contract or for the conversion.[11] In many cases the principal may regain his goods by an action of replevin.[12] The relation of the parties is, also, usually such as to bring the agent within the operation of the ordinary statutes authorizing attachment.[13] As has been seen in a previous section,[14] an agent who has received money for his principal, cannot ordinarily be charged with the conversion of it, unless it was his duty to pay over the specific funds received.[15] Where the agent fails to restore upon reasonable demand chattels received from his principal to be kept on his account,[16] or to deliver to his principal upon such demand chattels received for and belonging to the principal,[17] the agent may be held for conversion. The fact that the demand involves or implies a termination of the agency is immaterial, since the principal always has the right upon reasonable notice to terminate an ordinary agency and to demand an accounting for or restoration of his property.

§ 1343. ——— When equitable.—It is well settled that the mere relation of principal and agent is not sufficient to authorize the principal to come into a court of equity for an accounting. For very many of the questions arising between them, the ordinary legal remedies are, as has been seen in the preceding section, entirely adequate; and where this is the case, resort cannot ordinarily be had to equity.[18]

[11] See Ridder v. Whitlock, 12 How. Pr. (N. Y.) 208; Zindel v. Finck, 120 N. Y. Supp. 738.

Agent held neither liable for breach of contract or for conversion. Pneumatic Weigher Co. v. Burnquist, 128 Iowa, 709.

[12] Thus where a principal has terminated his factor's authority and has satisfied, or the factor has forfeited, the factor's lien, the principal may maintain replevin for the goods. Terwilliger v. Beals, 6 Lans. (N. Y.) 403.

So in Robinson v. Stewart, 97 Mich. 454, where plaintiff endorsed to defendant a certificate of deposit to be used to purchase real estate for plaintiff, and later, when the purchase failed, demanded it back and was refused, *held* that replevin will lie for the certificate.

[13] De Leonis v. Etchepare, 120 Cal. 407.

[14] See *ante*, § 1254.

[15] Hazelton v. Locke, 104 Me. 164, 20 L. R. A. (N. S.) 35, 15 Ann. Cas. 1009; Walter v. Bennett, 16 N. Y. 250; Conaughtey v. Nichols, 42 N. Y. 83; Vandelle v. Rohan, 36 N. Y. Misc. 239; Wright v. Duffie, 28 N. Y. Misc. 338; Schanz v. Martin, 37 N. Y. Misc. 492; Rothchild v. Schwarz, 28 N. Y. Misc. 521; Hartman v. Hicks, 28 N. Y. Misc. 527.

Where it was his duty to pay over the identical money received, see Farrelly v. Hubbard, 148 N. Y. 592; and Michigan Carbon Works v. Schad, 1 N. Y. Supp. 490.

[16] Potter v. Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Solomon v. Waas, 2 Hilt. (N. Y.) 179; Brown v. Cushman, 173 Mass. 368; Bridgeport Organ Co. v. Snyder, 147 N. Car. 271.

[17] Nading v. Howe, 23 Ind. App. 690.

[18] Knotts v. Tarver, 8 Ala. 743; Crothers v. Lee, 29 Ala. 337; Paulding v. Lee, 20 Ala. 768; Halsted v.

When, however, the agency is one of a strictly fiduciary character, involving a question of confidence between the parties,[19] or, in many

Rabb, 8 Porter (Ala.), 63; Coquillard v. Suydam, 8 Blackf. (Ind.) 24; Powers v. Cray, 7 Ga. 206; Moxon v. Bright, L. R. 4 Ch. App. 292; Navulshaw v. Brownrigg, 2 DeGex, M. & G. 441; Hemings v. Pugh, 4 Giff. 456; Stewart v. Austin, L. R. 3 Eq. 299.

For the mere failure of an agent to remit money received upon the sale of property, an action at law and not in equity is the remedy. Herbert v. Henry, 20 Hawaii, 187.

[19] In Moxon v. Bright, L. R. 4 Ch. App. 292, Lord Hatherly, L. C., said: "There were numerous cases showing that where the relation of principal and agent had imposed a trust upon the agent, the court would entertain a bill for an account, and the only difficulty was in determining what constituted this species of trust. It was not every agent who held a fiduciary position as between himself and his principal. Foley v. Hill, 1 Ph. 399, 2 H. L. C. 28, showed that though a banker was the agent of the customer for many purposes, they were not such as would constitute a trust. Nor did the mere circumstances that the principal wanted discovery empower the court to give him assistance in the way of relief. The case of Smith v. Leveaux, 2 D. J. & S. 1, showed that though you might be entitled to discovery, which you could get either in equity or at law, that did not entitle you to relief, for all depended upon the character of the agency. As between master and servant such an agency did not exist, and the Vice-Chancellor Knight Bruce, in Smith v. Leveaux, expressed his opinion that a Court of Equity ought not to entertain a suit in such a case."

In Underhill v. Jordan, 72 N. Y. App. Div. 71, it is said: "While it is true that the existence of a bare agency is not sufficient upon which the equitable jurisdiction of the court can be invoked, yet where the agent's duties are fiduciary in character and involve a dealing with trust funds, he is regarded in the law as a *quasi* trustee and may be called to account in a court of equity for his management of the trust fund, and in such action judgment may pass determining the respective rights and liabilities of the parties thereto and adjusting the respective interests of the parties in and to the trust fund." See also, 91 App. Div. (N. Y.) 124.

In Marvin v. Brooks, 94 N. Y. 71, it is said that where an agent has been intrusted with his principal's money, to be expended for a specific purpose, the former may be required to account in equity. Followed in Kawananakoa v. Puahi, 14 Hawaii, 72.

And where an executrix brought an action in the nature of a bill in equity, alleging that defendant, as agent of plaintiff's intestate, received from the latter certain moneys to loan for him, and had not fully accounted therefor, and that the plaintiff was not in possession of any books, papers or memoranda, by which the amount or the investment thereof could be ascertained,—it was held that, although the statute had abolished action for a discovery, in aid of another action, this did not affect the jurisdiction of equity in any proper case for an accounting, and that the petition disclosed a proper case of that sort. Schwickerath v. Lohen, 48 Wis. 599. Same effect: Rippe v. Stogdill, 61 Wis. 38.

To the effect that "where an agent is intrusted with money to be disbursed, his principal may sustain a bill in equity against him for an account of his agency," see Dunn v. Johnson, 115 N. C. 249.

An agent intrusted with the management of property, authorized to buy and sell, receive payments and make disbursements, occupies a fiduciary relation and a court of equity

cases, where fraud is alleged[20] or a discovery sought, the equitable jurisdiction will attach, even though some remedy at law might also have been found.[21] So where the account is so complicated that it cannot be settled at law without great difficulty, a bill in equity may be maintained.[22]

The fact that the agent has rendered numerous and, as he claims, full and correct accounts, will not bar the court of its jurisdiction, nor of itself make the action vexatious. Whether they are in fact full and correct is often the very matter to be determined, and as to this the principal's right cannot be foreclosed by the agent's statement.[23]

In many cases, moreover, equity will lend its aid either by way of injunction or decree of specific performance to prevent the violation, or enforce the performance, of the trusts upon which the agent holds the property of his principal.[24]

§ 1344. The burden of proof.—The burden of showing the existence of such a relation and such a receipt of money or property as

has jurisdiction to adjust and settle the accounts between them. Thornton v. Thornton, 31 Gratt. (Va.) 212. To same effect: Coffin v. Craig, 89 Minn. 226; Frethey v. Durant, 24 N. Y. App. Div. 58. See also, Colonial Mtg. Co. v. Hutchinson Mtg. Co., 44 Fed. 219; Phillipps v. Birmingham Industrial Co., 161 Ala. 509; Campbell v. Cook, 193 Mass. 251; Thatcher v. Hayes, 54 Mich. 184; Holthouse v. Poling, — Ind. App. —, 99 N. E. 810.

Where an agent is intrusted with money to invest, receive payments upon and reinvest, a trust relation exists, which entitles the principal to an account in equity. Dillman v. Hastings, 144 U. S. 136, 36 L. Ed. 378.

[20] A landowner may maintain a suit in equity against the agent and manager of his estates, if the object of such suit is either to obtain an account, (and in that case allegations of fraud or special circumstances are unnecessary); or to obtain the delivery up by the agent of documents in his hands belonging to the landowner. Makepeace v. Rogers, 4 DeGex, J. & S. 649.

[21] Warren v. Holbrook, 95 Mich. 185, 35 Am. St. Rep. 544; Robson v. Sanders, 25 S. Car. 116; Decell v. Oil Mill Co., 83 Miss. 346.

[22] A bill for an account by a principal against his agent is not necessary where the transaction to which it relates is a single transaction and fraud is not charged. Navulshaw v. Brownrigg, 2 DeGex, M. & G. 441.

A bill for an account, with demand for a discovery as incidental to and in aid of that relief, may be maintained by a principal against an agent to whom he has delivered goods for sale on commission, where the matter is complicated or the principal would be embarrassed in making out his proof in a court of law: Taylor v. Tompkins, 49 Tenn. (2 Heisk.) 89. See also Walker v. Spencer, 45 N. Y. Super. 71; Halsted v. Rabb, 8 Port. (Ala.) 63; Hofer v. Silberberg, 3 Vict. L. R. Eq. 125.

[23] Jordan v. Underhill, 91 N. Y. App. Div. 124; Frether v. Durant, 24 N. Y. App. Div. 58.

[24] See Wood v. Rowcliffe, 3 Hare, 304, 6 Hare, 183. In Phillipps v. Birmingham Industrial Co., 161 Ala. 509, a manager of a cotton plantation, in whose possession the accounts and contracts with share-tenents were, was made to account and to deliver over all documents belonging to the proprietor of the plantation.

will impose upon the agent the duty to account, is upon the principal.[25] When, however, this showing has been made, or when the agent voluntarily admits the receipt of the property or money, the burden of showing that he made a proper disposition of it, rests upon the agent.[26] In making this showing, moreover, the agent must be ready with vouchers and particulars; he cannot compel the principal to be satisfied with the agent's general statement, even under oath, that he knows he made a proper disposition of it, though he cannot give particulars.[27]

Moreover, the agent's failure to keep correct accounts, in violation of his obvious duty, "authorizes," it is said,[28] "unfavorable inferences, and subjects him when called on for an account to a heavy burthen of suspicion as well as of proof." All the more so will this be true where it appears that the agent has destroyed such accounts as he had. The maxim, *Omnia presumuntur contra spoliatorem*, applies in such a case.[29]

§ 1345. Proof of amount due—Special method agreed upon—Conclusiveness of agent's accounts.—Under ordinary circumstances, the amount due from the agent must be shown as in any other case.

[25] Anderson v. First Nat. Bank, 4 N. D. 182; Harr v. Roome, 28 App. D. C. 214.

[26] Anderson v. First Nat. Bank, *supra;* Dodge v. Hatchett, 118 Ga. 883; Robson v. Sanders, 25 S. C. 116; Farmers' Warehouse Ass'n v. Montgomery, 92 Minn. 194; Laporte v. Laporte, 109 La. 958; Liesmer v. Burg, 106 Mich. 124; Carder v. Primm, 52 Mo. App. 102; Young v. Powell, 87 Mo. App. 128; Little v. Phipps, 208 Mass. 331, 34 L. R. A. (N. S.) 1046.

In New York the contrary seems to be held. Thus in Breed v. Breed, 55 N. Y. App. Div. 121, it is said that there is not only a presumption that the agent has done his duty, but also that he has not committed embezzlement. (The mere fact however that the agent had not paid over the money, would not necessarily constitute embezzlement.) So in Beattie v. Beattie, 83 Hun (N. Y.), 295, aff'd in 153 N. Y. 652, the court takes the same position for substantially the same reason. So in Turner v. Kouwenhoven, 100 N. Y. 115, it is said that there is a presumption that the servant has performed his duty.

[27] Farmers' Warehouse Ass'n v. Montgomery, *supra;* Webb v. Fordyce, 55 Iowa, 11.

In Wolf Co. v. Salem, 33 Ill. App. 614 it is said: "The law is settled and is sustained by reason that the duty of an agent is not fulfilled in a case of this kind, by reporting to his principal that he has spent a round sum of money in prosecuting his employment, and then swearing to the fact in a suit to recover the sum. His duty to keep and preserve true and correct statements of accounts is a necessary consequence of his duty to account."

To like effect: Gladiator Mines Co. v. Steele, 132 Iowa, 446; Quirk v. Quirk, 155 Fed. 199; Webb v. Fordyce, 55 Iowa, 11. Compare also Davenport v. Schutt, 46 Ia. 510. See also, Clayton v. Patterson, 32 Ont. 435.

[28] Peterson v. Poignard, 47 Ky. 309. To same effect: Illinois Linen Co. v. Hough, 91 Ill. 63; Armour v. Gaffey, 30 N. Y. App. Div. 121.

[29] Armour v. Gaffey, *supra.*

[30] Where an insurance agent agreed that the actual condition of his accounts with the company should be ascertained and determined by an in-

It is entirely possible, however, for the parties to agree that the amount due shall be determined in a specified manner or by a particular person, and unless impeached for mistake or fraud, such a determination would ordinarily be conclusive.[30] Usually statements and accounts rendered by the agent would have no greater conclusiveness than other similar admissions, open to correction upon proof of mistake. But where the principal, in reasonable reliance upon the statement, has altered his situation in such wise that he will be prejudiced if the statement be not true, the agent may be estopped from contradicting it.[31] *A fortiori* would this be true where the statement was made with the intention to deceive.

§ 1346. When liability barred by statute of limitations.—Statutes of limitation usually begin to operate only when a right of action has accrued. The determination therefore of the question when the statute begins to run against the principal depends usually upon the other question of the time when his right of action accrued. As has been seen, the general rule, subject to certain exceptions already noted which make demand unnecessary, is that the right of action does not accrue until a demand has been made with which the agent has refused or neglected to comply. It is therefore the general rule that the statute of limitations begins to operate upon a claim against an

spection of his reports, made by any person authorized by the company to make it, gave to such person full power to compute the sum due to the company as it appeared from such inspection, and agreed to ratify his computations, "waiving the production of any evidence other than such report and account," it was *held*, that, in the absence of fraud or mistake, the report of such person was conclusive Metropolitan Life Ins. Co. v. Long, 65 Ill. App. 295.

To same effect: Owiter v. Metropolitan Life Ins. Co., 4 N. Y. Misc. 543.

[31] Where a real estate agent falsely reported to his principal that he had received from a purchaser a certain deposit on the purchase price, by which statement the principal was induced to ratify the sale, the agent is bound to the principal to make good his statement. Wood v. Blaney, 107 Cal. 291, following Meyers v. Byars, 99 Ala. 484, where it was held that if an agent represents to his principal that he has money in his possession belonging to the latter, but says he will not pay it over until their conflicting claims have been adjudicated in court; and the principal thereupon brings suit for the recovery of the money, the agent is estopped from saying, that he did not, in fact, have it.

Where an agent to invest money has reported to his principal that he has made investments in certain mortgages, which were however fictitious, and has paid to his principal regularly what he asserted was the income therefrom (really paid out of the principal's money) until the agent's death, his estate is liable to the principal for the amount so reported as invested. Hartmann v. Schnugg, 113 App. Div. (N. Y.) 254, aff'd 188 N. Y. 617.

agent for money or property received by him, only from the time when he has rendered an account showing a balance due from him, or when a demand has been made upon him and he has refused or neglected to account,[32] or when he owes a duty to account without a demand, as where it is the duty of a collecting agent, imposed expressly or by implication, to remit the money to his principal upon receipt.[33]

[32] Judah v. Dyott, 3 Blackf. (Ind.) 324, 25 Am. Dec. 112; Jett v. Hempstead, 25 Ark. 463; Whitehead v. Wells, 29 Ark. 99; Dodds v. Vannoy, 61 Ind. 89; Lynch v. Jennings, 43 Ind. 276; Green v. Williams, 21 Kan. 64; Perry v. Smith, 31 Kan. 423; Guernsey v. Davis, 67 Kan. 378; Taylor v. Spears, 8 Ark. 429; Hyman v. Gray, 4 Jones (N. Car.) L. 155; Merle v. Andrews, 4 Tex. 200; Baker v. Joseph, 16 Cal. 173; Lever v. Lever 1 Hill (S. Car.) Ch. 62; Roberts v. Armstrong, 1 Bush (Ky.), 263, 89 Am. Dec. 624; Voss v. Bachop, 5 Kan. 59; Egerton v. Logan, 81 N. Car. 172; Jayne v. Mickey, 55 Pa. 260; Baird v. Walker, 12 Barb. (N. Y.) 298; Halden v. Crafts, 4 E. D. Smith (N. Y.), 490; Sawyer v. Tappan, 14 N. H. 352; Hutchins v. Gilman, 9 N. H. 360; Taylor v. Bates, 5 Cow. (N. Y.) 379; Hays v. Stone, 7 Hill (N. Y.), 128; Krause v. Dorrance, 10 Pa. 462, 51 Am. Dec. 496; Staples v. Staples, 4 Me. 532; Cole v. Baker, 16 S. D. 1; Ash v. Frank Co. (Tex. Civ. App.) 142 S. W. 42; Knowles v. Rome Tribune Co., 127 Ga. 90.

The statute will in no event begin to run until the money has been received. Lawrence University v. Smith, 32 Wis. 587.

[33] As has been seen in a preceding section, an agent for collection may be required by the course of business or express or implied agreement, or the instruction of his principal to remit the money collected to his principal without waiting for a demand. In such cases it is held by many authorities that the statute of limitations begins to run from the time of the receipt of the money, and that the fact that the principal is not aware of the collection is immaterial where there has been no evasion or fraudulent concealment on the part of the agent. Thus in Campbell v. Roe, 32 Neb. 345, the court said: "While there are decisions sustaining both propositions, it seems to us that the rule which is based upon the soundest principles, is that where an agent is appointed to collect money and remit, after deducting his charges, no time being stated when the remittance is to be made, the statute commences to run from the time of the receipt of the money by the agent. The money is due the principal as soon as it is collected, and it is the duty of the agent to pay it over or remit at once. If he fails so to do, he is liable to an action. . . . As the money is due the principal as soon as received by the agent, we perceive no reason why the same rule as to the beginning of the running of the statute, should not govern as controls actions upon demand notes. It can make no difference that the defendant failed to inform the plaintiff of the receipt of the money, or that the plaintiff had no knowledge that it had been collected, until three years after the note had been paid. The ignorance of one's rights, when not occasioned by the fraud of the debtor, will not have the effect to prevent the running of the statute. The rule is universal that mere silence or concealment by the defendant, without affirmative misrepresentation will not toll the statute." [A marked distinction may, however, be made here. In the case of the demand note the obligation is fixed and the holder may make it due at any time by making a demand. In the case of the collection, no demand can

§ 1347. ——— The questions respecting demand before action against the agent, and demand to set the statute of limitations into operation, are not identical. The purpose of the law in the former case is to protect the agent against the imputations, troubles and expenses of an action where the agent is in nowise at fault, and before

lawfully be made until the money has been received. It is not within the creditor's power to make it due by demand until the other party has done something, namely, collected the money. Who knows when that event has happened? The agent certainly is in a better situation to know than the principal in the ordinary case. Why should he not therefore be required to give notice of that fact? F. R. M.]

So in Mast v. Easton, 33 Minn. 161, it was said: "The decisions are conflicting as to the conditions under which a right of action exists in favor of a principal against his agent for the recovery of money collected by the latter, and as to the time when the statute of limitations commences to run with respect to such an action. But it may be stated that generally, when the case has been such that it has been considered that the duty had become fixed upon an agent to remit or pay money collected by him, a neglect to perform that duty has been held to render the agent liable to an action, and hence that the statute would then commence to run."

To same effect: Haebler v. Luttgen, 2 N. Y. App. Div. 390, aff'd 158 N. Y. 693; Stacey v. Graham, 14 N. Y. 492; Campbell v. Boggs, 48 Pa. 524; Rhines v. Evans, 66 Pa. 192; Guarantee Trust Co. v. Farmers' Nat. Bank, 202 Pa. 94; Jewell v. Jewell, 139 Mich. 578; Goodyear Rubber Co. v. Baker, 81 Vt. 39, 17 L. R. A. (N. S.) 667, 15 Ann. Cas. 1207.

In Hart's Appeal, 32 Conn. 520, it is said: "*Prima facie*, money received by one for the use of another is to be paid over without delay. Circumstances may indeed exist warranting the party in keeping it, either till demanded, as in case of deposits for safe keeping, or till some particular time, as in case of deposits depending on wagers or contingencies, or until instructions as to the mode of remittance, as in cases where the party is expected to remit and not pay the money in person."

Where the retention of money is a breach of contract merely and not fraud, failure to discover it will not prevent the running of the statute under the Iowa code. Brunson v. Ballou, 70 Iowa, 34.

So where an attorney in fact invested moneys in bonds instead of remitting to principal, as directed, it is not a fraudulent concealment that will stop the statute from running. Fleming v. Culbert, 46 Pa. 498.

In Douglas v. Corry, 46 Ohio St. 349, 15 Am. St. Rep. 604, it is held that, where there is no charge of misrepresentation or concealment, the statute begins to run in favor of an attorney who has made a collection, from the time of the collection, even though there has been no demand and, apparently, though the attorney has not given notice of the collection. "The holding that the statute does not begin to run until the attorney has given notice to his client of the collection of the money, because such is his duty, would seem to misconceive the reason and policy of the statute of limitations. It might with as much propriety be said that he could have protected himself by paying over the money, because that was as much his duty as to give notice of its receipt. The unreasonableness of the rule is not in any inconvenience that might attend compliance with it in the first instance, but in overlooking the difficulty that

he has had opportunity to comply with an ordinary demand. The purpose of the statute of limitations in these cases is to protect the agent against the assertion of stale claims, but it ought not to be made the means of screening a guilty agent, by allowing him to set it up as a defense, where the agent's own fault furnishes the cause of action, and the principal had no knowledge or means of knowledge that such

may be encountered, after the lapse of a great number of years, of proving that the notice was in fact given. This might be as difficult as to prove payment itself, if not more so." [Except in cases in which the principal knew or might have known that the money had been received, this reasoning does not seem conclusive. The giving of the notice in other cases is required so that the principal may know that he now has a matured claim upon the agent, and the agent ought not to have the benefit of the statute until his duty in that respect has been performed. If he suffers from loss of evidence that he has done so, it is because of a matter within his own control.] Goodyear Rubber Co. v. Baker, 81 Vt. 39, 17 L. R. A. (N. S.) 667, 15 Ann. Cas. 1207, applies the same rule in the absence of fraudulent concealment. See also, Lancaster v. Springer, 239 Ill. 472.

Fraudulent concealment immaterial. Ott v. Hood, 152 Wis. 97.

That agent, and particularly attorney, who has received claims for collection, is not liable to an action, and the statute does not begin to run until a demand and refusal: Taylor v. Spears, 6 Ark. 381, 44 Am. Dec. 519. s. c. 8 Ark. 429; Whitehead v. Wells, 29 Ark. 99; Jett v. Hempstead, 25 Ark. 462; Voss v. Bachop, 5 Kan. 59; Perry v. Smith, 31 Kan. 423; Robers v. Armstrong, 64 Ky. (1 Bush) 263; Merle v. Andrews, 4 Tex. 200; Dodds v. Van Noy, 61 Ind. 89; Staples v. Staples, 4 Me. 532; Judah v. Dyott, 3 Blackf. (Ind.) 324, 25 Am. Dec. 112.

In Wilder v. Secor, 72 Iowa, 161, 2 Am. St. Rep. 236, an attorney having a claim against an estate for collection, availed himself of it in the settlement of his own accounts with the administrator. *Held*, that the statute does not begin to run against the client until he discovers the cause of action, or by the exercise of reasonable diligence, might have done so.

In Guernsey v. Davis, 67 Kan. 378, it was held that where an agent misappropriates money sent him for the purpose of making a loan, the statute does not begin to run until the principal has knowledge of the agent's wrong.

In McCoon v. Galbraith, 29 Pa. St. 293, defendant's law partner collected a claim given to the firm for collection, and kept the money. After the dissolution of the firm plaintiff inquired of defendant respecting his claim. He was told by Galbraith that he knew nothing of the matter but would investigate and report to the plaintiff. "Long before that his partner had collected the most of the claim and Galbraith is in law chargeable with a knowledge of this, and therefore he must be treated as not revealing it when called upon, but promising to do so, and not until then, at least, could the statute of limitations begin to run."

Aultman v. Adams, 35 Mo. App. 503, is similar in facts and holding.

In King v. Mackellar, 109 N. Y. 215, where an agent entrusted with funds to invest misappropriated them and concealed the fact from the principal, it was said: "Where a right of action exists but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete, except . . . where the right

a default had occurred. Where the agent has failed to give notice to the principal as was his duty, or where the agent has been guilty of some misapplication or misappropriation of money or property which the principal had no reason to anticipate or suspect, it sounds very ill in the agent's mouth to plead the statute of limitations against the principal, until after the principal has learned of the wrong. To allow this is to sacrifice the principal to the guilty agent. The agent does not stand upon the same footing as a stranger. He is a person relied upon. He owes a duty. He is not dealing at arm's length. He disarms the ordinary diligence and watchfulness of the principal by undertaking to protect his interests. Some distinctions might therefore be made where the statute will permit it.

Where the principal knows, or in the ordinary course of business might have known (as where there is payment or performance due at a particular time), there is no particular hardship; but where the agent misleads the principal, or conceals facts which it was his duty to disclose, or fails to give required information, the case is different.[84]

So if a collecting agent has neglected to give his principal notice of the fact of the collection where notice is necessary in order that the latter may give him instructions as to the disposition of the money, he can not complain if the statute does not begin to run, unless he can show affirmatively that by the exercise of reasonable diligence the principal could have ascertained the fact of collection and made a demand accordingly.[85]

§ 1348. ——— But while the law will protect the principal until knowledge, he cannot afterwards lie by and allow the matter to run on against the agent indefinitely. Hence upon receiving notice of the receipt of the money, it is the duty of the principal to demand

grows out of the receipt or detention of money by a person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends."

[84] In Perry v. Smith, 31 Kan. 423, an agent to sell property remitted less than he actually received as the proceeds. *Held*, that the statute of limitations did not begin to run until discovery by the principal of the agent's default.

In Morgan v. Tener, 83 Pa. 305, a claim which had been collected was reported by the agent as "uncollectible." *Held*, that the statute did not begin to run until the principal had discovered the fraud.

In Shuttleworth v. McGee, 47 Tex. Civ. App. 604, an agent to collect negligently allowed the claim to become barred by the statute and reported that suit was pending. In an action by principal against agent for damages, *held*, that the statute did not commence to run until the principal learned of the loss.

[85] Jett v. Hempstead, 25 Ark. 463; Whitehead v. Wells, 29 Ark. 99; Drexel v. Raimond, 23 Pa. 21. See Rhines v. Evans, 66 Pa. 192; Campbell v. Boggs, 48 Pa. 524.

it, or give instructions as to the disposition of it, within a reasonable time; and if he omits to do so, he will put the statute in motion, from the time of such receipt.[36]

While there is a running account of continuous transactions, the statute will usually not begin to run until the matter is completed or the relation of principal and agent terminated.[37]

§ 1349. Of the agent's right of set-off.—Where the principal proceeds in equity, allowances will usually be made in the same action for such compensation and reimbursement as the agent may be entitled to. When necessary the agent may resort to a cross-bill.[38]

The right of set-off, recoupment and counter-claim in actions at law between principal and agent is governed ordinarily by the same rules that apply in other cases.[39] This right, however, may be waived by contract, express or implied, and it cannot be insisted upon where its enforcement would result in a violation of the agent's duty to his principal.[40] The receipt of money by an agent to be applied to a specific purpose, imposes upon him the duty not to apply it to another and different purpose. He cannot therefore apply it to his own use, by using as a set-off against it, a demand due him from his principal.[41]

Thus where the principal authorized his agent to collect certain rents, and apply them first to the payment of debts due to third persons and then to the payment of a debt due the agent, but the agent applied the whole amount upon his own debt, it was held, in an action by the principal to recover the amount collected, that the agent could

[36] Jett v. Hempstead, *supra;* Campbell v. Boggs, 48 Pa. 524; Schofield v. Woolley, 98 Ga. 548, 58 Am. St. Rep. 315.

In Ash v. Frank Co. (Tex. Civ. App.) 142 S. W. 42, the agent was authorized to collect certain claims and to apply the proceeds to the payment of the principal's creditors. The agent effected a settlement with the creditors; of this the principal was informed by a creditor, whereupon principal immediately demanded an accounting; the agent's reply was sent in March, 1904, but was not received until May; in April, 1906, principal sued. *Held*, that principal had been reasonably diligent in discovering the agent's default so that the statute was not a bar.

[37] Estate of Ritchey, 8 Pa. Super. Ct. 527 (citing Campbell v. Boggs, 48 Pa. 524, Norris's Appeal 71 Pa. 106; McCain v. Peart, 145 Pa. 516; Johnston v. McCain, 145 Pa. 531); Knowles v. Rome Tribune Co., 127 Ga. 93; Teasley v. Bradley, 110 Ga. 497, 78 Am. St. Rep. 113.

[38] Hutchinson v. Van Voorhis, 54 N. J. Eq. 439.

[39] See Brown v. Gallandet, 80 N. Y. 413.

[40] Tagg v. Bowman, 108 Pa. 273, 56 Am. Rep. 204.

[41] Tagg v. Bowman, *supra;* Tagg v. Bowman, 99 Pa. 376; Smuller v. Union Canal Co., 37 Pa. 68; Bank v. Macalester, 9 Pa. 475; Ardesco Oil Co. v. North American Co., 66 Pa. 375; Middletown, etc., Road v. Watson, 1 Rawle (Pa.), 330.

not set off the debt due to himself. The money collected by the agent, said the court, belonged to the principal, and as it came into the agent's hands, it was impressed with a trust in favor of the principal which required its application to the objects specified in their order. So long as there was anything due upon the preferred objects, the agent had no right to appropriate any of the money to the payment of his own claim. If he did so, it was a manifest breach of the trust under which it was received.[42]

And the same principle applies wherever the agent has received money of his principal by virtue of any special authority. Thus an agent employed to collect a claim, when he has received the money, has no right to set off against it an antecedent debt or claim owing to him by the principal, without first showing that the latter has agreed that he might so apply it.[43]

§ 1350. How far principal may follow trust funds.—It may be stated as a general principle that, wherever property or funds have come into the hands of the agent impressed with a trust in favor of the principal, such property or funds may be followed by the principal as long as they can be identified until they come into the possession of a *bona fide* purchaser for value without notice of the trust.[44] So if the property or funds have been disposed of or reinvested by the agent, the trust will in equity adhere to the proceeds in his hands in the same manner and to the same extent as to the original estate,—

[42] Tagg v. Bowman, *supra*.

[43] Simpson v. Pinkerton, Penn. 10 W. N. C. 423; Middleton, etc., Road v. Watson, *supra*.

[44] Phelps v. Jackson, 31 Ark. 272; Atkinson v. Ward, 47 Ark. 533; Griffin v. Blanchar, 17 Cal. 70; Price v. Reeves, 38 Cal. 457; Scott v. Umbarger, 41 Cal. 410; Mercier v. Hemme, 50 Cal. 606; Sharp v. Goodwin, 51 Cal. 219; Boyd v. Brinckin, 55 Cal. 427; Dotterer v. Pike, 60 Ga. 29; Planters' Bank v. Prater, 64 Ga. 609; Pugh v. Pugh, 9 Ind. 132; Riehl v. Evansville Foundry Ass'n, 104 Ind. 70; Burnett v. Gustafson, 54 Iowa, 86; Peak v. Ellicott, 30 Kan. 158, 46 Am. Rep. 90; Third Nat. Bank v. Stillwater, 36 Minn. 75; Swinburne v. Swinburne, 28 N. Y. 568; Siemon v. Schurck, 29 N. Y. 598; Van Alen v. American National Bank, 52 N. Y. 1; Newton v. Porter, 69 N. Y. 133; Holden v. Bank, 72 N. Y. 286; Stephens v. Board of Education, 79 N. Y. 183; Baker v. New York Nat. Bank, 100 N. Y. 31, 53 Am. Rep. 150; Roca v. Byrne, 68 Hun (N. Y.), 502; s. c., 145 N. Y. 182, 45 Am. St. Rep. 599; Warren v. Union Bank, 157 N. Y. 259, 68 Am. St. Rep. 777, 43 L. R. A. 256; Farmers' & Mechanics' Bank v. King, 57 Pa. 202, 98 Am. Dec. 215; Farmers' & Traders' Bank v. Kimball, 1 S. D. 388, 36 Am. St. Rep. 739; Velle v. Blodgett, 49 Vt. 270; McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287; Oliver v Piatt, 44 U. S. (3 How.) 332, 11 L. Ed. 622; May v. Le Claire, 78 U. S. (11 Wall.) 217, 20 L. Ed. 50; Nat. Bank v. Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Central Stock Exchange v. Bendinger, 48 C. C. A. 726, 109 Fed. 926, 56 L. R. A. 875.

In re District Bank, 11 Ch. D. 772; Knatchbull v. Hallett, 13 Ch. D. 696;

that is as long as they can be traced and until they are acquired by a *bona fide* purchaser without notice.[45] It does not matter that the legal title to the fund may have changed. Equity will follow it through any number of transmutations and preserve it for the owner so long as it can be identified.[46] And if it can not be identified by reason of being mingled with the funds or property of the agent, then the principal, though he may not be able to identify his fund specifically, will be entitled to a charge upon the whole mass to the extent that the trust fund is traceable into it, and has operated to enhance it. It is not necessary in such a case to trace the trust fund into any specific property. If it can be traced into the estate of the defaulting agent, and still remains there in whole or in part, it is sufficient to found a charge upon the whole to the extent of such enhancement.[47] Some

Rolfe v. Gregory, 4 DeG. J. & S. 576; Leigh v. Macaulay, 1 Y. & C. Ex. 260; Smith v. Barnes, L. R. 1 Eq. 65; Boursot v. Savage, L. R. 2 Eq. 134; Newton v. Newton, L. R. 6 Eq. 135; Heath v. Crealock, L. R. 18 Eq. 215. Many other cases are cited in following notes.

[45] National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Pennell v. Deffell, 4 DeG. M. & G. 372; Frith v. Cartland, 2 Hem. & M. 417; Taylor v. Plumer, 3 M. & S. 562; Knatchbull v. Hallett, 13 Ch. Div. 696, 36 Eng. Rep. 779; Atkinson v. Ward, 47 Ark. 533; Oliver v. Piatt, 44 U. S. (3 How.) 332, 11 L. Ed. 622; May v. Le Claire, 78 U. S. (11 Wall.) 217, 20 L. Ed. 50; Twohy Mercantile Co. v. Melbye, 78 Minn. 357.

[46] Farmers', etc., Bank v. King, 57 Pa. 202, 98 Am. Dec. 215; Atkinson v. Ward, *supra;* Third Nat. Bank v. Stillwater, 36 Minn. 75, Twohy Mercantile Co. v. Melbye, *supra.*

[47] See St. Louis Brew. Ass'n v. Austin, 100 Ala. 313; Bank of Florence v. U. S. Savings & Loan Co., 104 Ala. 297; Winston v. Miller, 139 Ala. 259; McClure v. LaPlata County, 19 Cal. 122; Holden v. Piper, 5 Cal. App. 71; but see following note; Ober v. Cochran, 118 Ga. 397; Woodhouse v. Crandall, 197 Ill. 104, 58 L. R. A. 385; Seiter v. Mowe, 182 Ill. 351; Lanterman v. Travous, 174 Ill. 459; Accident Ass'n v. Jacobs, 141 Ill. 261; Windstanley v. Second Nat. Bank, 13 Ind. App. 544; Independent District of Boyer v. King, 80 Iowa, 497; Jones v. Chesebrough, 105 Iowa, 303; Bradley v. Chesebrough, 111 Iowa, 126; Sioux City Stock Yards Co. v. Fribourg, 121 Iowa, 230, but see following note; Burrow v. Johntz, 57 Kan. 778; Travelers Ins. Co. v. Caldwell, 59 Kan. 156; Kansas Bank v. State Bank, 62 Kan. 788; Reeves v. Pierce, 64 Kan. 502, but see following note; Drovers' Bank v. Roller, 85 Md. 495, 60 Am. St. Rep. 344, 36 L. R. A. 767; Englar v. Offut, 70 Md. 78, 14 Am. St. Rep. 332; Little v. Chadwick, 151 Mass. 109, 7 L. R. A. 570; (compare Lowe v. Jones, 192 Mass. 94, 116 Am. St. R. 225, 6 L. R. A. (N. S.) 487, 7 Ann. Cas. 551; Hewitt v. Hayes, 205 Mass. 356, 137 Am. St. R. 448); Board of Commissioners v. Wilkinson, 119 Mich. 655, 44 L. R. A. 493; Sunderland v. Mescota Bank, 116 Mich. 281, but see following note; Bishop v. Mahoney, 70 Minn. 238; Shields v. Thomas, 71 Miss. 260, 42 Am. St. 458; Burcher v. Walther, 163 Mo. 461, but see following note; State v. Bank of Commerce, 54 Neb. 725, same case 61 Neb. 181, 52 L. R. A. 853; Morrison v. Lincoln Bank, 57 Neb. 225; Lincoln v. Morrison, 64 Neb. 822, but see note following; Ellicott v. Kuhl, 60 N. J. Eq. 333; Cavin v. Gleason, 105 N. Y.

cases have gone further and held that it is sufficient to trace the fund into the estate,[48] but the weight of modern authority is against them, and many of them have been overruled or limited in later cases in the same states.

In case of the bankruptcy of the agent, neither the property nor the money would pass to his assignees for general administration, but would be subject to the paramount claim of the principal.[49]

The fact that the agent may be prosecuted criminally does not prevent the principal from following and recovering his money.[50] The

256; Matter of Hicks, 170 N. Y. 195; Elevator Co. v. Clark, 3 N. D. 26; Ferchen v. Arndt, 26 Ore. 121, 29 L. R. A. 664, 46 Am. St. 603; Muhlenberg v. Loan & Trust Co., 26 Ore. 132, 29 L. R. A. 667; Freiberg v. Stoddard, 161 Pa. 259; Lebanon v. Bank, 166 Pa. 622; Slater v. Oriental Mills, 18 R. I. 352; Continental Nat. Bank v. Weems, 69 Tex. 489, 5 Am. St. 85; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, but see note following. State v. Foster, 5 Wyo. 199 at 215, 63 Am. St. Rep. 47, 29 L. R. A. 226; Metropolitan Nat. Bank v. Campbell, 77 Fed. 705; Spokane County v. First Nat. Bank, 68 Fed. 979.

[48] McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287; Francis v. Evans, 69 Wis. 115; Bowers v. Evans, 71 Wis. 133 (all overruled in Nonotuck Silk Co. v. Flanders, 87 Wis. 237); Peak v. Ellicott, 30 Kan. 158, 46 Am. Rep. 90; Myers v. Board of Education, 51 Kan. 87, 37 Am. St. Rep. 263; Hubbard v. Irrigating Co., 53 Kan. 637. But see Burrows v. Johntz, 57 Kan. 778; Travelers' Insurance Co. v. Caldwell, 59 Kan. 156; Kansas Bank v. State Bank, 62 Kan. 788; Reeves v. Pierce, 64 Kan. 502; Davenport Plow Co. v. Lamp, 80 Iowa, 722, 20 Am. St. 442; (but see Independent District of Boyer v. King, 80 Iowa, 497; Jones v. Chesebrough, 105 Iowa, 303; Bradley v. Chesebrough, 111 Iowa, 126; Sioux City Stock Yards Co. v. Fribourg, 121 Iowa, 230); Wallace v. Stone, 107 Mich. 190. (But see Board of Commissioners v. Wilkinson, 119 Mich. 665, 44 L. R. A. 493); Harrison v. Smith, 83 Mo. 210, 53 Am. Rep. 571; Stoller v. Coates, 88 Mo. 514; Evangelical Synod v. Schoenich, 143 Mo. 652; Pundmann v. Schoenich, 144 Mo. 149; (but see Bircher v. Walther, 163 Mo. 461). In Colorado, Peak v. Ellicott, *supra*, and McLeod v. Evans, *supra*, have been cited with approval. First Nat. Bank v. Hummel, 14 Col. 259, 20 Am. St. Rep. 257, 8 L. R A. 788. See also Hopkins v. Burr, 24 Col. 502, 65 Am. St. Rep. 238; Banks v. Rice, 8 Col. App. 217; (but compare McClure v. La Plata, 19 Col. 122; Holden v. Piper, 5 Col. App. 71); Griffin v. Chase, 36 Neb. 328; Capital Nat. Bank v. Coldwater Nat. Bank, 49 Neb. 786, 59 Am. St. Rep. 572; State v. Midland Bank, 52 Neb. 1. But see State v. Bank of Commerce, 54 Neb. 725; s. c., 61 Neb. 181, 52 L. R. A. 858; Morrison v. Lincoln Bank, 57 Neb. 225; Lincoln v. Morrison, 64 Neb. 822.

[49] Baker v New York National Bank, 100 N. Y. 31, 53 Am. Rep. 150; McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287; Peak v. Ellicott, 30 Kan. 158, 46 Am. Rep. 90; Chesterfield Mfg. Co. v. Dehon, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; Merrill v. Bank of Norfolk, 19 Pick. (Mass.) 32; Thompson v. Perkins, 3 Mason (U. S. C. C.), 232; Duguid v. Edwards, 50 Barb. (N. Y.) 388; Harrison v. Smith, 83 Mo. 210; Stoller v. Coates, 88 Mo. 514; Thompson v. Gloucester City Sav. Inst. (N. J.) 8 Atl. Rep. 97, and cases in preceding notes.

[50] Riehl v. Evansville Foundry

principal cannot, of course, both compel payment from the agent of the amount misappropriated, and also have a decree investing him with the title to the property acquired with it by the agent, but he may have a judgment against the agent for the amount of the trust money, less the sum so recovered.[51]

It is obvious, of course, as has been pointed out in many of the cases cited in this section, that the rights herein considered, can arise only when a trust relation existed between the parties; if the relation was merely that of debtor and creditor, no such considerations are involved.[52]

§ 1351. Conclusiveness of account—Failure to object—Account stated.—When the agent has rendered an account to his principal, it is open to the latter to object either to the fullness or the accuracy of the account; or, on the other hand, to agree to it as a full and accurate account of the agent's transactions. If he expressly agrees to it, the account will then have ordinarily all the characteristics of an account stated. But it is not necessary that the principal's acquiescence shall be express; it may be implied from the facts and circumstances as in other cases. The essential thing is, that the facts and circumstances relied upon, as constituting acquiescence, must be such as reasonably lead to the inference that the principal assents to the account as correct.[53]

Ass'n, 104 Ind. 70, disapproving Campbell v. Drake, 4 Ired. (N. C.) Eq. 94, and Pascoag Bank v. Hunt, 3 Edw. (N. Y.) Ch. 583.

[51] Riehl v. Evansville Foundry Ass'n, *supra;* Barker v. Barker, 14 Wis. 131; Murray v. Lydburn, 2 Johns. (N. Y.) Ch. 441; Chapman v. Hughes, 134 Cal. 641.

[52] See Aetna Powder Co. v. Hildebrand, 137 Ind. 462, 45 Am. St. Rep. 194; *Ex parte* White, 6 Ch. App. 397; Nutter v. Wheeler, 2 Low. 346, Fed. Cas. No. 10,384; *In re* Linforth, 4 Saw. 370, Fed. Cas. No. 8,369.

In New Zealand Land Co. v. Watson, 7 Q. B. Div. 374, the doctrine of following trust funds was held not applicable in an action by the principal against subagents who stood in no privity to him, and who had received the goods for sale from the agent, against whom the sub-agents had a balance of account on dealings which involved the principal's goods as well as those of other persons.

In La Marchant v. Moore, 150 N. Y. 209, plaintiffs ordered their agents, (with whom they had a sufficient credit) to buy certain stock for them. The agents ordered defendants who were their correspondents, and with whom they had some but not sufficient credit, to buy the stock on the agents' account not disclosing plaintiffs' interest. Defendants bought and paid for the stock, but retained possession to secure them for the balance due from the agents. The agents notified the plaintiffs that they had bought the stock as directed and charged it to their account. Later the agents failed. *Held*, that plaintiffs' claim to the stock is subject to defendants' claim for the unpaid balance.

[53] In Quincey v. White, 63 N. Y. 370, it was said that to give an ac-

If an agent, as for example, a factor or commission merchant, renders to his principal an account of his transactions, the principal must, in general, if he would object to it, do so within a reasonable time, and if he does not, the agent is justified in treating the principal's silence as an admission by the principal "that the account as rendered was just and true and that he was willing to be bound by it."[54] The question of what is a reasonable time, in this case as in others, is usually a question of fact, to be determined by the jury,[55] but where only one inference could be drawn from the facts, it may be determined by the court.[56]

§ 1352. ——— Reopening account—Impeachment for fraud or mistake.—When once an account has taken on the form of an account stated, courts are very reluctant, especially in cases between ordinary debtor and creditor, to allow it to be reopened;[57] and this reluctance increases rapidly with the lapse of time.[58] Nevertheless

count delivered the force of an account stated, because of the silence of the party receiving it, the circumstances must be such as to justify an inference of assent to it. If he has disclaimed all liability on the account, his silence will not be deemed *prima facie* proof of acquiescence, and he is not bound to examine its items. Woodward v. Suydam, 11 Ohio, 361.

[54] Austin v. Ricker, 61 N. H. 97; Knickerbocker v. Gould, 115 N. Y. 533; Langdon v. Roane, 6 Ala. 518, 41 Am. Dec. 60; Burns v. Campbell, 71 Ala. 271; Mayberry v. Cook, 121 Cal. 588; Flower v. O'Bannon, 43 La. Ann. 1042; Allen v. Nettles, 39 La. Ann. 788; McCord v. Manson, 17 Ill. App. 118; Hall v. Sloan, 9 Phila. (Pa.) 138; Everingham v. Halsey, 108 Iowa, 709; Allen-West Commission Co. v. Patillo, 90 Fed. 628, 33 C. C. A. 194; Eichel v. Sawyer, 44 Fed. 845; Wiggins v. Burkham, 10 Wall. (U. S.) 129, 19 L. Ed. 884; Powell v. Pacific Railroad, 65 Mo. 658; Darley v. Lastrapes, 28 La. Ann. 605; Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81; s. c., 18 N. Y. 285; Woodward v. Suydam, 11 Ohio, 361; Benan v. Cullen, 7 Pa. St. 281.

Where a factor has sent to his principal accounts of two different sales of the same goods, and the principal approves the first account, he is not bound to object to second account at the peril of its being taken as a stated account, binding on him. Cartwright v. Greene, 47 Barbour (N. Y.) 9.

[55] Austin v. Ricker, 61 N. H. 97; Wiggins v. Burkham, 10 Wall. (U. S.) 129, 19 L. Ed. 884; Darby v. Lastrapes, 28 La. Ann. 605; Lockwood v. Thorne, 18 N. Y. 285, 62 Am. Dec. 81.

[56] Allen-West Commission Co. v. Patillo, 90 Fed. 628, 33 C. C. A. 194; Hall v. Sloan, 9 Phila. (Pa.) 138; Knickerbocker v. Gould, 115 N. Y. 533; Langdon v. Roane, 6 Ala. 518, 41 Am. Dec. 60; Eichel v. Sawyer, 44 Fed. 845; Freedland v. Heron, 7 Cranch (U. S. Sup. Ct.) 146, 3 L. Ed. 297; Wiggins v. Burkham, 10 Wall. (U. S.) 129, 19 L. Ed. 884; Rich v. Eldredge, 42 N. H. 153; Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81.

[57] Chappedelaine v. Dechenaux, 8 U. S. (4 Cranch) 305, 2 L. Ed. 629; Kilpatrick v. Henson, 81 Ala. 464; Stevens v. Board of Supervisors, 62 Mich. 579; Hart v. Gould, 62 Mich. 262.

[58] Chappedelaine v. Dechenaux, *supra;* Horan v. Long, 11 Tex. 230;

even as between such parties an account may often be impeached for mistake or fraud;[59] though the party seeking to do so must come with clear and definite allegations and not rely merely on vague and general charges.[60]

These rules in general apply to the principal and his agent, though where the parties thus occupy a fiduciary relation somewhat more liberal rules apply as to the amount of proof required. Thus it was said by Jessel, M. R., "when the account is between persons in a fiduciary relation, and the person who occupies the position of accounting party —that is, the trustee or agent—is the defendant, it is easier to open the account than it is in cases where persons do not occupy that position—that is to say, that a less amount of error will justify the court in opening the account."[61]

Moreover, the presumption of acquiescence, based upon the principal's failure to object to the account, presupposes that the principal has not been kept in ignorance of material facts through the acts or default of the agent. As stated in one case, that presumption "can have no application to dealings between principal and agent, where the agent misstates an account in a respect peculiarly within his own knowledge, and which misstatement cannot be discovered by an inspection of the account or by any other means possessed by the principal."[62]

VI.

TO GIVE NOTICE TO PRINCIPAL OF MATERIAL FACTS.

§ 1353. Duty of agent to give principal notice of facts material to agency.—It is the duty of the agent to give to his principal reasonable and timely notice of every fact relating to the subject-matter of the agency, coming to the knowledge of the agent while acting as

Pratt v. Weyman, 1 S. C. Eq. (McCord) 89..

[59] Chappedelaine v. Dechenaux, *supra;* Kilpatrick v. Henson, *supra;* Stevens v. Board of Supervisors, 62 Mich. 579; Vanderveer v. Statesir, 39 N. J. L. 593.

[60] Chappedelaine v. Decheneaux, *supra;* Kilpatrick v. Henson, *supra;* Pratt v. Weyman, 1 S. C. Eq. (McCord) 89; Conlin v. Carter, 93 Ill. 536; Langdon v. Roane, 6 Ala. 518, 41 Am. Dec. 60.

[61] Williamson v. Barbour, 9 Ch. Div. 529. See also Gruby v. Smith, 13 Ill. App. 43; Farnam v. Brooks, 9 Pick. (Mass.) 212; Hopkinson v. Jones, 28 Ill. App. 409; Stearns v. Page, 48 U. S. 818.

The case for re-opening is much stronger when to confidential relations there are added charges of fraud or undue influence exercised by the agent. Rembert v. Brown, 17 Ala. 667.

[62] Gale v. New York Hay Co., 54 N. Y. App. Div. 72. See also Michoud v. Girod, 45 U. S. (4 How.) 503, 11 L. Ed. 1076; Raht v. Union Mining Co., 5 Lea (Tenn.) 1.

Where the principal in ignorance of the fraud makes a settlement, and

such, and which it may fairly be deemed material for the principal to know for the protection or preservation of his interests.[63]

This duty may take on a variety of forms. As has been already seen, the duty of loyalty to his principal may require that the agent shall disclose to his principal the existence of adverse interests, either in the agent or in others whom he represents, which are inconsistent with the full and fair performance by the agent of his duty to his principal.[64]

So a duty to exercise care, or to obey instructions, may require that the agent shall notify the principal of dangers affecting his interests, or of the inability of the agent to accomplish the results, take the precautions, or pursue the methods contemplated by the principal at the time the service was undertaken, so that the principal may take steps for the protection of his interests, or give new directions in view of the new conditions.[65]

Thus, if property of the principal in the agent's possession is attached [66] or seized [67] as the property of another, or if it is exposed to danger, or if, having undertaken to insure it, he finds himself unable to do so,[68] or if claims and demands in his hands to receive payment are not paid when due;[69] in these and other similar cases, which will readily suggest themselves, it is the duty of the agent to give his principal notice that he may take such steps as he deems desirable for his protection, and if the agent fails in the performance of this duty to the injury of the principal, he must respond to the latter in damages for the loss naturally and proximately resulting from such failure.[70]

As will be seen hereafter, the existence of this duty, coupled with a conclusive presumption that it has been duly performed, is often made the bases of the rule that notice to the agent of facts material to his agency shall be deemed to be constructive notice to the principal.[71]

enters into a new contract with the agent the settlement is void and the principal may recover the money paid without obtaining a formal rescission of the settlement. Hindle v. Holcomb, 34 Wash. 336.

[63] Arrott v. Brown, 6 Whart. (Penn.) 9; Harvey v. Turner, 4 Rawle (Penn.), 223; Moore v. Thompson, 9 Phila. 164; Devall v. Burbridge, 4 Watts & Serg. (Penn.) 305; Hegenmyer v. Marks, 37 Minn. 6, 5 Am. St. Rep. 808; Emerson v. Turner, 95 Ark. 597; Dorr v. Camden, 55 W. Va. 226, 65 L. R. A. 348.

[64] See *ante*, § 1207.

[65] See *ante*, §§ 1264, 1298, 1307.

[66] Moore v. Thompson, *supra*.

[67] Devall v. Burbridge, *supra*.

[68] Callander v. Oelrichs, 5 Bing. N. C. 58.

[69] Harvey v. Turner, *supra*; Arrott v. Brown, *supra*.

[70] But the principal cannot recover substantial damages without proof of such a loss. Emerson v. Turner, *supra*.

[71] See *post*, Book IV, Chap. V, *Notice to an Agent*.

CHAPTER III

THE DUTIES AND LIABILITIES OF THE AGENT TO THIRD PERSONS

§ 1354. Purpose of this chapter.

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IV. LIABILITY FOR TORTS OF THEIR PRIVATE SERVANTS OR AGENTS.

1506. Liable for torts of private servant or agent.

§ 1354. Purpose of this chapter.—Attention may next be directed to the question, what, if any, are the duties and liabilities of the agent to third persons. In some respects, as will be seen, the problem may depend upon whether the agent in question was a public or a private one. This work, in general, deals only with the latter, though occasional references are made to the former. By reason of this fact, the case of the private agent will be considered first.

A. Private Agents.

§ 1355. How subject divided.—In accordance with a familiar classification, the question of the liability of the private agent to third persons will be considered: I. In Contract. II. In Tort.

I.

IN CONTRACT.

§ 1356. In general.—When the matter of the personal liability of an agent upon or growing out of contracts made by him for his principal is suggested, the question not infrequently arises, Why should he be liable at all? Naturally and normally it would seem that there is no room for such a liability. And if a person, who so assumes to act, does so only when he has adequate authority, and if, in acting, he confines himself within the scope of that authority, and makes the contract or does the act,—as is ordinarily his duty,—only in the name and on the account of his principal, he would incur no personal liability.

As matter of fact, however, cases constantly arise wherein some or all of these qualifications have been ignored. Thus it may happen that one person may assume to act as agent for another, when he has in fact no authority from that other so to act. Or it may happen, that, though having adequate authority to act, he yet intentionally or unintentionally so acts as not to bind his principal at all, but to pledge his own personal responsibility.

§ 1357. Agent not personally liable upon authorized contract made in principal's name.—Before proceeding to consider the cases in which the agent may be liable, it is worth while to recall to mind the general rule of normal agency, which is that, where a contract is made by an authorized agent in the name and on the account of a competent principal, the agent incurs no liability upon or with reference to the contract.[1] The agent does not guarantee that his principal will perform the contract or that he can perform it. Neither does he guarantee the honesty, solvency or good faith of his principal, nor the legal sufficiency or validity of the contract. The agent is merely the means of making for his principal the contract itself. All matters respecting its validity or effect, and all questions respecting its performance lie ordinarily beyond the range of the agent's undertaking. If the agent is liable, it must be because of the abnormality of the situation, or of some personal undertaking which the agent assumes. The same rule applies, of course, to the collateral promises, representations, undertakings and other acts of the agent made in good faith, in the name of his principal, and within the scope of the agent's authority. They bind the principal and not the agent personally,

[1] Pyle v. Booz, 10 Ga. App. 760; Siler v. Perkins, — Tenn. —, 149 S. W. 1060.

§ 1358. Liability of agent as here discussed assumes that agent is of normal legal capacity.—It is also to be kept in mind that the discussion which follows, respecting the liability of the agent to third persons in contract, presupposes that the agent is of normal legal capacity and competent to assume contractual obligations. If the agent be an infant, an insane person, a married woman under common law disabilities, a corporation acting *ultra vires*, and the like, that fact might furnish a complete answer to a liability which the law would otherwise attach.[2]

1. Where he Acts without Authority.

§ 1359. In general.—The question of the liability of the agent to third persons in contract for acts done or contracts made or attempted to be made by him as agent, but without authority, presents many phases.

Thus this absence or want of authority in any given case may result either, 1. Because the agent never possessed it; 2. Because once having it, it has since expired, or 3. Because while having some authority, or authority to perform this act in another way, he has exceeded his authority, or failed to observe the methods prescribed for him.

The reason why the agent never possessed the authority he assumed to exercise, may be simply and solely that the assumed principal never conferred or intended to confer it; or though he intended to confer it, he failed to do so in a legal and effective manner. It may be because there never was such a principal, or though once existent, he had ceased to exist at the time the authority was supposed to have been conferred. It may be because he never had legal capacity, or because though once having capacity, that capacity had ceased to exist at the time the authority was supposed to have been conferred.

The reason why, though once having had authority, it has ceased to exist, may be the happening of one of the many events or changes in the character, condition or status of the parties, such as war, death, insanity, bankruptcy, marriage and the like, which may operate to terminate, modify, or suspend an existing authority, or that the principal has expressly revoked, or the agent has renounced, the authority.

§ 1360. ——— So the question of the agent's knowledge of the existence of his authority and his manner of representing its existence, may present a variety of phases.

[2] Thus in Jemison v. Citizens' Savings Bank, 122 N. Y. 135, 19 Am. St. 482 9 L. R. A. 708, it was held that a bank could not be liable as agent of an undisclosed principal upon an act *ultra vires* of the bank.

Thus an agent in dealing with third persons may make an express assertion of his authority to perform the act in question, (a) knowing at the time that he has no such authority; or (b) believing in good faith, though erroneously, that he has such authority. So under the same circumstances, he may deal with third persons making no express assertion of authority, but that only, if any, which arises from his assuming to act as agent, and as before, either knowing that he has not the requisite authority, or believing in good faith, but erroneously, that he is competent.

Or, again, believing himself to be or not to be authorized, but the question not being free from doubt, he may fully and fairly disclose to the other party the facts in regard to his authority and leave the other party to determine for himself whether he will rely upon it or not.

§ 1361. ——— Still further with respect of the principal for whom the agent purports to act; that principal may be either disclosed or undisclosed. That is to say, the pretended agent may assume to act for a certain principal, naming him, or he may assume to act for a principal without disclosing who he is. The former case is much the more common; it presents questions which do not arise in the other and will be first considered.

A. Assuming to Act for a Disclosed Principal.

§ 1362. **Theories of liability.**—Where a person has assumed as agent to make a contract with another on behalf of a certain principal, but without authority, or has induced the other to do some act or change his position so that he will be prejudiced if authority did not exist, the question at once arises, Upon whom should responsibility for the loss of the contract, or for the consequences of the unauthorized change of position, fall? The assumed principal is, by the hypothesis, not bound, and the loss must fall either upon the third person who has dealt with the agent, or upon the agent who has induced him to act. As between these parties, it might be urged that it was the duty of the other party before dealing with the agent to ascertain his authority, and that if he failed to do so, he should be deemed, even as between himself and the pretended agent, to have assumed the risk. However true this might be as between the principal and third persons, it is ordinarily more consistent with legal principles to hold as between the agent and the other party, that, where the agent has induced action, in reliance upon express or implied representations of authority, the agent and not the other party should assume the risk. Of these two, the agent is the one who takes the initiative; he is usually in the better situation to know of the existence of the authority, and

where he undertakes, either expressly or by implication, to induce action, in reliance upon its existence, he would seem to be the party upon whom the risk of its non-existence should fall.

§ 1363. Deceit—Warranty of authority.—Where at the time of making such a representation of authority, the agent knows that it does not exist, but nevertheless misleads the other to his detriment, the case presents the ordinary aspects of deceit.

Where, however, the assumed agent has acted in good faith, believing that the authority which he assumed to exercise in fact existed, the case is not so clear. The case does not now—at least where the doctrine of Derry v. Peek prevails—present the necessary aspects of deceit. Nevertheless, in this case also, it is thought that the agent should bear the risk. Thus in the leading case of Collen v. Wright,[3] it was said by Willes, J.: "I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise."

The same rule has subsequently been stated in many different ways, and among others, by Brett, L. J., as follows: "That where a person either expressly or by his conduct invites another to negotiate with him upon the assertion that he is filling a certain character, and a contract is entered into upon that footing, he is liable to an action if he does not fill that character; but the liability arises not from the misrepresentation alone, but from the invitation to act and from the acting in consequence of that invitation."[4]

[3] Collen v. Wright, 8 El. & Bl. 647.

[4] Oliver v. Bank of England, [1902] 21 Ch. 610. See also Blower v. Van Noorden, [1909] Transv. L. R. (S. C.) 890; Rederi Aktiebolaget Nordstjernan v. Salvesen, 6 Ct. Sess. Cas. (5th

§ 1364. Agreement to indemnify.—It is usually said, in cases of this nature, as is seen in the preceding sections that the undertaking imputed to the assumed agent is one of warranty of the existence of his authority; but it may well take the form of an undertaking to indemnify the other party against the consequences of the lack of authority. Thus in one of the most recent and important of these cases,[5] a case wherein it was sought to hold the defendant responsible for inducing the plaintiff corporation to transfer shares in reliance upon a forged deed of transfer, it was said by Lord Davey in the English House of Lords, "Lastly * * * it was said * * * that this is not an action on a warranty, and that a warranty and a contract of indemnity are distinct, one important difference being the period from which the statute of limitations would run. That, of course, is so, and the appellants admit that if they were suing on the warranty their action would be out of time. But I can see no legal reason why, in circumstances like those of the present case, it should not be held, if necessary, that the true contract to be implied from those circumstances is not only a warranty of the title, but also an agreement to keep the person in the position of the appellants indemnified against any loss resulting to them from the transaction. And I think that justice requires that we should so hold. I agree with the Lord Chief Justice that, as between these two innocent parties, the loss should be borne by the respondents who caused the appellants to act upon an instrument which turned out to be invalid."

§ 1365. Objections—A fiction—Conflict with Derry v. Peek.—This doctrine of an implied warranty of authority did not become established without dissent. Thus Cockburn, C. J., in Collen v. Wright,[6] protested against it as a remedy introduced "by the mere fiat of a judicial decree." It has been urged also that it is in conflict with the rule that no action at law lies for an innocent misrepresentation. To this objection Lord Bramwell in one case[7] replied as follows: "The general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. This general rule is admitted by

ser.) 64; Maneer v. Sanford, 15 Manitoba, 181; Russell v. Koonce, 104 N. C. 237.

[5] Sheffield Corporation v. Barclay, [1905] App. Cas. 392. Same effect, Bank of England v. Cutler, [1908] 2 K. B. 208.

[6] Collen v. Wright, 7 E. & B. 301; 26 L. J. (Q. B.) 147; in Exch. Ch. 8 E. & B. 647, 27 L. J. (Q. B.) 215. See also 18 Law Quarterly Review, 364.

the plaintiff's counsel, and *prima facie* includes the present case. But then it is urged that the decision in Collen v. Wright has shown that there is an exception to that general rule, and it is contended that this case comes within the principle of that exception. I do not think that Collen v. Wright, properly understood, shows that there is an exception to that general rule. Collen v. Wright establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction."

The doctrine of Collen v. Wright has also been alleged to be in conflict with that of Derry v. Peek.[8] To this objection, Lord Halsbury in a recent case[9] replied as follows: "I have not the least notion how that state of the law is supposed to have been shaken by the decision in Derry v. Peek. We have more than once been informed that Derry v. Peek is supposed to have altered the law. I do not think Derry v. Peek has anything to do with it. Derry v. Peek was an action for deceit, and this house held that where it was an action for deceit you must prove deceit, and you must prove *mala fides* on the part of the person who deceived the other. I suppose that was no new law."

§ 1366. Liability not based on theory of agent's actual wrong.— In Smout v. Ilbery[10] it was said to be "the true principle derivable from the cases, that there must be some wrong or omission of right on the part of the agent in order to make him personally liable on a contract made in the name of his principal." But as is pointed out by Kekewich, J., in a recent case,[11] the present doctrine "does not proceed on the footing of there having been any wrong, or omission of right, on the part of the agent in order to make him personally liable in respect of a contract made in the name of his principal, and the conclusion in Smout v. Ilbery, that such wrong or omission of right, on the

[7] Dickson v. Reuter's Telegram Co., L. R. 3 C. P. Div. 1. See also, per Lord Davey, in Starkey v. Bank of England, [1903] App. Cas. 114, at 118. Compare Sir Frederick Pollock in 5 Law Quarterly Review at p. 415. Also, F. R. Y. Radcliffe in 18 Law Quarterly Review at p. 364.

[8] Derry v. Peek, 14 App. Cas. 337.

[9] Starkey v. Bank of England, [1903] App. Cas. 114. See also Blower v. Van Noorden, [1909] Transv. L. R. (S. C.) 890.

[10] Smout v. Ilbery, 10 M. & W. 1, at p. 11.

[11] Halbot v. Lens, [1901] 1 Ch. 344, at p. 349.

part of the agent is necessary, must be taken to have been negatived by Collen v. Wright, which was decided fifteen years later. The conclusion, therefore, is that, in order to enable a plaintiff to maintain an action on such a contract, he must prove a misrepresentation in fact,—that is to say, a representation by the defendant that he was authorized to sign on behalf of an alleged principal when in fact he was not so authorized,—but he need not prove that this misrepresentation was due to an omission or wrong of the party signing."

§ 1367. Liability based on representations of matters of fact only. This implied warranty by the agent of his authority must ordinarily be limited to its existence as a matter of fact, and not be held to include a warranty either of its existence or of its adequacy or sufficiency, in point of law.[12]

Thus in a case often referred to,[13] it was said by Mellish, L. J., "though I have not found any case in the courts of law on the question, I have no doubt myself that it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law, that is to say, if the person who deals with the agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, under those circumstances I have no doubt that the agent would not be liable. For instance, supposing when an agent comes and professes to make a contract on behalf of his principal, instead of trusting his representa-

[12] Beattie v. Lord Ebury, L. R. 7 Ch. App. 777; Thilmany v. Iowa Paper Bag Co., 108 Iowa, 357, 75 Am. St. Rep. 259; Kansas Nat'l Bank v. Bay, 62 Kan. 692, 54 L. R. A. 408, 84 Am. St. Rep. 417; Abeles v. Cochran, 22 Kan. 405, 31 Am. Rep. 194; Holt v. Winfield Bank, 25 Fed. 812.

In Walker v. Bank of New York, 9 N. Y. 582, it is said the doctrine "clearly does not extend to cases where there is no mistake, misrepresentation or deception as to any matter of fact, although for some legal reason the principal may not be bound. One party is presumed to know the law as well as the other, and each contracts at his peril as to the legal effect of what is done."

In Michael v. Jones, 84 Mo. 578, it is said: "Where all the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal can not be bound is no ground for charging the agent." To same effect are Western Cement Co. v. Jones, 8 Mo. App. 373; Humphrey v. Jones, 71 Mo. 62; Ware v. Morgan, 67 Ala. 461; Hall v. Lauderdale, 46 N. Y. 70.

Where the other party knows that the agent purports to act only by virtue of an oral authority, he can not hold the agent liable for the failure of a contract for which the law—as both are presumed to know—requires a written authority. McReavy v. Eshelman, 4 Wash. 757.

[13] Beattie v. Lord Ebury, L. R. 7 Ch. App. 777, at 800.

tion that he has power to bind his principal, the person dealing with the agent were to ask to see his authority, and a power of attorney executed by the principal was shown to him, and he took the opinion of his lawyer as to whether the power of attorney was sufficient to bind the principal, and was advised that it was sufficient to bind the principal, and then after that a contract was made, and it turned out when the point was raised in a court of law that the power of attorney was insufficient—under such circumstances I am clearly of opinion that there would be no warranty on the part of the agent that the power of attorney was good in point of law."

§ 1368. Doctrine not confined to the making of contracts.—The act which the agent assumes to do need not be the making of a contract, although in fact it most frequently is so. "As a separate and independent rule of law," said Lord Davey is a recent case,[14] the doctrine of Collen v. Wright, "is not confined to the bare case where the transaction is simply one of contract, but it extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business, has the authority of some other person." It may therefore consist in inducing the other party to do or refrain from doing some act, which the assumed principal might call upon him to do or refrain from doing. Thus, for example, the agent by an assumption of authority to demand it, may induce the payment of money, the delivery of goods, the surrender of securities, the discharge of liens, the alteration of records, the transfer of stocks, and many other similar acts which will readily suggest themselves. As to many of these cases, the rules already suggested would be adequate, but a broader statement of the principle has been made, which is undoubtedly sound and which would be more appropriate to many of the cases here suggested. Thus in a recent case before the English House of Lords,[15] where the question was as to the liability to the plaintiff of one who had induced the plaintiff to transfer stocks in reliance upon an instrument of transfer which proved to have been forged, it was said by Lord Davey: "I am of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use) and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of that duty, and thereby incurs liability to third parties,

[14] Starkey v. Bank of England, [1903] App. Cas. 114.

[15] Sheffield v. Barclay, [1905] App. Cas. 392, at 399.

there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it."

§ 1369. How where other party knows or agent discloses all the facts relating to his authority.—If the true principle be, as has been pointed out, that the liability of the agent is based on his untrue representation or warranty, however innocent, of a material fact, namely the fact of his authorization, the other party must, in this case, as in other similar ones, show that he relied upon the representation and was misled by it to his detriment. If, on the contrary, he did not rely upon the representation but on his own knowledge or upon other evidence, or if, because he knew the facts, or was charged with notice of them, he was not misled by the agent's representation, he cannot recover.

So where the agent, acting in good faith, fully discloses to the other party, at the time, all the facts and circumstances touching the authority under which the agent assumes to act, so that the other party from such information or otherwise, is fully informed and may decide for himself as to the existence and extent of the authority, the agent cannot be held liable,[16] unless he has, in some way, expressly assumed the responsibility. It is of course essential to this immunity that there shall have been a full and fair disclosure, and if the agent conceals or misrepresents material facts to the detriment of the other party, he cannot claim exemption.[17]

[16] Newport v. Smith, 61 Minn. 277; LeRoy v. Jacobosky, 136 N. C. 443, 67 L. R. A. 977; Thilmany v. Iowa Paper Bag Co., 108 Iowa, 357, 75 Am. St. Rep. 259; Kansas Nat'l Bank v. Bay, 62 Kan. 692, 84 Am. St. Rep. 417, 54 L. R. A. 408; Dillon v. Macdonald, 21 New Zeal. L. R. 45; Blower v. Van Noorden, [1909] Transv. L. R. (S. C.) 890.

Where the agent, in signing, recites that he signs as agent, "by telegraphic authority of" a named principal, and there was also testimony that this form of signing was adopted in the trade to negative the implication of a warranty, the agent was held not bound. Lilly v. Smales, [1892] 1 Q. B. 456.

Where the assumed agent is also a principal in the transaction he may be personally liable on his own promise although the other party knew that he was unauthorized to bind the others associated with him. Gutherless v. Ripley, 98 Iowa, 290.

[17] Newman v. Sylvester, 42 Ind. 112; Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Walker v. Bank, 9 N. Y. 582; Jefts v. York, 10 Cush. (Mass.) 392.

§ 1370. Where agent disclaims present authority.—If the doctrine of the preceding section be sound, as it unquestionably is, then *a fortiori* will the agent not be liable where he expressly disclaims any present authority, and leaves the other party to take the chances. He may, of course, expressly undertake to procure authority or ratification, but such an undertaking would not be lightly inferred. As was said in a recent case:[18] "A man, of course, might say, 'I have no authority and probably cannot obtain such authority, but yet I will contract to obtain it, and run the risk of damages.' Such a contract is conceivable, and would be good in law, but ought not, I think, to be inferred except from facts leading directly to that conclusion."

§ 1371. How in case of public agent.—Where the agent is a public agent who derives his authority from some public act or law rather than by appointment in fact of some superior officer, and that fact is known to the other party, the latter will be presumed to have knowledge of the nature and extent of the agent's authority, it being determined by law of which every person is bound to take notice. Where such an agent, therefore, discloses the source of the authority under which he assumes to act, and practices no fraud or misrepresentation, he will not be held liable upon the ground of an implied warranty of authority.[19]

There may, however, easily be cases of public agents whose authority depends upon the same sort of considerations as private agents, and there is then no reason for distinction.

§ 1372. To whom the liability extends.—So far as the liability of the agent is deemed to rest upon any theory of contracts, it could in general extend only to the party to the contract or to those who stand in a situation to enforce contracts made with him. So far as it is based upon theories of misrepresentation it would extend only to those to whom the representation was made and who were entitled to rely upon it.

§ 1373. Application of these rules.—An attempt may now be made to apply these rules to the various cases in which, for any reason, there is an absence of authority to do the act assumed to be done. For this purpose, the cases may be more or less roughly distributed under four general heads: I. Where the authority might have been

[18] Halbot v. Lens, [1901] 1 Ch. 344, at p. 351.

[19] McCurdy v. Rogers, 21 Wis. 197, 91 Am. Dec. 468; New York, etc., Co. v. Harbison, 16 Fed. 688; Perry v. Hyde, 10 Conn. 329; Murray v. Carothers, 1 Metc. (Ky.) 71. See also Sanborn v. Neal, 4 Minn. 126, 77 Am. Dec. 502; Sandford v. McArthur, 18 B. Monroe (Ky.), 411; Newman v. Sylvester, 42 Ind. 106; Dunn v. Macdonald, [1897] 1 Q. B. 555.

conferred but was not. II. Where it had once existed but had for some reason expired. III. Where, though there may have been a pretence of authority, none could in fact be conferred because the alleged principal was not in existence. IV. Where the authority could not be conferred because of the lack of capacity or legal status of the supposed principal.

§ 1374. I. Where authority never conferred.—The simplest and most frequent case in which the lack of authority presents itself is that wherein an existing and competent principal who might have conferred authority for the act in question, has never conferred any authority at all, or, while conferring authority to do some other act, or to do this act at some time or under some conditions, has never conferred authority for the doing of this act, or for the doing of it at the time or under the conditions existing in the present case. These cases are not complicated by any question of the existence of a principal or of his competence to act. He simply has not conferred the authority which the agent has assumed to exercise. In these cases the rules above referred to have free exercise, and the agent who has either expressly or by implication asserted an authority which as a matter of fact he does not possess, is liable to the other party with whom he deals. Illustrations of this liability are very numerous, and some of them will be found exhibited in the notes.[20]

[20] In Collen v. Wright, [1857] 8 E. & B. 647, an agent to lease lands made an agreement to lease for a term of unauthorized length, whereby the tenant lost the benefit of the lease. *Held*, that the agent was liable to the tenant.

In Firbank's Executors v. Humphreys, [1886] 18 Q. B. D. 54, the directors of a corporation undertook to pay a creditor in securities of the corporation. The power of the corporation to issue securities of that sort had been exhausted. *Held*, that the directors were liable to the creditor for the loss.

In Starkey v. Bank of England, [1903] App. Cases, 114, a broker acting in good faith procured the transfer of registered securities upon a forged power of attorney. *Held*, that he was liable to the bank.

In Sheffield v. Barclay, [1905] App. Cases, 392, a transfer of stock was made upon defendant's application upon a forged transfer which both parties supposed to be genuine. *Held*, that defendant must indemnify the corporation.

In Kroeger v. Pitcairn (1882), 101 Pa. 311, 47 Am. Rep. 718, an insurance agent issued a policy with unauthorized oral waivers. After a loss, the company made a successful defence because of breaches of conditions. *Held*, that the agent must indemnify the insured.

In Farmers' Trust Co. v. Floyd (1890), 47 Ohio St. 525, 21 Am. St. Rep. 846, directors of a corporation acting in good faith but before the corporation was legally authorized to do business, made a contract with plaintiff. *Held*, that they were personally liable.

In Kennedy v. Stonehouse (1904), 13 N. D. 232, an agent who knew he was not authorized made a contract

§ 1375. **II. Where authority once existing has terminated.**—The questions thus far considered have been those dealing with the possibility and the fact of the actual creation of the authority in the first instance, but as has been pointed out, the lack of authority in a particular case may arise, not because it was never conferred, but because an authority once existing has since been in some wise terminated, and the question now is as to the liability of the agent under such circumstances. The question may present itself in a variety of forms. It may be simply as to the liability of the agent for continuing to exercise an authority actually terminated which all the parties in question knew to have been actually conferred by the principal. Or it may take the form of an agent, whose authority has in fact terminated, appearing and proposing to deal for the first time with a person who knows neither whether the authority was ever conferred, nor, if so, whether it still continues. A very marked distinction may exist between the two cases, as may be seen by a comparison of the question whether the agent is responsible to third persons for continuing to exercise an expired authority which the principal led them to believe to exist, and the question whether the agent is liable to third persons for continuing to exercise a terminated authority which he alone caused them to believe to exist.

§ 1376. ——— **Authority terminated by act of principal.**—Where the authority is terminated by the act of the principal, such termination, as has been already seen, usually becomes effective as to the agent from the time that he is notified of it. As to third persons, in the case of the so-called general agent, the termination becomes opera-

to sell land and put the buyer into possession. After buyer had paid the price, he was evicted. *Held*, that the agent was liable to him.

And so the agent was held liable where he professed to be authorized to agree to pay the plaintiff a commission for securing a purchaser for lands of a third person, when in fact no such authority existed. Oliver v. Morawetz (1897), 97 Wis. 332. And so where the owner of the land was a corporation. Groeltz v. Armstrong (1904), 125 Iowa, 39.

In Cochran v. Baker (1899), 34 Ore. 555, an agent who had undertaken to sign a bond of indemnity without authority was held liable to the plaintiff who had relied upon it.

In Anderson v. Adams (1903), 43 Ore. 621, an agent made a lease to the plaintiff of certain land, and without authority agreed to furnish water for irrigating. The plaintiff entered into possession and planted a crop, which was lost for lack of water. *Held*, that the agent was liable.

See also Argersinger v. Macnaughton, 114 N. Y. 535, 11 Am. St. Rep. 687; Lane v. Corr, 156 Pa. 250; West London Comm. Bank v. Kitson, L. R. 13 Q. B. D. 360; Duffy v. Mallinkrodt, 81 Mo. App. 449; Campbell v. Muller, 19 N. Y. Misc. 189; Taylor v. Nostrand, 134 N. Y. 108; Browning v. Marvin, 100 N. Y. 144; Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343.

tive when they are notified. When the agent is employed to act on a particular occasion or for a given transaction only, no presumption can ordinarily arise that the authority will continue upon other occasions or for other acts, and no notice of its termination by its own limitation is usually required. But if the principal terminates such an authority before its execution, he must ordinarily give notice as in other cases.

Where notice to third persons is required, a third person, ignorant of the termination, may often hold the principal even though the agent knew that his authority was terminated. If both the agent and the other party were ignorant of the termination, the principal and not the agent would be liable. If the agent but not the other party knew of the termination, the other party, being still able to recover of the principal, would ordinarily have no substantial claim against the agent, although the agent's warranty of authority might in fact be broken.

Where notice to the agent but not to third persons is required, the principal would be liable to the other party usually until the agent had been notified of the termination. If the agent assumed to act after notice to him, in such a case, he would undoubtedly be liable to the other party.

§ 1377. ——— But, as has been seen, there are many cases in which the authority of the agent is really a conditional one, that is to say, it is not to be exercised if before its execution the desired end has been attained in some other way. Thus where brokers are employed to sell land, for example, it is ordinarily said that the authority of each broker is conditioned upon the fact that the land is not previously sold by the principal in person or by some other broker. In such a case, the broker himself may not be entitled to notice before such a revocation; and in any case in which third persons may fairly be charged with notice of the same condition, they would not be entitled to notice, and would have no action against the agent for a loss of authority resulting from the exercise of the reserved power.

§ 1378. ——— **Authority terminated by death of principal.**—As has been seen in an earlier chapter,[21] the death of the principal operates usually, *ipso facto*, to terminate the authority of the agent, even though both he and the person with whom he deals are ignorant of the death. Where the authority has thus been terminated by death, and the agent knows it but the other party does not, the agent who continues to act should be held responsible. If the other party knew of the death but the agent did not, the agent would not be responsible

[21] *Ante*, § 652.

because the other party has not relied upon any implied representation of the agent. If both parties are ignorant of the death, more difficulty arises. Comparatively few cases in this field have arisen. In the leading case of Smout v. Ilbery,[22] the defendant was the widow of an Englishman who had sailed for China leaving his family at home in defendant's charge, and who had died on the outward voyage, but whose death was not known at home until five months after it had occurred. The plaintiff was a dealer who had supplied goods to the family before the husband sailed, during his voyage and down to the time of the news of his death, and even afterwards. The action was against the widow to recover the price of goods supplied after the date of her husband's death and before it was known. It was held that the defendant was not liable. The case was decided in 1842, fifteen years before Collen v. Wright, and of course long before the recent extensions of the doctrine of the latter case. After reviewing the authorities then existing upon the subject of the liability of the agent for misrepresentations as to his authority, it was said by Alderson, B.: "The present case seems to us to be distinguishable from all these authorities. Here the agent had in fact full authority originally to contract, and did contract in the name of the principal. There is no ground for saying, that in representing her authority as continuing, she did any wrong whatever. There was no *mala fides* on her part; no want of due diligence in acquiring knowledge of the revocation; no omission to state any fact within her knowledge relating to it, and the revocation itself was by the act of God. The continuance of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come."

[22] Smout v. Ilbery, 10 M. & W. 1. To same effect, Ginochio v. Porcella, 3 Bradford (N. Y.), 277.

See also, Carriger v. Whittington, 26 Mo. 311, 72 Am. Dec. 212; Jenkins v. Atkins, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

In Salton v. New Beeston Cycle Co., [1900] 1 Ch. 43, it was held that the principal of Smout v. Ilbery applies to a solicitor representing a party in an action, and it applies to a revocation of authority by the dissolution of a company as well as by the death of an individual.

But in Yonge v. Toynbee, [1910] 1 K. B. 215, Salton v. New Beeston Cycle Co., *supra*, is repudiated, and the majority of the judges were of opinion that Smout v. Ilbery was no longer law.

§ 1379. ——— As pointed out in this case, the result of the determination is that no one is liable on the contract, whereas, by the rule found applicable in the cases previously considered, the agent is usually liable in some form when the principal is not. It has moreover been already observed, with reference to this case, that it has been thought in later cases,[23] to have been negatived by Collen v. Wright, so far as the liability of the agent is made to depend upon some wrong or omission of right upon the part of the agent. If that conclusion be sound, the case is left to stand, if at all, upon the ground that, the principal having personally held the agent out to the plaintiff as one having authority, the agent was not liable for continuing to exercise it, after it had in fact been revoked by death, an event not actually known to either party, and of which both had equal means of knowledge. The case may be thought to be analogous to the dissolution of a partnership by death, where no notice is required to be given because, it is said, among other reasons, that death itself is an event so likely to be attended by publicity that no notice of it need be given. The case does not decide the other question suggested as to the liability to the agent not previously known or dealt with as such, but who, for the first time, appears and proposes to deal as agent by virtue of an authority which has then in fact been terminated. If the liability of an assumed agent depends, as is pointed out in the more recent cases, upon his express or implied representation of the existence of an authority when none in fact exists, it would seem that this representation may arise from his conduct as well where it has been terminated as where it never existed. The only escape from this conclusion would be to say that the effect of his representation is that the authority once existed and has not to his knowledge been terminated. But this is to narrow the effect of the representation to a greater degree than seems warranted by the later cases.[24]

§ 1380. ——— **Authority terminated by principal's insanity.**— The distinction suggested in the preceding section, that where the principal himself has held the agent out as such, the agent will not be responsible for continuing to exercise the authority until he has had notice of its termination, has been applied in the case of the principal becoming insane. In the leading case of Drew v. Nunn,[25] where a wife had been acting as agent for her husband until he became insane,

[23] See Halbot v. Lens, [1901] 1 Ch. 344.

[24] See Yonge v. Toynbee, [1910] 1 K. B. 215, *supra*.

[25] Drew v. Nunn, L. R. 4 Q. B. D. 661.

it was said by Brett, L. J.: "It seems to me that an agent is liable to be sued by a third person, if he assumes to act on his principal's behalf after he had knowledge of his principal's incompetency to act. In a case of that kind he is acting wrongfully. The defendant's wife must be taken to have been aware of her husband's lunacy; and if she had assumed to act on his behalf with any one to whom he himself had not held her out as his agent, she would have been acting wrongfully, and, but for the circumstance that she is married, would have been liable in an action to compensate the person with whom she assumed to act on her husband's behalf. In my opinion, if a person who has not been held out as agent assumes to act on behalf of a lunatic, the contract is void against the supposed principal, and the pretended agent is liable to an action for misleading an innocent person."

But in a very recent case [26] in which solicitors, who had had authority to act for a client, instituted an action in his name after he had, without their knowledge, become insane, it was held that the solicitors were personally liable to the other party for the costs, and the doctrine of a warranty of authority was affirmed and applied. A majority of the judges were of the opinion that Smout v. Ilbery was no longer law.

§ 1381. ——— Authority terminated by other events.—More or less similar rules would doubtless be held to apply where the authority was terminated by such events as war, bankruptcy or marriage, as to the two former of which at least it would doubtless be held that there were such ordinary elements of publicity that both the agent and the other party might be deemed equally conversant with the facts.

§ 1382. ——— Authority terminated by act of agent.—Where after termination by the agent's own act, the agent still continues to act as agent, the principal might be liable if he had failed to give proper notice of that fact. The basis of the agent's liability, where the principal could not be held, at least, would be clear.

§ 1383. III. Where no principal in existence—Inchoate corporations—Promoters.—As has already been pointed out, one reason for the lack of authority may be the non-existence of the principal, who may either never have existed at all, or, though once in existence, had yet ceased to exist at the time when the authority was supposed to be conveyed. The most common case of one assuming to act in behalf of a principal not yet in existence, is that of a person, often called a "promoter," who undertakes to act in behalf of a corporation not yet formed. Such a person obviously cannot now be the agent of a cor-

[26] Yonge v. Toynbee, [1910] 1 K. B. 215.

poration hereafter to be created, and as has often been pointed out, his acts and contracts, without something more, cannot impose any liability on the corporation when created.[27] If the person who deals with him, knows that the corporation is not yet organized, as is the fact in the majority of cases, there is no room for the doctrine of the warranty of authority. The question in such a case becomes simply, to whom was credit extended? It is of course true that the other party dealing in anticipation of the creation of the corporation, may be willing to take his chances that the corporation when created will adopt the act, or he may be willing to rely upon funds raised or to be raised. But if on the other hand he relies upon any present personal responsibility, it must usually be the responsibility of the person who so assumes to act.[28]

If, on the contrary, the other person does not know that the corporation has not come into existence and the person who assumes to act, assumes to act for it as an existing principal, without a disclosure of the facts, he would doubtless be held to warrant that there was at least such a corporation existing in fact.[29]

The same rules would also undoubtedly be held to apply to the case wherein the corporation, although actually in existence, had not yet reached the stage or complied with the conditions which entitled it to begin business.[30]

§ 1384. ——— Provisional arrangements with promoters.—In cases in which it is known that the corporation is not yet organized,

[27] Buffington v. Bardon, 80 Wis. 635; Long v. Citizens' Bank, 8 Utah, 104.

[28] Kelner v. Baxter, L. R. 2 C. P. 174; O' Rorke v. Geary, 207 Pa. 240; Hurt v. Salisbury, 55 Mo. 310; Glenn v. Bergmann, 20 Mo. App. 343; Booth v. Wonderly, 36 N. J. L. 250; Allen v. Pegram, 16 Iowa, 163; Hub Publishing Co. v. Richardson, 13 N. Y. Supp. 665; also in 59 Hun (N. Y.), 626 (no opinion). See also, Chronicle Co. v. Franklin, 119 Ill. App. 384.

[29] See Lagrone v. Timmerman, 46 S. C. 372.

[30] Where one leased an office to the directors of a new national bank in ignorance of the fact that the bank, although otherwise completely organized, had no certificate from the comptroller authorizing it to transact business, and the enterprise was subsequently abandoned and the office surrendered. *Held*, that the directors were liable in an action *ex contractu* upon their implied warranty of authority to make the lease. Seeberger v. McCormick, 178 Ill. 404.

Where the directors of a corporation, otherwise duly organized, but which had no authority to make contracts until ten per cent of the capital stock had been subscribed, did make contracts as such directors knowing that the requisite amount had not been subscribed, they were held personally liable, even though they believed in good faith that they were contracting on behalf of a legally constituted corporation. Farmers' Trust Company v. Floyd, 47 Ohio St. 525, 21 Am. St. Rep. 846, 12 L. R. A. 346.

it may easily be found that informal negotiations and arrangements with the promoter were not intended to bind him personally, but to be at most in the nature of offers or authorities to make offers to the corporation which it may accept, either formally or informally, when it comes into existence and thus bind itself, the promoter not being bound at all.

If there be a present contract with the promoter, it may be found to have been upon condition that it should cease when the corporation came into existence, or when the corporation bound itself by similar or other satisfactory terms.

If there be a present contract with the promoter, there may also be a novation, with the consent of all parties, when the corporation comes into existence by which the corporation is substituted for the promoter in the contract.

There is even authority for saying, what seems more questionable, that though there is in form or in terms a present contract with the promoter, he may be regarded as a mere depositary or conduit to hold matters in suspense until the corporation, which is to be the real party, is organized, and that then, upon assignment or transfer to it and acceptance by it of the obligations, the promoter shall be deemed to be released.[81]

§ 1385. ——— Principal dead at time authority supposed to be conferred.—Where, at the time the authority is supposed to be conferred, the principal is in fact dead, as might be the case where the principal died after mailing a power of attorney and before its receipt, or where one agent is appointed by another agent, as, for example, by a superior agent or a general manager, the latter and the agent he appoints both being ignorant of the death, the rules already given would seem to impose liability in case the agent so appointed

[81] The case which probably goes furthest in this direction is that of Heckman's Estate, 172 Pa. 185, where a lease was made, with knowledge of all the facts, to the contemplated president of a proposed corporation. It was found that it was the intention of all parties that he should hold it only for the corporation and until it was in readiness to accept it. When the corporation was organized, he assigned the lease to the corporation which took possession and paid the rent for a period, the bills being made out in the name of, and being presented to, the corporation. No formal consent to the assignment or release of the first lessee was ever given. In an action against his estate for rent unpaid, *held*, that he had been released. (Mr. Machen, Corporations, § 336, thinks the case wrong.)

Compare Case Mfg. Co. v. Soxman, 138 U. S. 431, 34 L. Ed. 1019; Shields v. Clifton Hill Land Co., 94 Tenn. 123, 45 Am. St. Rep. 700, 26 L. R. A. 509; Van Vlieden v. Welles, 6 Johns. (N. Y.) 85; Chicago, etc., Mfg. Co. v Talbotton Creamery Co., 106 Ga. 84.

assumes to act. If he acted after the knowledge of the death of his supposed principal came to him, and the other party was ignorant of the death, the agent's liability would be clear. But even though both the agent and the other party were ignorant, and the agent acted in good faith, his assumption to act as agent would still appear to be equivalent to a representation of the existence of a principal, upon which he would be liable, unless the case of the non-existent principal under these circumstances is put upon a different footing from that of other cases of non-existing principals. It might indeed be argued that since death is, in many cases, held to be an event of such ordinarily inherent publicity that all persons may be charged with notice of it, both parties here either actually knew of it in contemplation of law or were equally in a situation to know, and that therefore there was no reliance upon the agent's implied representation; but this conclusion is at least doubtful.

§ 1386. IV. Where principal in existence but principal had not the authority to confer—Ultra vires acts—Liability of corporate directors and agents.—Where the difficulty is that, though there is a principal in existence, that principal does not possess the power which has been attempted to be conferred upon the agent, a different question arises. The typical case is that of acts done by corporate officers or agents in behalf of the corporation but which are really *ultra vires* of the corporation. Where the corporation derives its power from some public act or law with which everybody is presumably familiar, and the agent has done no more than to attempt to exercise in a corporate capacity a power supposed to be conferred by the act or law, no personal liability should ensue. He ought not to be held to warrant by implication that which is mere matter of law and as much within the knowledge of one party as the other.[32]

Where however the question turns upon a question of fact of which the other party cannot be charged with knowledge, as whether an otherwise duly organized corporation has yet received a necessary certificate,[33] or the prescribed percentage of capital,[34] to authorize the commencement of business, or has in fact exceeded its borrowing power

[32] Thilmany v. Iowa Paper Bag Co., 108 Iowa, 357, 75 Am. St. Rep. 259; Sanford v. McArthur, 57 Ky. (18 B. Mon.) 411; Abeles v. Cochran, 22 Kan. 405, 31 Am. Rep. 194.

Agent not liable on contract signed by him in behalf of a corporation to take stock in another corporation, it being *ultra vires* to do so. Merchants' Packet Co. v. Streuby, 91 Miss. 211, 124 Am. St. Rep. 651.

[33] Seeberger v. McCormick, 178 Ill. 404.

[34] Farmers' Trust Co. v. Floyd, 47 Ohio St. 525, 21 Am. St. Rep. 846, 12 L. R. A. 346.

or its power to issue stock,[35] or whether its rules do or do not give it authority to borrow money,[36] and the like, a different rule should apply. These are matters of fact, belonging to the internal management of the corporation, of which third parties have ordinarily no means of knowledge and of which the officers and directors, at least, are in position to know or inform themselves, and of the existence of which their assumption to act may fairly be regarded as a representation. Whether the same rule should apply to the ordinary agent of the corporation may be open to more question, but the theory of the rule would apply to him also, unless he has made such disclosures or disclaimers as to bring himself within the exceptions.

§ 1387. ——— Where principal temporarily forbidden to act.— Where the principal, though fully existent and in general authorized to act, is temporarily disabled to act in a given instance or locality,— as, for example, where a foreign insurance company which has not complied with state regulations is forbidden to do business until it does comply, and its agents are forbidden under penalty from acting for it,—an agent, who assumes to act for the principal during such disability with a person ignorant of it, is held personally liable if the contract fails for that reason.[37]

[35] Firbank's Ex'r v. Humphreys, 18 Q. B. Div. 54.

[36] Richardson v. Williamson, L. R. 6 Q. B. 276; Chaples v. Brunswick Bldg. Society, 6 Q. B. Div. 696. See also, Booth v. Wonderly, 36 N. J. L. 250; Small v. Elliott, 12 S. D. 570, 76 Am. St. Rep. 630.

[37] See Vertrees v. Head, 138 Ky. 83; Lasher v. Stimson, 145 Pa. 30; Raff v. Isman, 235 Pa. 347.

The theory of these cases is not entirely clear. Vertrees v. Head was the case of a purported insurance in a company not authorized to do business in the state and also alleged to be insolvent. The court assumes that the contract of insurance was valid, though the agent may have been liable to a penalty. The agent's liability was placed upon the ground "that any person who undertakes to act as agent for a company not authorized to do business in this state thereby personally assumes that the company for which he acts is solvent and able to perform its agreements." Lasher v. Stimson, *supra*, was the case of a foreign manufacturing company not authorized to do business in the state. The court said the business was unlawful, that the corporation had no legal existence in Pennsylvania, where the agent assumed to act, that the agent could have no authority and was, therefore, personally liable. The statutory penalty was held to be a cumulative and not exclusive remedy.

Raff v. Isman, *supra*, was a similar case, proceeding upon the theory that the foreign corporation had no legal existence in the state and could not authorize the defendant to act for it. He was therefore held to be within the rule of Lasher v. Stimson. In all of these cases it was said that the agent was presumed to know whether the corporation for which he assumed to act had complied with the provisions of the statute and that the person dealing with him might rely

§ 1388. ——— Where principal's insolvency destroys his legal status.—Ordinarily an agent does not impliedly warrant the solvency of his principal; neither is he liable for innocent misrepresentations concerning his principal's solvency, standing, and the like, which purport to be made and are in fact made by the principal's authority. But where under the law he can have no principal other than a solvent one, as, for example where none but solvent insurance companies can do business within the state owing to the regulations prescribed concerning examinations, or deposits and licenses, an agent who assumes to have a principal may fairly be held to represent to a third party who is ignorant of the facts that his principal is of the sort which can only lawfully do business in the state.[38]

§ 1389. ——— When no legally responsible principal—Unincorporated associations.—Somewhat similar questions arise where a person assumes to act for a group of persons unincorporated or otherwise having no definite legal organization, as in the case of voluntary unincorporated societies or associations, like unincorporated churches, lodges, and the like. It is, of course, possible in such a case that the assumed agent may have expressly excluded personal responsibility,[39] or that the person extending the credit may have done so in reliance upon voluntary payments, subscriptions or funds to be raised, but where it does not appear that he has done so, the person who assumes to act will usually be personally responsible.[40] In such cases usually the

upon his implied representation and was not obliged to investigate the matter for himself.

In Landusky v. Beirne, 80 N. Y. App. Div. 272 (affirmed without opinion, 178 N. Y. 551), it was held that, where an insurance agent undertook in New York to procure for the plaintiff "a good policy in a very good company" upon property in Pennsylvania, the agent's promise imported an undertaking upon his part to procure a contract of insurance which should be enforceable both in New York where the contract was made, and in Pennsylvania where the property was situated. The court said that the proof showed that the policy was not valid in either state. On the other hand, in Jones v. Horn, 104 Mo. App. 705, the opposite conclusion was reached. The court said that the contract was not invalid, and that the only liability of the agent was the statutory penalty for assuming to insure property for a company not authorized to do business in the state.

[38] Vertrees v. Head, 138 Ky. 83.

[39] Thus in Shoe & Leather Nat. Bank v. Dix, 123 Mass. 148, 25 Am. Rep. 49, where persons who were acting as trustees of a number of unincorporated associates made a contract beginning "We as trustees but not individually promise to pay," etc., and signed it in their own names with the word "trustees" added, it was held that they could not be held personally liable.

[40] In a number of cases, committees and others acting for unincorporated societies, churches, lodges, and the like, have been held personally liable for services, materials, etc., ordered

fact that there is no legally responsible principal will be equally within the knowledge of both parties, and in that event, as in the similar case referred to in a preceding section, there will be no occasion for resorting to an implied warranty of authority. The question here is, rather, to whom was the credit extended. The rule in such cases, it is said, "is founded upon a presumption of fact, and is not the expression of any positive or rigid legal principle. The presumption referred to is that the parties to a contract contemplate the creation of a legal obligation capable of enforcement, and that, therefore, it is understood that the obligation shall rest on the individuals who actively participate in the making of the contract, because of the difficulty in all cases, the impossibility in many, of fixing it upon the persons taking part in or submitting to the action of the evanescent assemblage. If, however, the person with whom the contract is made, expressly agrees to look to another source for the performance of its obligations, or if the circumstances be such as to disclose an intention not to charge the agent, as where the other agrees to accept the proceeds of a particular fund, there is no longer reason to indulge the presumption, and it may be rebutted by proof of such facts." [41] There may of course be cases, even in this field, where the lack of legal responsibility may not be apparent, and in which express or implied representations of matters of fact will make the assumed agent liable.

by them. Fredendall v. Taylor, 23 Wis. 538, 99 Am. Dec. 203; Winona Lumber Co. v. Church, 6 S. D. 498; Clark v. O'Rourke, 111 Mich. 108, 66 Am. St. Rep. 389; Comfort v. Graham, 87 Iowa, 295; McCartee v. Chambers, 6 Wend. (N. Y.) 649, 22 Am. Dec. 556; Learn v. Upstill, 52 Neb. 271; Codding v. Munson, 52 Neb. 580, 66 Am. St. Rep. 524; Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818; Lewis v. Tilton, 64 Iowa, 220, 52 Am. Rep. 436; Johnson v. Corser, 34 Minn. 355.

Other cases are Burton v. Grand Rapids Furn. Co., 10 Tex. Civ. App. 270; Summerhill v. Wilkes, — Tex. Civ. App. —, 133 S. W. 492, in the latter of which the rule was applied to make personally liable the chairman of a building committee who had signed a note in the name of an unincorporated religious society.

Some of the cases have undoubtedly carried the presumption very far, and treated it more as a presumption of law than merely one of fact.

See also, cases cited *ante*, § 187.

[41] Codding v. Munson, 52 Neb. 580, 66 Am. St. Rep. 524. See also, to like effect, Eichbaum v. Irons, 6 W. & S. (Pa.) 67, 40 Am. Dec. 540, and cases cited in the following section. Where it clearly appears that the plaintiff agreed to look to funds to be raised in a certain way, there is no personal liability. Landman v. Entwistle, 7 Exch. 632.

So where it was shown that a loan made to a church was made in specific reliance upon the security of certain lands belonging to the church, after a personal investigation, and without reference to the names of the church trustees, their financial standing, or ability to pay, it was held that the trustees who had signed the obligations were not personally liable

§ 1390. ——— Meetings, committees, etc.—The same considerations apply, and perhaps still more strongly where the only principal disclosed is such an evanescent and ephemeral body as a public meeting.

Thus where a committee, appointed by a political meeting for that purpose, ordered a public dinner for the party, it was held that the members were personally liable. There was here no legal body to be bound. It did not rise to the dignity of a voluntary society or a club, for, said the court, "a club is a definite association organized for indefinite existence; not an ephemeral meeting for a particular occasion, to be lost in the crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate, or furnish a dinner on the credit of a meeting which had vanished into nothing. It was already defunct; and we are not to imagine that the plaintiff consented to look to a body which had lost its individuality by the dispersion of its members in the general mass." [42]

Here also, as in the cases in the preceding section, there would ordinarily be no room for a warranty of authority, and the liability would be directly upon the contract itself.

§ 1391. Legal competency of an existing principal.—As has been already seen,[43] the implied warranty of authority upon the part of an agent does not ordinarily arise where the question is merely one of law. Both parties have usually equal knowledge of the law and equal knowledge or opportunity to acquire knowledge as to its effect. But in many cases legal capacity depends wholly upon matters of fact, and the agent who assumes to act as though capacity existed, must be held to represent the existence of the facts upon which the capacity depends.[44] In the case of a corporation organized under a public act,

although the church was not incorporated. Elwell v. Tatum, 6 Tex. Civ. App. 397.

[42] Eichbaum v. Irons, 6 Watts & Serg. (Penn.) 67, 40 Am. Dec. 540. See also, Blakely v. Bennecke, 59 Mo. 193 (an action upon an instrument signed by one as captain of a military company); Edings v. Brown, 1 Rich. (S. C.) 255; Steele v. McElroy, 1 Sneed (Tenn.), 341 (where the committee of an unincorporated Masonic lodge were held personally liable).

In Learn v. Upstill, 52 Neb. 271, the agents, who represented a public meeting to open and improve a public road, were held liable personally.

In Codding v. Munson, 52 Neb. 580, 66 Am. St. Rep. 524, the agent, acting for a public meeting to secure the location of an asylum in their town, was held personally liable.

So where an agent acted for a party of excursionists, he was held personally liable. N. Y., etc., Steamship Co. v. Harbison, 16 Fed. 688.

[43] *Ante*, § 1367.

[44] Thus where a corporation has no authority to make contracts until a certain percentage of its capital has been paid in, and this had not been

there would ordinarily, as has been seen, be deemed to be no implied representation concerning its legal capacity.[45] But where the corporation is organized under a private act, there is said to be a warranty that there is a corporation in fact having the capacity to authorize the act.[46]

§ 1392. ——— **Infant principals.**—With respect of the infant principal, the question would seem to be whether assuming to act as agent is equivalent to a representation that the agent has in fact a principal who can not only confer authority and has done so, but who can make binding contracts. By the weight of modern authority, the infant's appointment of an agent is not void, and his act in many cases through an agent, as for example in the case of the purchase of necessaries, would be binding and not even voidable. Even in the case where the transaction would be voidable, it is valid until avoided and can be avoided by the infant only. Such authority as there is upon the question is to the effect that the mere infancy of the principal is not a breach of the agent's implied warranty of authority.[47] But it may well be open to question whether a third person dealing with an agent has not the right to assume that the agent undertakes to deal for a principal having normal legal capacity. The third person, however, would ordinarily suffer no appreciable loss until the act had been repudiated.

§ 1393. ——— **Married woman.**—The case of the married woman as a reputed principal at common law is obviously different from that of the infant, unless it be agreed that the latter's appointment of an agent in any case would be void. Cases involving reputed agency for a principal who was a married woman are very rare. In the only one discovered, wherein a man purported to act, though without any authority, for a person who was really his wife, though that did not appear on the face of the contract, it was held that he was personally liable upon the contract, as one purporting to act for an irresponsible principal.[48]

done, directors who make a contract for it with knowledge of the facts are held to impliedly represent that this condition has been complied with, and they are liable if it has not, Farmers' Trust Co. v. Floyd, 47 Ohio St. 525, 21 Am. St. Rep. 846, 12 L. R. A. 346.

[45] See *ante*, § 1385.

[46] West London Commercial Bank v. Kitson, 13 Q. B. Div. 360.

[47] Patterson v. Lippincott, 47 N. J. L. 457, 54 Am. Rep. 178.

In Continental Nat. Bank v. Strauss, 137 N. Y. 148 (the case of an infant partner), it is said that there is no presumption that the minor will set up his incapacity. "To the contrary is the presumption. It would be an immoral presumption to entertain that a person, who enters into engagements with others, will resort to the plea of infancy to avoid them thereafter."

[48] Edings v. Brown, (1845) 1 Rich. (S. Car.) 255.

§ 1394. ——— Where principal insane at time authority was supposed to be conferred.—Where, at the time the authority was supposed to be conferred, the principal was so far insane that he had no capacity to do or authorize the doing of the act contemplated, difficult questions arise. If the agent knew of the insanity, or if by reason of adjudication and the like, he was charged with notice, while the other party did not know of it, he would be liable. If the insanity was not obvious and there had been no adjudication, the assumption by the agent of authority to act would still seem to be a representation upon which he would be liable, at least so far as it could be deemed that the question of sanity or insanity was a matter of fact.[49]

§ 1395. When agent liable on contract itself.—Whether the agent can be held liable upon the contract itself which he has, without authority, assumed to make, is a question which has been much discussed, and upon which the cases cannot be entirely reconciled. It would seem, however, that this question is one which must be determined largely by the circumstances of each case. Where the promise is made in the name of a principal who might have authorized it and as his contract, the better opinion is that the agent can not be held liable upon it, but only in an action based upon the deceit, or upon the contract of warranty or indemnity, even in the case of a written contract, where the assumed relation of agency appears upon the face of it.[50] Some

[49] See per Brett, L. J., in Drew v. Nunn, 4 Q. B. Div. 661.

[50] Jefts v. York, 4 Cush. (Mass.) 371, 50 Am. Dec. 791; Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160; Ballou v. Talbot, 16 Mass. 461, 8 Am. Dec. 146; Jefts v. York, 10 Cush. (Mass.) 395; Trowbridge v. Scudder, 11 Cush. (Mass.) 83, 87; Draper v. Massachusetts, etc., Co., 5 Allen (Mass.), 339; Sherman v. Fitch, 98 Mass. 63; Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 105; Simmons v. More, 100 N. Y. 140; Baltzen v. Nicolay, 53 N. Y. 467; White v. Madison, 26 N. Y. 117; Taylor v. Nostrand, 134 N. Y. 108; McCurdy v. Rogers, 21 Wis. 197, 91 Am. Dec. 468; Noyes v. Loring, 55 Me. 408; Johnson v. Smith, 21 Conn. 627; Patterson v. Lippincott, 47 N. J. L. 457, 54 Am. Rep. 178; Taylor v. Shelton, 30 Conn. 122; Brong v. Spence, 56 Neb. 638; Cole v. O'Brien, 34 Neb. 68, 33 Am. St. Rep. 616; Duncan v. Niles, 32 Ill. 532, 534, 83 Am. Dec. 293; Hancock v. Yunker, 83 Ill. 208; Anderson v. Adams, 43 Ore. 621; Neufeld v. Beidler, 37 Ill. App. 34; American Surety Co. v. Morton, 32 Okla. 687, 39 L. R. A. (N. S.) 702; Heard v. Clegg, —— Tex. Civ. App. ——, 144 S. W. 1145.

"That an agent may bind himself personally," said Church, Ch. J., in Johnson v. Smith, 21 Conn. 627, "even when acting really or professedly as agent, is not denied; and in the execution of a simple contract as well as a specialty; and this will be so, in all cases, where, by language already expressive of such an intent, he has substituted his own responsibility for that of his principal. So, also, if he use language of personal obligation in the body of the contract, although he may sign as agent, he will bind himself if he had no authority to

courts have, indeed, manifested a disposition in this latter case to reject the words referring to the alleged principal as mere surplusage, and to hold the agent liable upon the remainder as upon his own contract.[51] This, however, as has been well said,[52] is rather to make a new

bind, and has not bound, his principal by his act. But in case of a defective power to bind the principal, if the agent speaks only in the language of the principal and does not use apt language to bind himself, he will not be liable on the contract thus made, but collaterally only for a false assumption of authority to act for another," citing Jones v. Downman, 4 Ad. & El. (N. S.) 235. See also the interesting discussion to same effect in Blower v. Van Noorden, [1909] Transv. L. R. S. C. 890.

The Negotiable Instruments Act— It is said that the Negotiable Instruments Law has not changed the common law as to the form of remedy available against an agent who signs without authority. Haupt v. Vint, 68 W. Va. 657, 34 L. R. A. (N. S.) 518. See also, 10 Law Notes, 104; 20 Harv. L. Rev. 159; Bunker Neg. Inst. Law § 22.

The statute (§ 20) provides that "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument *if he was duly authorized*," etc. The words italicized are not in the English Act. Professor Ames was of the opinion that, by necessary inference, the agent was liable on the instrument if he was not duly authorized. See Brannan's Neg. Inst. Law. (2d ed.), pp. 26, 242. Judge Brewster and the draftsman apparently concurred.

[51] See Weare v. Gove, 44 N. H. 196; Richie v. Bass, 15 La. Ann. 668; Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706; Meech v. Smith, 7 Wend. (N. Y.) 315; Palmer v. Stephens, 1 Den. (N. Y.) 471; Dusenberry v. Ellis, 3 Johns. Cas. (N. Y.) 70, 2 Am. Dec. 144; Feeter v. Heath, 11 Wend. (N. Y.) 479; White v. Skinner, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381 (the rule is now otherwise in New York, as seen in cases cited in preceding note); Dale v. Donaldson Lumber Co. 48 Ark. 188, 3 Am. St. Rep. 224 (*Semble*); Byars v. Doore, 20 Mo. 284; Coffman v. Harrison, 24 Mo. 524; Clark v. Foster, 8 Vt. 98.

In Weare v. Gove, *supra*, it is said that if after striking out the words which show representative character, and which the assumed agent had no right to put there, the words then remaining are sufficient to make a personal promise, the agent will be individually bound.

In applying such a rule, two forms of contract must be distinguished. Thus, assuming John Jones to be the reputed principal and Richard Roe the assumed agent, let one promissory note read: "John Jones promises to pay" etc., and be signed "Richard Roe, agent of John Jones;" and let another promissory note, reading: "I promise to pay" etc., be signed "Richard Roe, agent of John Jones." If now in the two cases, the words "agent of John Jones" be rejected as unauthorized, the first note will still upon its face contain no promise by Richard Roe to pay, but the second note now consists clearly of his individual promise. There are cases holding that even in the first form Richard Roe can be held liable upon the contract, though it is difficult to see how this can be thought to be his promise, unless the words "John Jones" in the body of the note be deemed to be stricken out and the word "I" or "Richard Roe" substituted in their place, a process which seems clearly to result in the making of a new contract.

contract for the parties than to construe the one which they have made for themselves.

§ 1396. ——— Where the agent speaks in what would otherwise be terms of personal responsibility, but adds recitals of agency indicating that he is acting for a principal (even though in such a manner as would charge that principal if there had been one), but there was no such principal, or at most only a fictitious or legally non-existent one, there, according to a number of authorities, the agent may be held upon the contract itself.[53]

Such a case, for example, is Kennedy v. Stonehouse, 13 N. D. 232, 8 Ann. Cas. 217, where the court felt bound by the language of the North Dakota Code, a substantial enactment of the Field Code, proposed but never adopted in New York, and based upon the doctrine of the early cases in that state, now no longer followed. The court, however, recognized that the rule is contrary to the overwhelming weight of authority, saying: "Few, if any, courts have in recent years, when not controlled by statute, followed this rule. Indeed, it seems to have been utterly repudiated both in England and in this country, including New York, where it had its origin."

So in Frankland v. Johnson, 147 Ill. 520, 37 Am. St. Rep. 234, where a note reading, "The Western Seaman's Friend Society agrees to pay" etc., was signed "B. Frankland, Gen. Sup't," a recovery against Frankland personally was sustained, upon allegations that he had no authority to bind the society, and that the defendant "by the name, style and description of 'The Western Seaman's Friend Society' promised to pay the said plaintiff." The only authorities relied upon are a loose and general statement in Angell & Ames on Corporations, § 303, and an early case in New York, where, as has been seen, that doctrine has been long repudiated.

The second class of cases presents fewer difficulties, though even here the clear weight of authority is to the effect that if the contract on its face purports to be the contract of the principal, no action on the contract can be maintained against the pretended agent. See the discussion in Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240.

It is proper to observe, however, in this connection, that, in many cases as has been already seen, the words "agent," "agent of John Jones," and the like, may without reference to the question of authority be rejected as mere *descriptio personae*.

[52] Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64; Thilmany v. Iowa Paper Bag Co., 108 Iowa, 357, 75 Am. St. Rep. 259; Abeles v. Cochran, 22 Kan. 410, 31 Am. Rep. 194; Holt v. Winfield Bank (C. C.), 25 Fed. 312.

In Shoe & Leather Nat'l Bank v. Dix, 123 Mass. 148, 25 Am. Rep. 49, it is said: "It is contended that if these defendants are not liable upon the contract as a note, then nobody is liable. Even if such were the fact, it would not be in the power of the court, as we have already seen, to alter the contract for the purpose of giving it validity. In deciding whether the defendants have or have not bound themselves, we need not decide whether they have or have not bound their principals. Abbey v. Chase, 6 Cush. 54."

Compare Knickerbocker v. Wilcox, 88 Mich. 200, 21 Am. St. Rep. 595.

[53] See Woodbury v. Blair, 18 Iowa, 572 (note signed "J. J. B., President I. R. C. Co.," binds agent until it appears that the company is capable of

Clearly, if the agent who acts without authority makes the contract in his own name only, or merely with such appendages as would in any event be simply *descriptio personae* if he had been authorized, he will be personally liable upon the contract. Here, as the expression goes, he has used apt words to bind himself personally.[54]

So if, notwithstanding the fact of his assumed agency, the credit was given to him personally, or if he has expressly pledged his own responsibility,—and as bearing upon this, the fact that he pretended to act for a non-existent or legally incompetent principal, may be taken into account,—he may be held upon the contract itself.[55]

The agent may, of course, as has been pointed out, exclude personal responsibility by the express terms of the contract,[56] or by showing that the other party had agreed to look to particular funds, subscriptions to be raised, and the like.[57]

contracting); Hurt v. Salisbury, 55 Mo. 310 (directors liable on note signed by them as officers of corporation before incorporation articles filed); Comfort v. Graham, 87 Iowa, 295 (officer of unincorporated association liable to attorney he engages by letter to do work for the association); Allen v. Pegram, 16 Iowa, 163 (officers of a bank whose charter had never been approved, signed a conveyance in the name of the bank reading, "and we do hereby covenant, etc."); Cane v. Sinclair, 10 Victor. L. R. (L.) 60 (contract to sell land to S., agent of Co.).

The following cases differ in that the promise was in form that of the principal and the agent signed only on behalf of the principal but added his own name. Booth v. Wonderly, 36 N. J. L. 250 (directors fraudulently issued policy in the name of a company they knew had no legal existence); Lagrone v. Timmerman, 46 S. Car. 372 (insurance policy binds officers where so-called company not incorporated); Lewis v. Tilton, 64 Iowa, 220, 52 Am. Rep. 436 (committee bound on lease wherein club was party of second part which they signed "Executive Committee of Club, R. Tilton, S. Thrall, etc."). As to this point they seem questionable. See note 51, *supra*.

Where the principal was entirely fictitious and the name of the agent nowhere appeared, the agent was not held. Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240 (negotiable note).

Where the contract itself shows the nonexistence of the principal, it must be deemed the contract of the agent only. O'Rorke v. Geary, 207 Pa. 240 (where the contract read, throughout, "D. J. G., for a bridge company to be incorporated").

[54] Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64; Knoch v. Hailzlip, — Cal. —, 124 Pac. 998; McKown v. Gettys (Ky.), 25 Ky. L. Rep. 2070, 80 S. W. 169.

[55] See *post*, § 1419.

In Raff v. Isman, 235 Pa. 347, an agent who had made a contract for a foreign corporation not authorized to do business in the state, and therefore as the court held a non-existent principal, was said to be liable on the contract.

[56] See for example, Shoe & Leather Nat. Bank v. Dix, 123 Mass. 148, 25 Am. Rep. 49.

[57] See for example, Landman v. Entwistle, 7 Exch. 632; Elwell v. Tatum, 6 Tex. Civ. App. 397.

§ 1397. ——— Agent not liable merely because principal is not.—The doctrine sometimes asserted that wherever the agent, because of his lack of authority, fails to create a right of action against his principal upon the contract, he makes himself liable thereon, cannot therefore be sustained as a general rule.[58] The agent is only liable on the contract in those cases in which references to a principal fail to relieve otherwise personal promises because no such principal exists, or in which he has used apt words to bind himself, or has expressly pledged his personal responsibility, or in which the credit was given to him personally.[59]

[58] Dusenbury v. Ellis, 3 Johns. Cas. (N. Y.) 70, 2 Am. Dec. 144; White v. Skinner, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Collins v. Allen, 12 Wend. (N. Y.) 356, 27 Am. Dec. 130; Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550. These early New York cases which are the foundation of most of the similar rulings in other states have been very much modified if not entirely overruled by the later cases in the Court of Appeals. Dung v. Parker, 52 N. Y. 494; Baltzen v. Nicolay, 53 N. Y. 467; White v. Madison, 26 N. Y. 117. Thus Gillaspie v. Wesson, 7 Port. (Ala.) 454, 31 Am. Dec. 715, is based upon the early New York cases. See also Clark v. Foster, 8 Vt. 98; Savage v. Rix, 9 N. H. 263; Hatch v. Smith, 5 Mass. 42; Byars v. Doores, 20 Mo. 284; Coffman v. Harrison, 24 Mo. 524.

[59] Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429. "We are aware," said Ellsworth, J., in this case, "that it is not unfrequently laid down as a rule of law that if an agent does not bind his principal he binds himself; but this rule needs qualification and can not be said to be universally true or correct. . . . If the form of the contract is such that the agent personally covenants and then adds his representative character, which he does not in truth sustain, his covenant remains personal and in force, and binds him as an individual; but if the form of the contract is otherwise, and the language when fairly interpreted, does not contain a personal undertaking or promise, he is not personally liable, for it is not his contract, and the law will not force it upon him. He may be liable, it is true, for tortious conduct if he has knowingly or carelessly assumed to bind another without authority; or, when making the contract, has concealed the true state of his authority, and falsely led others to repose in his authority; but as we have said, he is not *of course* liable on the contract itself nor in any form of action whatever."

So in a leading case in California, the rule is stated thus: "If an agent, in executing a contract, employ terms which, in legal effect, charge himself he may be sued upon the instrument itself as a contracting party. This is so because, by the use of such terms, he has made the contract his own. But if the instrument does not contain such terms, or, in other words, contains language which in legal effect binds the principal only, the agent can not be sued on the instrument itself, for the obvious reason that the contract is not his. If, then, the contract is not binding upon the principal because the agent had no authority to make it, and is not binding on the agent because it does not contain apt words to charge him personally, it is wholly void." Sanderson, J., in Hall v. Crandall, 29 Cal.

It may be said that this rule will result in many cases in binding neither the assumed agent nor his alleged principal upon the contract.[60] But if the other party fails to have a remedy either upon the contract itself, or upon the express or implied undertaking for authority, it will be in those cases in which he was fully informed by the agent of the source and nature of the authority under which he assumed to act, and was put in a situation to determine for himself whether to rely upon it or not; or in which it was clearly stipulated that the agent was, in no event, to assume responsibility.

§ 1398. In what form of action is agent liable.—Much question formerly existed as to the form of action in which the agent who acts in the name of his principal, but without authority, is to be held liable. The more recent cases, however, are in substantial accord as to the form of action which may be maintained.

Where an agent who knows that he has no authority, makes express assertions that he possesses it, or so acts as to amount to an assertion of authority, and by so doing deceives and injures the other party who has relied thereon, it can not be doubted that an action on the case for the deceit is an appropriate remedy.[61] At the same time, even in such a case it is also clear that the tortious aspects of the case may be ignored or waived, and an action of assumpsit upon the express or implied warranty of authority be maintained instead of the action of deceit.[62]

567, 89 Am. Dec. 64. To same effect, see Neufeld v. Beidler, 37 Ill. App. 84; Hancock v. Yunker, 83 Ill. 208; Holt v. Winfield Bank, 25 Fed. 812; Abeles v. Cochran, 22 Kan. 405, 31 Am. Rep. 194; Thilmany v. Iowa Paper Bag Co., 108 Iowa, 357, 75 Am. St. Rep. 259; Cole v. O'Brien, 34 Neb. 68, 33 Am. St. Rep. 616; Newman v. Sylvester, 42 Ind. 106; Duncan v. Niles, 32 Ill. 532, 83 Am. Dec. 293; Abbey v. Chase, 6 Cush. (Mass.) 54; Harper v. Little, 2 Me. 14, 11 Am. Dec. 25; Stetson v. Patten, 2 Me. 358, 11 Am. Dec. 111; McHenry v. Duffield, 7 Blackf. (Ind.) 41.

[60] Whether the fact that the principal can not be bound is any evidence from which it may be inferred that the agent intended to bind himself, see *post*, § 1422; Knickerbocker v. Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595; Merchants', etc., Packet Co. v. Streuby, 91 Miss. 211, 124 Am. St. Rep. 651; Abeles v. Cochran, 22 Kan. 405, 31 Am. Rep. 194; Shoe & Leather Nat. Bank v. Dix, 123 Mass. 148, 25 Am. Rep. 49.

[61] "The remedy against one who fraudulently represents himself as the agent of another, and in that capacity undertakes to make a contract binding upon his principal, is an action on the case for the deceit." Walton, J., in Noyes v. Loring, 55 Me. 408, citing Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160; Ballou v. Talbot, 16 Mass. 461, 8 Am. Dec. 146; Jefts v. York, 4 Cush. (Mass.) 371, 50 Am. Dec. 791, s. c. 10 Cush. (Mass.) 392; Abbey v. Chase, 6 Cush. (Mass.) 54; Smout v. Ilbery, 10 Mees. & Wels. 1; Jenkins v. Hutchinson, 13 Ad. & El. N. S. 744.

[62] In Lewis v. Nicholson, 18 Q. B. N. S. 503, Campbell, C. J., said:

Where, however, the agent acting in good faith and supposing himself authorized, has made express or implied assertions of authority, an action based upon the implied contract of warranty or indemnity is the appropriate remedy.[62]

"He is liable, if there was any fraud, in an action for deceit, and, in my opinion, as at present advised, on an implied contract that he had authority, whether there was fraud or not."

And so Starkey v. Bank of England, [1903] App. Cas. 114.

In White v. Madison, 26 N. Y. 117, in deciding that an action on the warranty of authority was a proper one, Selden, J., said: "If the act of the agent were fraudulent, an action for the deceit would lie, but it would be a concurrent remedy with an action on the warranty."

See Seeberger v. McCormick, 178 Ill. 404.

It is often said, in the older cases, that the only remedy is an action of deceit, whether the agent acted in good or in bad faith. It was so held, for example, in numerous cases, both in Maine and Massachusetts. All of these earlier cases were decided before the present doctrine of implied warranty of authority had been so fully developed. Maine apparently still adheres to the older rule, and as late as 1890, in Gilmore v. Bradford, 82 Me. 547, the court says: "It is settled in this state and Massachusetts, by a series of decisions commencing as far back as 1814, that the only remedy against one who undertakes to act as agent without authority, or in excess of his authority, is an action on the case for deceit. Noyes v. Loring, 55 Me. 408; affirmed in Teele v. Otis, 66 Me. 329; Abbey v. Chase, 6 Cush. 54; Jefts v. York, 10 Cush. 392; Ballou v. Talbot, 16 Mass. 461, 8 Am. Dec. 146; Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160."

The court in Massachusetts, on the other hand, shows a disposition to depart from its early cases, upon which the Maine court relied, and to adopt the modern view. Thus in Boston & Albany R. R. Co. v. Richardson, 135 Mass. 473, the courts say that they do not understand that the word "deceit" in the earlier cases was used in its technical sense, and they add, "We can see no good reason why an action of contract upon the implied warranty should not be maintained in the same manner as it may be upon the implied warranty in the sale of chattels." It was not necessary to determine the question in that case, because the plaintiff's pleading contained counts both in contract and in tort.

"Later cases," says Scudder, J., in Patterson v. Lippincott, 47 N. J. L. 457, 54 Am. Rep. 178, "have held . . . that he may be sued either for breach of warranty or for deceit, according to the facts of each case," citing Jenkins v. Hutchinson, 13 Ad. & El. (Q. B.) N. S. 744; Lewis v. Nicholson, 18 Ad. & El. (Q. B.) N. S. 503.

[62] Collen v. Wright, 8 El. & Bl. 647; Oliver v. Bank of England, [1901] 1 Ch. 652, [1902] 1 Ch. 610; affirmed as Starkey v. Bank of England, [1903] App. Cas. 114; Sheffield Corporation v. Barclay, [1903] 1 K. B. 1, [1905] App. Cas. 392; Godwin v. Francis, 5 C. P. 295; Simons v. Patchett, 7 El. & Bl. 568; Meek v. Wendt, 21 Q. B. 126; *In re* National Coffee Palace Co., 24 Ch. 367; Firbank's Executors v. Humphreys, 18 Q. B. Div. 54; Spedding v. Nevell, 4 C. P. 212; Hughes v. Graeme, 33 L. J. Q. B. 335; West London Commercial Bank v. Kitson, 13 Q. B. Div. 360; Farmers' Trust Co. v. Floyd, 47 Ohio St. 525, 12 L. R. A. 346, 21 Am. St. Rep. 846; Groeltz v. Armstrong, 125 Iowa, 39; White v. Madison, 26 N. Y. 117; Taylor v. Nostrand, 134 N. Y. 108; Campbell v. Muller, 19 Misc. (N.

It would be rarely if ever true that an action for the specific performance of the contract could be maintained against the agent; to justify it he must be something more than an agent.[64]

§ 1399. Burden of proof.—The burden of proof is upon the plaintiff to show the fact of the agent's warranty or undertaking, its breach, and the resulting damages.[65]

§ 1400. The measure of damages.—The damages to be recovered against the agent for acting without authority must, in general, be compensation for the loss which the other party has naturally and proximately sustained by reason of the false assertion of authority.[66] In

Y.) 189; Seeberger v. McCormick, 178 Ill. 404; Le Roy v. Jacobosky, 136 N. C. 443, 67 L. R. A. 977; Oliver v. Morawetz, 97 Wis. 332; Anderson v. Adams, 43 Ore. 621; Cochran v. Baker, 34 Ore. 555; Lane v. Corr, 156 Pa. St. 250.

[64] In Doolittle v. Murray, 134 Iowa, 536, the lower court granted specific performance against the agent upon the theory that he was really the principal though ostensibly agent.

[65] In an action for breach of an implied warranty of authority to make a contract, the plaintiff launches his case by showing that he entered into the contract with the defendant as agent, who so described himself and that the defendant had not the authority he professed to have. The *onus* of proving a defence that the plaintiff was aware, at the time, of the want of authority, will lie upon the defendant. Adamson v. Morton, 7 Vict. L. R. (L.) 307.

[66] Simons v. Patchett, 7 El. & Bl. 568; Meek v. Wendt, 21 Q. B. Div. 126; *In re* National Coffee Palace Co., 24 Ch. Div. 367; Oliver v. Bank of England, [1901] 1 Ch. 652, [1902] 1 Ch. 610; aff'd as Starkey v. Bank of England, [1903] App. Cas. 114; Sheffield Corporation v. Barclay, [1903] 1 K. B. 1, [1905] App. Cas. 392; White v. Madison, 26 N. Y. 117; Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343; Taylor v. Nostrand, 134 N. Y. 108; Campbell v. Muller, 19 Misc. (N. Y.) 189; Le Roy v. Jacobosky, 136 N. C. 443, 67 L. R. A. 997; Anderson v. Adams, 43 Ore. 621; Groeltz v. Armstrong, 125 Iowa, 39; Maneer v. Sanford, 15 Manitoba, 181.

In Oliver v. Bank of England, [1901] 1 Ch. 652, [1902] 1 Ch. 610, [1903] App. Cas. 114, where stock had been transferred in reliance upon a forged transfer, the measure of damages allowed was the value of the stock with all dividends and costs.

In Meek v. Wendt, 21 Q. B. Div. 126, where there had been an unauthorized settlement of a claim for insurance, the plaintiff was held to be entitled to recover not only the amount agreed upon to be paid upon the settlement, but also expenses incurred in getting ready to consummate it.

In Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718, where there had been an unauthorized representation that the defendant, as agent of an insurance company, was authorized to issue a policy covering a certain risk, the plaintiff was held to be entitled to recover the amount of the policy, with interest from the time when it should have been payable.

In Farmers' Trust Co. v. Floyd, 47 Ohio St. 525, 12 L. R. A. 346, 21 Am. St. Rep. 846, where goods had been sold in reliance upon the defendant's representation of the existence of a corporation as buyer, the plaintiff was held to be entitled to recover the full amount of the contract price.

In Campbell v. Muller, 19 Misc. (N. Y.) 189, where the defendant, without authority, had represented himself as agent to buy a horse for his principal,

the case of contracts, it must usually be compensation for the loss sustained by not obtaining a binding contract. In the case of other acts, it must usually be compensation for the loss caused by the doing, at the assumed agent's request, of that which, if the agent had been authorized, would have bound the principal and justified the other party, but which, because of the lack of authority, does not bind the pretended principal and subjects the other party to loss or hazard. In the case of contracts, the damages will, in many instances, be the same that could be recovered against the principal for his breach of the contract if it had been authorized;[67] but they are not necessarily the same.

and having received it into his possession, the plaintiff was held to be entitled to recover damages for the detention of the horse, for depreciation caused by a physical injury while the defendant had possession, and for the charges of a veterinary surgeon for treatment of the injury. No damages apparently were sought for the loss of the profit of the bargain.

In Taylor v. Nostrand, 134 N. Y. 108, where the defendant had employed the plaintiff to render services for a corporation, but had caused them to be so rendered that plaintiff could not recover of the corporation, plaintiff was held entitled to recover, for his services and disbursements, from the defendant.

In Anderson v. Adams, 43 Ore. 621, the defendant, an agent to lease land, in making a lease to plaintiff, agreed without authority to furnish plaintiff water for the irrigation of the land leased. The measure of damages was held to be the value which the crop would have had at maturity if water had been furnished, less the cost of labor, care and attention necessary to put it in condition for the nearest market.

In Roberts v. Tuttle, 36 Utah, 614, an agent without authority had purported to sell land, had put the purchasers in possession, and had received a part payment of purchase price. Upon eviction by the owner, the buyer was permitted to recover of the agent as damages the amount paid upon the purchase price with interest, the value of improvements made, the costs of defending the action of ejectment brought by the owner, the value of the bargain as it is usually estimated, and the cost of getting a loan to make up the unpaid portion of the price—an action taken by the purchasers on the advice of the agent that if such balance were tendered to the owner title would be passed—but not a sum equal to the amount recovered by the owner from the purchasers in the ejectment suit for use of the premises during the purchasers' occupation.

In Firbank's Executors v. Humphreys, 18 Q. B. Div. 54, the defendants, as directors of a corporation, issued to plaintiff debenture stock in payment for work done for the corporation. The corporation had power to issue stock only to a certain amount, and this amount, unknown to the defendants, had been issued, and the stock issued to plaintiff was an over-issue and valueless. The corporation became insolvent, but its valid outstanding debenture stock was worth face-value. *Held*, that the defendants were liable for the value of valid debenture stock of the same amount as plaintiff held of the over-issue.

See also, Simons v. Patchett, 7 El. & Bl. 568; Spedding v. Nevell, L. R. 4 C. P. 212; Godwin v. Francis, L. R. 5 C. P. 295.

[67] Thus in Simons v. Patchett, 7 El. & Bl. 568, it was said by Crompton, J., *arguendo*, "It is not the same thing

It must be kept in mind as was pointed out by Lord Bowen in one case,[68] "that an agent does not promise that his principal shall carry out the contract, but only that he shall be bound by it." It is entirely conceivable that many things may subsequently arise, like the other party's own default, affecting the extent of the principal's liability upon an authorized contract, which would not affect the value of it at the time it was made. So if the contract had actually been authorized, a number of things might then affect its value, as for example, the solvency of the principal. In such a case the amount assessed as damages for breach of the contract, might be one sum, while the amount which could be collected would be a different sum, and this fact must be taken into consideration in assessing damages against the agent.[69] If this were not so, then as was also pointed out by Lord Bowen,[70] "the plaintiff would be getting as much damages against the agent for an insolvent, as against the agent for a millionaire." The burden of making this showing rests ordinarily upon the agent.[71]

The costs and expenses of judicially determining whether the contract is binding upon the principal, may also in many cases, after notice at least, be a proper subject for compensation in an action against

to warrant to a man that a supposed principal is bound to fulfil a bargain, and to contract to fulfil it one's self. Though the principal was bound, the vendor might be no better off, as in the possible case that he was insolvent. But, when the principal would be able to pay if he were bound to do so, I do not see the difference in the damages."

[68] *In re* National Coffee Palace Co., 24 Ch. Div. 367.

[69] See for example, Simons v. Patchett, 7 El. & Bl. 568; *In re* National Coffee Palace Co., 24 Ch. Div. 367; Meek v. Wendt, 21 Q. B. Div. 126.

[70] In *In re* National Coffee Palace Co., *supra*.

[71] See *In re* National Coffee Palace Co., 24 Ch. Div. 367; Meek v. Wendt, 21 Q. B. Div. 126; Farmers' Trust Co. v. Floyd, 47 Ohio St. 525, 21 Am. St. Rep. 846, 12 L. R. A. 346.

In Farmers' Trust Co. v. Floyd, *supra*, the action was against persons who had assumed to act as officers and agents of a corporation before there had been actually paid in the amount required by the statute as a condition precedent to their or the company's right to do business. The plaintiff had sold and delivered goods to them as such agents, for which he could not recover payment against the corporation. Upon the trial, no showing was made as to whether there were other creditors of the corporation, or whether their claims stood upon the same footing as that of the plaintiff, or whether the plaintiff, if the contract had been authorized, could in fact have secured his pay in full. It was held that *prima facie* the measure of the plaintiff's damages was the amount of his claim, and that as the defendants had made no such claim in the court below, or in the supreme court, it was unnecessary to determine whether the defendants could have had the plaintiff's claim reduced to a *pro rata* footing with the other claims.

[72] White v. Madison, 26 N. Y. 117; Duffy v. Mallinkrodt, 81 Mo. App. 449; Kennedy v. Stonehouse, 13 N. D. 232, 3 Ann. Cas. 217; Cooper v. Gardiner,

the agent. They would undoubtedly be so wherever the action can be deemed to have been fairly and reasonably brought.[72]

Where the agent is liable directly upon the contract, the measure of damages would be the same as in any other similar case.

§ 1401. ——— To give damages for loss of a particular contract, it must have been one of value against principal if authorized.—In order, however, to make an agent liable for the loss of a particular contract which he has assumed, without authority, to make in the name of his principal, the unauthorized contract must have been, in general legality, form of execution and the like, one which would have been of some legal value against the principal if it had been authorized by him. Otherwise, the anomaly would exist of giving a right of action against an assumed agent for an unauthorized representation of his authority to make the contract, when the contract itself, in the form in which the other party was content to make it, would, even if it had been authorized, have been of no value against the principal.[73]

[1902] 2 State Rep. N. S. Wales 67; Maneer v. Sanford, 15 Manitoba, 181; Oliver v. Bank of England, [1901] 1 Ch. 652, [1902] 1 Ch. 610; affirmed under title of Starkey v. Bank of England, [1903] App. Cas. 114; Randell v. Trimen, 18 C. B. 786, 25 L. J. C. P. 307; Godwin v. Francis, L. R. 5 C. P. 295, 306, 39 L. J. C. P. 121, 125; Hughes v. Graeme, 33 L. J. Q. B. 335.

In Oliver v. Bank of England, *supra*, the following extract from Mayne on Damages (6th ed.), pp. 98, 99, was quoted with approval: "One who professes to contract as agent for another must, unless there be something in the transaction to rebut the implication, be taken to warrant that the authority, which he professes to have, does in fact exist; and if he has no such authority, he is liable to make good to the person who enters into the contract upon the faith of his being duly authorized, all the damage which is the natural and proximate consequence of the false assertion of authority. This will include the costs of unsuccessful legal proceedings taken by such person against the supposed principal for the purpose of enforcing performance of the contract, or recovering damages for its breach; if, at least, it was reasonable under the circumstances of the case that such proceedings should be taken, or if the professed agent was made aware of the litigation and sanctioned it, either expressly, or by allowing it to be continued without avowing his want of authority."

In Maneer v. Sanford, 15 Manitoba, 181, where an agent without authority made a contract for the sale of land, the damages were held to be not only the loss of the bargain—profits—but also expenses reasonably incurred.

[73] Dung v. Parker, 52 N. Y. 494 (where the contract if authorized could not have been enforced because of the statute of frauds which made it *void* for all purposes); Baltzen v. Nicolay, 53 N. Y. 467 (same). See also, Pow v. Davis, 1 B. & S. 220 (lack of seal).

(See comments on Dung v. Parker, and Baltzen v. Nicolay, in Browne on the Statute of Frauds (5th ed.), § 135a).

Illegal contract—The same rule applies where the contract was illegal. Merchants' Packet Co. v. Streuby, 91 Miss. 211.

No damages can be recovered of an insurance agent for not issuing a

And not only that, but so far as the enforcement of the contract against the principal depends upon the other party's performance or ability to perform, he must also show that the contract would have been, from his side, enforceable; "for, if he is not in shape to ask or compel a performance from the supposed principal, he has lost nothing by not having a valid contract with him, and so can demand nothing by way of damages from the agent on its account." [74]

The mere fact that the contract was not in such form as to be legally enforceable against the principal, if it be not void, seems not to be conclusive that it would have been of no value. Contracts not legally enforceable, because of the Statute of Frauds for example, are constantly performed, and until it appears that such a contract will not be performed, such a result is not to be assumed. Such a defect seems to go rather to the question of damages than to the existence of a cause of action.[75]

§ 1402. Effect of ratification.—It must be kept in mind, in dealing with this question of the liability of the agent to third persons for making a contract without authority, that, as has been seen in an earlier chapter,[76] the liability of the agent will be terminated if the principal ratifies the contract in such form and under such conditions as to make the contract binding upon himself. What the cases are wherein there may be such ratification has been so fully considered in the chapter upon ratification as to need no further discussion here. In many of the cases referred to in the present chapter, however, there could be no ratification because of the lack of the necessary conditions; [77] and in such cases, of course, the rule above referred to could have no operation.

§ 1403. Where a nominal agent is the real principal.—Where, although there was nominally an agency, there was no agency in fact, and the nominal agent was the real principal, such principal may usually be held liable. Many cases of this sort have already been considered, at least in substance. Thus, if he pretends to act for a fictitious principal, he is really acting with no principal.[78] If he purports to act for an undisclosed principal, but that principal is nonexistent, the ordinary rule respecting agents of undisclosed principals would

valid policy, if, because of double insurance, the policy could not have been enforced if valid. Lim-Juco v. Lim-Yap, 3 Philipp. 130.

Insolvency of Principal goes to the measure of damages.

[74] Kent v. Addicks, 126 Fed. 112, 60 C. C. A. 660.

[75] See the excellent discussion in McCarthy v. Young, 19 Austral. L. Times, 231.

[76] See *ante*, §§ 542, 543.

[77] See *ante*, §§ 376, 416.

[78] See *ante*, § 1383.

See also Schenkberg v. Treadwell, 94 N. Y. Supp. 418.

make the agent liable, and no further remedy would ordinarily be necessary.[79] If he pretended to act as agent for a described but not named principal, as where he acts as "agent for the owner," etc., he could doubtless be shown to be the person described.[80] Where the real agent poses as the principal and the real principal is described as the agent in a written contract, it is held that the so-called parol evidence rule forbids a showing that the nominal agent was the real principal.[81] In a case not hampered by the parol evidence rule, the nominal agent could be shown to be the real undisclosed principal, unless the doctrine of election at the time of making the contract should be deemed to prevent it. It is thought that that doctrine ought not to prevent it, because the real principal, by concealing the true state of the facts, has prevented an intelligent election.

There would also be many cases in which the real principal would be liable where he had used some name suggesting agency as his trade or business name.

B. Assuming to Act for an Undisclosed Principal.

§ 1404. Liability of pretended agent.—The cases thus far considered have been cases wherein the pretended agent assumed to act for a certain and disclosed principal, but, as has already been pointed out,

[79] See *post*, § 1410.

[80] See Carr v. Jackson, 7 Exch. Rep. 382; Schmaltz v. Avery, 16 Q. B. Rep. 655; Sharman v. Brandt, L. R. 6 Q. B. Cas. 720; Harper v. Vigers, [1909] 2 K. B. 549. See also Spurr v. Cass, L. R. 5 Q. B. Cas. 656.

[81] In Heffron v. Pollard, 73 Tex. 96, 15 Am. St. Rep. 764, the defendant H made a contract to purchase certain pipe from P by a writing made on its face between F the buyer and P the seller, and signed "John W. Fry, per Heffron." H was the real principal in the matter, and P, at the time of making the contract, knew that H was buying for himself." H had some sort of authority from F, so that it was conceded that H was not liable on a warranty. P sought to hold H on the contract by proving by parol that H was the one intended to be bound. *Held*, that the parol evidence rule prevented P from charging H. The court construed the writing as if it expressly excluded the liability of H, and distinguished the case from those wherein an agent is the undisclosed principal and bound as such, since here the relation of the parties appeared on the face of the writing and was known to the seller at the time.

But in Isham v. Burgett, 157 Mass. 546, where the nominal agent was the promoter of a corporation duly formed, but was in fact using the corporation as an agent of himself, and gave an order to the plaintiffs for electric light poles in this form: "D. B. Isham . . . Please furnish poles as follows . . . H. W. Burgett, Mark. The Dover Electric Light Company," he was held liable on the contract, not only on the grounds that the form of it was sufficient to bind him as agent personally, but on the ground that he was the true principal.

there may be cases in which he assumes to act for a certain but undisclosed principal. Such cases are rare, but they are nevertheless possible. Thus the assumed agent may say, "I have a principal; I act for him, but I decline or omit to disclose his name or identity." It is possible that the other party may prefer to deal with any principal rather than the agent. It is certainly possible that he may prefer the credit of a principal of a certain description rather than of the agent, as where the pretended agent says, "I act for a manufacturer; he is as good as X and in good standing and credit with you, but I will not disclose his name." If, then, negotiations are had upon that basis, but the pretended agent had no authority of any such principal, what is the result? First, there is no contract between the other party and the principal, because there was no principal; second, there is no contract in the terms proposed, with the agent, because the form of dealing has excluded him as a party to it.[82] But there is no reason why the assumed agent should not be liable in deceit or upon an express or implied warranty of authority, as in the cases already considered. There might in many cases of this sort be difficulty about the measure of damages, but no reason is apparent why they should not be based upon the loss of a contract with a person as good as the principal described.

2. Where, though authorized to bind his Principal, he binds Himself or no one.

§ 1405. In general.—But it is not alone in those cases in which he acts without authority, that the agent makes himself liable to third persons. This result may ensue, under a variety of circumstances, even though the agent were fully authorized to bind his principal.

Thus the agent intending to bind his principal may, from the failure to use apt words for that purpose, not only not bind his principal, but may pledge his personal responsibility. So he may conceal the fact of his agency and contract as the ostensible principal.

So, though disclosing the fact of his agency, he may voluntarily enter into personal obligations.

Each of these several situations requires separate consideration.

[82] See Rodliff v. Dallinger, 141 Mass. 1, 55 Am. Rep. 439. In Macdonald v. Bond, 195 Ill. 122, a person who purported to sign a contract as agent but who had no authority and did not disclose his principal, was held personally liable upon the contract.

§ 1406. Authorized agent contracting in name of principal incurs no personal liability.—As has often been pointed out, it is ordinarily the duty as well as the interest of the agent to confine himself within the limits of his authority and to act only in the name and for the account of his principal. This is so far the normal and expected course that any discussion of the agent's liability should start with this situation. And here the rule of law is clear and certain. If the agent makes a full disclosure of the fact of his agency and of the name of his principal, and contracts only as the agent of the named principal, he incurs no personal responsibility.[83] The insolvency of the principal or his inability or refusal to perform the contract does not affect this result.[84]

And where the agent with full authority makes a contract in proper form to bind the principal, it is held that the agent cannot be made liable upon the contract by offering to prove that it was not intended to bind the principal at all but to bind the agent only.[85]

If, therefore, the authorized agent is to incur a personal liability, it must be because he has in some respect departed from the normal and expected course, and a discussion of these departures is essential.

§ 1407. Where agent intending to bind principal, binds no one.—Where the agent intending to bind his principal uses such language that neither the principal nor the agent is bound upon the contract, there has been said, in many cases, to be no liability attaching to the agent. He can not be held liable upon the contract itself, because he

[83] Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Dunton v. Chamberlain, 1 Ill. App. 361; Barry v. Pike, 21 La. Ann. 221; Aspinwall v. Torrance, 1 Lans. (N. Y.) 381; Kean v. Davis, 20 N. J. L. 425; Klay v. Bank of Dallas Center, 122 Iowa, 506; Imhoff v. House, 36 Neb. 28; Largey v. Leggat, 30 Mont. 148; Hewes v. Andrews, 12 Colo. 161; Bleau v. Wright, 110 Mich. 183; Durham v. Stubbings, 111 Ill. App. 10; Thompson v. Irwin, 76 Mo. App. 418; Lehman v. Feld, 37 Fed. 852; Whiting v. Saunders, 23 N. Y. Misc. 332; Ernst v. Thom, 65 N. Y. Misc. 206; Homan v. Payne, 127 N. Y. Supp. 418; Baer v. Bonynge, 72 Hun (N. Y.), 33; Falk v. Wolfsohn, 7 N. Y. Misc. 313; Lake Shore Nat. Bank v. Butler Colliery Co., 51 Hun, 63; Crandall v. Rollins, 83 N. Y. App. Div. 618; Holmes v. Griffith, 1 Colo. App. 423; Scaling v. Knollin, 94 Ill. App. 443; Huston v. Tyler, 140 Mo. 252; Moody v. Trustees, 99 Wis. 49; McCauley v. Trust Co., 81 N. J. L. 86; Boyd Grain Co. v. Thomas (Ark.), 142 S. W. 1150.

See also Smith v. Bond, 25 W. Va. 387; Johnson v. Welch, 42 W. Va. 18.

[84] Davis v. Lee, 52 Wash. 330, 132 Am. St. Rep. 973.

[85] Heffron v. Pollard, 73 Tex. 96, 15 Am. St. Rep. 764. A person who sells goods to an authorized agent, intending to sell to the principal and delivering the goods to the principal, cannot recover of the agent because he thought the agent was the principal. Turchin, etc., Silver Co. v. Baugh, 117 N. Y. Supp. 137, 133 N. Y. App. Div. 899 (no opinion).

has used no language sufficient to charge him. He cannot be held liable upon any express or implied warranty of authority, because there is no failure or lack of authority. It is simply a case of defective execution. If, however, the agent has expressly warranted the sufficiency of his method of execution, he could undoubtedly be held liable upon such warranty so far as matters of fact are concerned.

Whether there is in every case from the mere fact that the agent assumes to execute in a certain manner, an implied warranty of the sufficiency of that manner to bind the principal, is a question not settled by the authorities. Upon reason, it would seem that this question is to be determined by substantially the same considerations that apply to the case of a warranty of authority. It is, indeed, simply a question of a warranty of authority to execute in that form.

If the agent knowing a certain form to be insufficient in point of fact, yet assumes to adopt it, to the damage of an innocent third party who has relied thereon, he should certainly be held liable for the deceit. And so where no deceit is practiced, unless the agent fully discloses the nature and limitations of his authority so that the other party may judge for himself as to the proper method, it would seem that he is still to be held liable for a defect in fact as upon an implied warranty. But for a defect in point of law only, the agent would not ordinarily be bound.[86]

§ 1408. Where agent intending to bind principal, inadvertently uses apt words to bind himself.—It often happens that an agent known to be such and seeking and intending to bind his principal upon a contract, so defectively executes it that he fails to accomplish that purpose. In such cases it is not infrequently the result that no one is bound; but, more often, it is found that the agent has so executed as to bind himself.[87]

It is true, as has already been pointed out, that the law aims to carry into effect the intention of the parties, but this is so only where it can be done consistently with legal rules. Parties constantly attempt to make contracts which are in fact subject to definite legal rules respecting form or content, who are entirely ignorant of, or indifferent to, the rules which govern the transaction. Where the parties are negotiating informally and by word of mouth, the rules are most flexible and permit a wide search after the intention of the parties. This is also true, to a considerable degree, in the case of informal but written

[86] See Beattie v. Lord Ebury, L. R. 7 Ch. Ap. 777.
See also, cases cited in § 1367, *ante*.

[87] See *ante*, Book III, Chapter I; Stewart v. Shannessy, 2 Ct. Sess. Cas. (5th ser.) 1288.

contracts. When, however, the case involves formal contracts in writing, less latitude is permissible. When the contract is a negotiable instrument, strict and definite rules, based upon the nature and purpose of such instruments, are applicable. When the contract takes the form of a deed,—a specialty, an instrument necessarily under seal,—the rules, as has been seen, are not only rigid but highly technical. A perusal of the vast number of cases shows that, in these latter fields, parties are constantly using forms of expression which they then think, or at least subsequently pretend to think, to be controlling of the obligation, but which the law disposes of as merely descriptive of the person. The vast number of cases in which parties are held personally liable who have added to their signature such words as "Agent," "President," "Treasurer," "Secretary," "Trustee," and the like, furnish many illustrations of situations wherein parties are held to have incurred personal obligations who undoubtedly intended to act only in a representative capacity.

This whole subject has been fully discussed under the head of the Execution of the Authority,[88] and nothing further needs to be added to it here, than that where by those rules of construction it is determined that the agent has contracted in his personal capacity, he is, of course, bound upon the contract to the person with whom it was made.

§ 1409. ——— Reformation of contract to release agent.—Although the agent may thus have bound himself by the express terms of the contract, if he did this as the result of a mistake of fact, equity may, it is held, grant him relief by a reformation of the contract to conform to the actual bargain between the parties.[89]

§ 1410. Where agent conceals fact of agency or name of principal.—As has been already frequently pointed out, it is usually the interest as well as the duty of the agent, in his contractual dealings with third persons, to fully disclose his representative character, and to make all contracts in the name of his principal. Intentionally or unintentionally, however, he may fail to make this disclosure, and may either conceal the fact of his agency altogether, or, though he discloses that he is an agent, may conceal the name or identity of his principal. In the former case, since no one else is named or suggested who may be liable, the rule of law is entirely clear. An agent who conceals the fact of his agency and contracts as the ostensible principal is liable in

[88] See *ante*, Book III, Chap. I.

[89] Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 212. See also, McNaughten v. Partridge, 11 Ohio, 223, 38 Am. Dec. 731.

the same manner and to the same extent as though he were the real principal in interest.[90]

As has often been pointed out, it affords no defence in such a case that he is known to be an auctioneer, broker, or other agent or that he

[90] Wood v. Brewer, 73 Ala. 259; Brent v. Miller, 81 Ala. 309; Armour Packing Co. v. Vletch-Young Produce Co. (Ala.) 39 So. 680; Drake v. Pope, 78 Ark. 327; Boynton v. Brannum, — Ark. —, 136 S. W. 979; Murphy v. Helmrick, 66 Cal. 69; Bradford v. Woodworth, 108 Cal. 684; Evans v. Swan (Colo.), 88 Pac. 149; Jones v. Aetna Ins. Co., 14 Conn. 501; Pierce v. Johnson, 34 Conn. 274; Gerard v. Moody, 48 Ga. 96; Nall v. Farmers' Warehouse Co., 95 Ga. 770; Whitney v. Woodmansee, 15 Idaho, 735; Bickford v. First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Wheeler v. Reed, 36 Ill. 81; Corrigan v. Reilly, 64 Ill. App. 531; Weil v. Defenbaugh, 65 Ill. App. 489; Trench v. Hardin County Canning Co., 67 Ill. App. 269; Loehde v. Halsey, 88 Ill. App. 452; Scaling v. Knollin, 94 Ill. App. 443; Merrill v. Wilson, 6 Ind. 426; Lowrey v. Scargill, 7 Ind. Ter. 497; Nixon v. Downey, 49 Iowa, 166; Lull v. Anamosa Nat. Bank, 110 Iowa, 537; Thompson v. Bldg. & Loan Ass'n, 114 Iowa, 481; Fritz v. Kennedy, 119 Iowa, 628; Temple v. Pennell, 123 Iowa, 729; Mithoff v. Byrne, 20 La. Ann. 363; York County Bank v. Stein, 24 Md. 447; Bartlett v. Raymond, 139 Mass. 275; Brigham v. Herrick, 173 Mass. 460; Welch v. Goodwin, 123 Mass. 71, 25 Am. Rep. 24; Newberry v. Slafter, 98 Mich. 468; Lewis v. Weidenfeld, 114 Mich. 581; Rochester Distilling Co. v. Bostrum, 158 Mich. 543; Bacon v. Rupert, 39 Minn. 512; Amans v. Campbell, 70 Minn. 493, 68 Am. St. Rep. 547; McClellan v. Parker, 27 Mo. 162; Porter v. Merrill, 138 Mo. 555; Leckie v. Rothenbarger, 82 Mo. App. 615; Sheehy v. Wollman, 152 Mo. App. 506; O'Neil Lumber Co. v. Greffet, 154 Mo. App. 33; Jackson v. McNatt, 93 N. W. 425 (Neb.); Batchelder v. Libbey, 66 N. H. 175; M'Comb v. Wright, 4 Johns. (N. Y.) Ch. 659; Baltzen v. Nicolay, 53 N. Y. 467; Mills v. Hunt, 20 Wend. (N. Y.) 431; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Kneeland v. Coatsworth, 9 N. Y. Supp. 416; Boyd v. Quinn, 17 Misc. 278; Ashner v. Abenheim, 19 Misc. 282; Forrest v. McCarthy, 30 Misc. 125; Beidleman v. Kelly, 51 Misc. 51; Schmerler v. Barash, 113 N. Y. S. 745; Forney v. Shipp, 4 Jones (N. C.) L. 527; Beymer v. Bonsall, 79 Pa. 298; Meyer v. Barker, 6 Binn. (Penn.) 228; Davenport v. Riley, 2 McCord (S. C.), 198; Conyers v. Magrath, 4 McCord (S. C.), 392; Bacon v. Sondley, 3 Strobh. (S. C.) L. 542, 51 Am. Dec. 646; Hardman v. Kelley, 19 S. D. 608; Siler v. Perkins, — Tenn. —, 149 S. W. 1060; Book v. Jones, 98 S. W. (Tex.) 891; Hatchett & Large v. Sunset Brick Co., 99 S. W. (Tex.) 174; Hauser v. Lane (Tex. Civ. App.), 131 S. W. 1156; Royce v. Allen, 28 Vt. 234; Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324; Button v. Winslow, 53 Vt. 430; Leterman v. Charlottsville Lumber Co., 110 Va. 769; Gordon v. Brinton, 55 Wash. 568, 133 Am. St. R. 1038; Poole v. Rice, 9 W. Va. 73; Alexander & Edgar Lbr. Co. v. McGeehan, 124 Wis. 325; Ye Seng Co. v. Corbitt, 9 Fed. 423; American Alkali Co. v. Kurtz, 134 Fed. 663; Synnot v. Douglas, 5 Austr. Jur. 165; Davis v. Rood, [1905] Transv. L. R. (S. C.) 196; Coote v. Gillespie, 6 Victor. L. R. (L.) 56; Wilcox v. Clarke, 21 Victor. L. R. 694.

Where the defendant ordered plaintiff to do a job of painting and decorating, and did not inform plaintiff that he was acting as a representative for another, he was held personally responsible for the value of the work done. Corrigan v. Reilly, 64 Ill. App.

is usually employed in acting as agent for other persons. If he does not disclose this agency and the identity of his principal, he will be personally liable.

§ 1411. ——— Disclosing fact of agency, but concealing identity of principal.—In the second case,—where the fact of the agency is known but the name and identity of the principal are concealed,—the case is not quite so clear. As was said in a case,[91] already cited in another section, "there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party;" and the agent may expressly stipulate that the contract shall bind the unnamed principal and not the agent; or the other party, as was the fact in the case referred to, may expressly decline the responsibility of the agent and rely on that of his undisclosed principal. While such cases are thus possible, they are not the common ones; and for the ordinary case the rule is abundantly established that if an agent, though known to be such, conceals the name or identity of his principal and contracts in

531. To same effect: Kneeland v. Coatsworth, 9 N. Y. Supp. 416; Book v. Jones, 98 S. W. (Tex.) 891.

The president of a mining company who purchases lumber to be used in the construction of a mill for the company, dealing as principal and not disclosing, and the seller not knowing of, his agency, is personally responsible for the value of the lumber purchased. Bradford v. Woodworth, 108 Cal. 684.

In an action to recover the price of a horse, purchased of plaintiff by the defendant, an instruction that if defendant did not disclose his agency to the plaintiff, but left the plaintiff to believe that he was acting for himself, he would be personally liable, was upheld. Fritz v. Kennedy, 119 Iowa, 628.

Where the defendant company, acting as agent of another, loaned money to the plaintiff without disclosing its agency, and plaintiff thought she was borrowing from the defendant, the defendant was held liable for over payments made by her. Thompson v. People's Loan Co., 114 Iowa, 481.

When the defendant employed the plaintiff to procure a mortgage loan, without disclosing to the plaintiff that he was not the owner of the land and the real borrower, he is liable for the value of the services. Bacon v. Rupert, 39 Minn. 512.

Fact that one is known generally to act as agent does not exonerate him if he does not disclose the fact of his agency on the occasion in question and the name of his principal. He may, nevertheless, be acting for himself. Thus an express company making collection of a draft through a forged endorsement was held personally liable where the fact of the agency was not otherwise disclosed, nor the name of the principal. "It matters not that the general business of the express company was to act as agent for others. It could have owned this draft and have collected it as principal." It was not the duty of the payer to inquire in what capacity it acted. Holt v. Ross, 54 N. Y. 472, 13 Am. Rep. 615, relying on Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287, in the case of a bank; Mills v. Hunt, 17 Wend. (N. Y.), 333, 20 *id.* 431, the case of auctioneers.

[91] Rodliff v. Dallinger, 141 Mass. 1, 55 Am. Rep. 439.

his own name without limiting his liability, he will be personally liable upon the contract.[92] Whether he has done so is, where the contract is in writing or the facts are capable of but one interpretation, a question for the court; otherwise it becomes a question for the jury.

§ 1412. ——— Identity of principal sufficiently disclosed—What terms sufficiently exclude personal liability—Liability by custom.—The identity of the principal may be disclosed by description as well as by name, as where the agent made a contract "for the owners" of a ship named;[93] and the agent may sufficiently exclude personal re-

[92] In Argersinger v. Macnaughton, 114 N. Y. 535, 11 Am. St. Rep. 687, it is said: "The proposition that an agent contracting in his own name, and failing to disclose the name of his principal at the time of making a contract for the sale or purchase of goods, is personally liable for whatever obligation may arise out of the contract, has the support of authority. (Mills v. Hunt, 17 Wend. (N. Y.) 333; Morrison v. Currie, 4 Duer, 79; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Ludwig v. Gillespie, 105 N. Y. 653; Jemison v. Citizens' Sav. Bk., 44 Hun, 412, 122 N. Y. 135, 19 Am. St. Rep. 482, 9 L. R. A. 708.) That doctrine is applicable to the present case. The defendant made the contract of sale in his own name, as commission merchant, without disclosing the name of any principal; and his warranty given to produce it may, within that rule, as between the parties, be deemed his undertaking. In such case, it may be supposed that a purchaser relies upon the responsibility of the person with whom he deals for the performance of the contract, and that he is not required to look elsewhere to obtain it. When there is, in fact, a principal the agent may ordinarily relieve himself from personal liability, upon a contract made in his behalf, by disclosing his name at the time of making it. Upon such disclosure, however, the party proceeding to deal with the agent may or may not, as he pleases, enter into contract upon the responsibility of the named principal, but to permit an agent to turn over to his customer an undisclosed and, to the latter, unknown principal, might have the effect to deny to the customer the benefit of any available or responsible means of remedy or relief founded upon the contract. The rule is no less salutary than reasonable that an agent may be treated as the party to the contract made by him in his own name, unless he advises the other party to it of the name of the principal whom he assumes to represent in making it where that is unknown to such party."

To same effect, see Pugh v. Moore, 44 La. Ann. 209; Landyskowski v. Lark, 108 Mich. 500; Dockarty v. Tillotson, 64 Neb. 432; Powers v. McLean, 14 N. Y. App. Div. 92; Nichols v. Weil, 30 N. Y. Misc. 441; Good v. Rumsey, 50 N. Y. App. Div. 280; Long v. McKissick, 50 S. C. 218; Morris v. Clifton Forge Grocery Co., 46 W. Va. 197; Macdonald v. Bond, 195 Ill. 122; McClure v. Central Trust Co., 165 N. Y. 108, 53 L. R. A. 153; Meyer v. Redmond, 141 N. Y. App. Div. 123; Neely v. State, 60 Ark. 66, 46 Am. St. R. 148, 27 L. R. A. 503; Cooley v. Ksir (Ark.), 151 S. W. 254.

[93] Waddell v. Mordecai, 3 Hill (S. C.) L. 22. In this case the contract was: "Received from Mr. Waddell one hundred dollars, on account of passage of slaves on board the Brig Encomium. For the owners. M. C. Mordecai."

Said the court: "Did Mordecai name his principal? The answer is, he entered into the contract as

sponsibility by expressely stating that the contract is made for and on account of his principal, although the principal is not directly named.[94] On the other hand in such a case, it may be shown that under the custom of trade the agent may be personally liable upon the contract, even though the language used otherwise would have excluded him.[95]

agent for the owners of the Encomium—but he did not express or give their paternal or christian names. Now, is such fullness and precision indispensible, where the communication made is intelligible? I concede that every agent must so disclose his principal at the time of the contract, as to enable the opposite party to have recourse to the principal, in case the agent had authority to bind the agent naming, specifically and him. 2 Kent, 631. But I cannot perceive wherein lies the necessity of severally, every one of a class or company of his principals who are usually designated among men of business by some brief descriptive terms. For instance, were an agent to say, 'the work is to be done for the steamer Etiwan, and I am the captain, or for the owners of Fitzimons' wharf,' this would be enough *prima facie*, unless, or until, the agent be called on for a more precise specification of the names of his principals. To require more, in every instance, would be very often to require matter utterly superfluous."

In Lyon v. Williams, 5 Gray (Mass.), 557, the contract was made on account of "the several railroad companies between Boston and Zanesville," and was signed "J. S. for the corporations," and was held not to bind J. S. personally. The court said: "But it is said that the names of these corporations are not stated. This is true; but they are capable of being made certain by proper inquiry, and the plaintiff was content to take a contract thus generally designating the parties with whom the liability was to rest for the safe and proper conveyance of the goods."

[94] The material question here is, of course, to distinguish between the case in which the agent says, "I" buy or sell or promise, but recites that he does it for a principal, in which case he is clearly liable, and the case in which he discloses that the promise or sale or purchase is to be the promise or sale or purchase of the principal. Thus, as was pointed out by several of the judges in Southwell v. Bowditch, 1 C. P. Div. 374, there is a material difference when you seek to hold him liable as buyer, between the case in which the agent says, "I have sold for you to my principals," and the case in which he says, "I have bought of you for my principals." The former case is a sale to his principals (see Fleet v. Murton, L. R. 7 Q. B. 126); the latter may be a sale to himself. Where the contract read "We have this day sold to you on account of J. M. & Co." it was held that the seller sufficiently appeared to be J. M. & Co. and not the brokers who signed the note. Gadd v. Houghton, 1 Ex. Div. 357.

So where the note read "Sold for and on account of owner" it was held that the note sufficiently indicated the owner and not the broker as the seller. Pike v. Ongley, 18 Q. B. Div. 708.

So where the contract was made "for the corporations" i. e., the several railroad companies between Boston, Mass., and Zanesville, Ohio, though they were not specifically named. Lyon v. Williams, 71 Mass. (5 Gray) 557.

Signing "*as* broker" as distinguished from merely adding "broker," will usually be enough. See Cooper v. Gardiner, [1902] 2 State Rep. N. S. Wales, 67.

[95] Thus in Pike v. Ongley, 18 Q. B. Div. 708, *supra*, it was held that

It is also to be noted that though the agent may make himself personally liable in these cases, the other party may also, at his option (negotiable and sealed instruments excepted), ordinarily hold the real principal liable when discovered,—a subject to be hereafter considered.[96]

§ 1413. ——— Burden on agent to disclose principal.—The duty rests upon the agent, if he would avoid personal liability, to disclose his agency, and not upon others to discover it.[97] It is not, therefore, enough that the other party has the means of ascertaining the name of the principal; the agent must either bring to him actual knowledge or, what is the same thing, that which to a reasonable man is equivalent to knowledge or the agent will be bound.[98] There is no

though the agents were clearly not liable on the contract, they might be made liable on proof of a custom to be personally liable in such a case.

To same effect: Fleet v. Murton, L. R. 7 Q. B. 126, *supra;* Humfrey v. Dale, 7 E. & B. 266, E. B. & E. 1004; Hutchinson v. Tatham, L. R. 8 C. P. 482.

[96] See *post*, §§ 1734, 1736.

[97] Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324; Fritz v. Kennedy, 119 Iowa, 628; Book v. Jones, 98 S. W. (Tex.) 891; Weil v. Defenbaugh, 65 Ill. App. 489; Bradford v. Woodworth, 108 Cal. 684.

[98] Thus in Cobb v. Knapp, *supra*, it was said: "It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the neglect to inquire might be deemed sufficient. He must have actual knowledge." See also, Nelson v. Andrews, 19 N. Y. Misc. 623.

This rule, however, cannot be held to mean that the other party may shut his eyes to what would be obvious to any reasonable man. Thus where the question was whether the defendant was personally responsible for the fees of architects who prepared plans and specifications for a college building of which the defendant was president and financial agent, the court said:

"If Johnson had a principal capable of being bound, and whom he had authority to bind by the contract, and if the contract was about the business of the principal and such facts were known to the plaintiffs, then, as Johnson did not expressly bind himself, it must be held to be the contract and debt of his principal, for which he is not responsible. It clearly appears that plaintiffs knew that the building was intended for a public and not for a private purpose. The evidence does not in so many words show that they knew that the building was to be constructed by an existing corporation so as to apprise them that Johnson had a principal capable of being bound by the contract. But it does show that there was in fact such a corporation and principal, and the circumstances that were known to plaintiffs were sufficient to put them upon inquiry. The inquiry that it was their duty to make, under the circumstances of this case, would have developed a responsible principal, and it is difficult to conclude that plaintiffs did not have actual knowledge that they were dealing with a corporation, notwithstanding the fact that they did not at the time of making the contract inquire for or get that information from Johnson, the agent." Johnson v. Armstrong, 83 Tex. 325, 29 Am. St. Rep. 648. See also, Cuneo v. Wimberly (Tex. Civ.

hardship to the agent in this rule, as he always has it in his power to relieve himself from personal liability by fully disclosing his principal and contracting only in the latter's name. If he does not do this, it may be well be presumed that he intended to make himself personally responsible.[99]

An agent who does not disclose his principal and to whom a personal credit is given, can not escape responsibility merely because he generally acts for a disclosed principal in other transactions;[1] nor, of course, because he may not have actually intended to bind himself on this occasion.[2]

On the other hand, the failure of the agent to expressly disclose his agency will not make him individually liable where the other party knew that he was dealing with a certain principal and had had similar dealings with that principal through the agent's predecessor.[3]

App.), 115 S. W. 673; Alexander & Edgar Lumber Co. v. McGeehan, cited in third note following.

So where the deacons of a church invited a minister to accept the pastorate of their church, revealing the identity of the church and stating in the letter that they were acting by virtue of a resolution at the church meeting, it was held in an action by the minister for salary that the fund from which he was to be paid was sufficiently identified and that therefore the deacons were not agents for an undisclosed principal and consequently not liable. Morley v. Makin, 22 T. L. R. 7.

[99] Cobb v. Knapp, 71 N. Y. 349, 27 Am. Rep. 51; Fritz v. Kennedy, 119 Iowa, 628; Weil v. Defenbaugh, 65 Ill. App. 489; Bradford v. Woodworth, 108 Cal. 684; Armour Packing Co. v. Vietch-Young Produce Co. (Ala.), 39 So. 690; Porter v. Merrill, 138 Mo. 555; Kneeland v. Coatsworth, 9 N. Y. Supp. 416; Raymond v. Crown, etc., Mills, 2 Metc. (Mass.) 319; McConnell v. Holderman, 24 Okla. 129.

But see Worthington v. Cowles, 112 Mass. 30, where the rule is laid down that the agent is bound unless from his disclosures the other party understood, or ought as a reasonable man to have understood, that he was dealing with the principal. To same effect, Johnson v. Armstrong, 83 Tex. 325, 29 Am. St. Rep. 648.

So far as the burden of proof upon the trial is concerned, the burden is upon the plaintiff to show that he dealt with the agent under such circumstances as to make the latter liable to the plaintiff. Wilder v. Cowles, 100 Mass. 487.

[1] Brent v. Miller, 81 Ala. 309; Wood v. Brewer, 73 Ala. 259.

[2] McConnell v. Holderman, 24 Okla. 129; Leterman v. Charlottesville Lumber Co., 110 Va. 769.

[3] Forrest v. McCarthy, 80 N. Y. Misc. 125.

So in Alexander & Edgar Lumber Co. v. McGeehan, 124 Wis. 325, it was said: "The general statement, [of the rule] should not be construed as requiring the agent under all circumstances to expressly declare his agency and the name of his principal,—to do so regardless of whether the person dealing with him knows the facts, or is chargeable with knowledge thereof from circumstances brought to his attention."

In Amans v. Campbell, 70 Minn. 493, 68 Am. St. Rep. 547, one Campbell, who was really manager of a business belonging to his wife, in making a contract in relation to the

Notice of the agency to one member of a firm, has been held not to be sufficient notice to the firm to relieve the agent from personal responsibility for transactions subsequently had with another member, who did no know, and was not informed of the agency.[4]

§ 1414. ——— Disclose when.—The liability is to be determined by the conditions known at the time the contract was made or other transaction had. If at that time the principal was not disclosed, his subsequent disclosure will not relieve the agent.[5]

A disclosure, however, is sufficient within this rule if, though not made at the time negotiations were begun, it is full and complete before any contract is made or obligation incurred. And, though not made until after one contract has been entered into, the disclosure would be operative as to further contracts if fully made before such new contracts are consummated.[6]

As has already been pointed out, a usage that the agent shall be personally liable if he does not disclose his principal within a reasonable time, even though the agent would not by reason of its terms be primarily liable upon the contract, is good.[7]

§ 1415. ——— Agent liable although principal might also be held.—As has been already suggested, although the agent makes himself liable in these cases, the undisclosed principal may also, when discovered, be usually held liable.[8] This is not true, however, as will be more fully seen hereafter, in the case of negotiable instruments[9] and instruments under seal.[10]

business, signed "Campbell & Co.," without indicating in any way that he did so as agent. It did not appear that there was any other business in the community being conducted under that name. *Held*, that the mere use of the name "Campbell & Co." did not amount to a disclosure of his agency for his wife, Delia Campbell, doing business under the name of "Campbell & Co."

[4] Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324.

[5] Batchelder v. Libbey, 66 N. H. 175; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Meyer v. Redmond, 141 App. Div. 123; Nelson v. Andrews, 19 Misc. 623; Whiting v. Saunders, 23 Misc. Rep. 332; Lull v. Anamosa Nat. Bank, 110 Iowa, 537; Pancoast v. Dinsmore, 105 Me. 471, 134 Am. St. Rep. 582. An agent of an undisclosed principal bid at an auction sale and the goods were struck off to him by name. Upon his request, made privately to the clerk, the latter entered the name of the principal as buyer upon the auctioneer's book. *Held*, that this was not within the authority of the clerk and that the agent was liable. Batchelder v. Libbey, *supra*.

[6] Brackenridge v. Claridge, 91 Tex. 527, 43 L. R. A. 593.

[7] Humfrey v. Dale, El. Bl. & El. 1004; Fleet v. Murton, L. R. 7 Q. B. 126; Hutchinson v. Tatham, L. R. 8 C. P. 482; Pike v. Ongley, 18 Q. B. Div. 708.

[8] See *post*, Book IV, Chap. V, *Undisclosed Principal*.

[9] See *post*, § 1736.

[10] See *post*, §§ 1734, 1735.

The fact that the other party may hold the principal when disclosed does not relieve the agent. The other party has a right to hold the agent who was apparently the contracting party, or (negotiable and sealed instruments excepted), at his option, to charge the real principal in the transaction. This is not a case of joint-liability or of double liability, but of alternative liability. If the other party elects to hold the principal upon discovery, he will release the agent. What constitutes such election is usually a question of fact, and many cases are collected in a later section showing the effect to be given to various acts thought to evidence an election.[11] As will there be seen the commencement of an action is ordinarily held not to be enough; the action must proceed to judgment.[12]

§ 1416. ——— Dealing with agent must have resulted in contract, etc.—It is of course essential to the liability of the agent in these cases that there shall have been a contract made with him by the other party, or that he shall have induced some action on the part of the other party. Thus where the defendant, known to be acting for an undisclosed principal, caused stock in a corporation to be taken, with the tacit assent of the corporation, in the name of a "dummy," it was held that the defendant was not liable for assessments upon the stock. He was not the record stockholder, and no contract had been made with him; neither had any action been induced by him, except with the consent of the corporation.[13] The real owner could be charged upon his discovery.

The alleged agent, obviously, must also, as will be more fully seen in a later section, (§ 1462), be something more than a mere automaton or messenger who purports only to deliver a message which he has been directed to transmit.

§ 1417. Where agent acts for a foreign principal.—Somewhat similar to the case of the undisclosed principal has sometimes been thought to be the case of a foreign principal; and a distinction formerly prevailed in cases in which the principal was a resident of a foreign state[14] or country. In such cases it was presumed that the other party had not trusted to the distant and remote principal, but that credit was given to the agent personally although the agent disclosed his agency.[15] But this rule no longer prevails in this country and the contracts of an

[11] See *post*, § 1750 *et seq.*

[12] See *post*, §§ 1758, 1759.

[13] Alkali Co. v. Kurtz, 134 Fed. 663.

[14] That a different state in the United States is to be regarded as a foreign country, see argument of counsel in Kaulback v. Churchill, 59 N. H. 296; Taintor v. Prendergast, 3 Hill (N. Y.), 72, 38 Am. Dec. 618. But *contra*, see *per* Walworth, and Verplanck in Kirkpatrick v. Stainer, 22 Wend. 224; Barham v. Bell, 112 N. C. 131.

[15] See Story on Agency, § 268

agent in behalf of foreign principals stand upon the same ground as those made for domestic employers.[16]

Such an agent may, like any other, incur personal liability by concealing his principal, or by pledging his own responsibility.

§ 1418. Where there is no responsible principal.—Akin to the cases considered in a preceding subdivision is that wherein the agent assumes to represent a principal who has no legal existence or status, or who has no legal responsibility, even though there may have been the forms of authorization which in other cases would have resulted in authority. These cases are often dealt with as instances of a want of authority (*ante* § 1389), though they ordinarily belong more properly among the cases considered in the following sections.

§ 1419. Where agent pledges his own responsibility.—It is entirely competent for the agent, although his agency is known and he is fully authorized to bind his principal, to pledge his own personal responsibility. He may do this in two ways, namely, he may add his responsibility to that of the principal, or he may tender his own responsibility instead of that of his principal.[17] The other party may say to him, "I know your principal, and I mean to bind him, but I also mean to make such a contract that, if I prefer, I may hold you upon it." Or the other party may say to the agent, "I do not know your principal well enough to trust him" (or, perhaps, "I know him too well"), "and therefore I will not deal with him at all, but I will deal with you exclusively." Either of these statements the other party may make expressly, or by implication from words or conduct. The agent is, of course, under no obligation to accept either one of these proposals, but he may accept either, and his acceptance, like the offer,

[16] Maury v. Ranger, 38 La. Ann. 485, 58 Am. Rep. 197; Bray v. Kettell, 1 Allen (Mass.), 80; Barry v. Page, 10 Gray (Mass.), 398; Goldsmith v. Manheim, 109 Mass. 187; Oelricks v. Ford, 23 How. (U. S.) 49, 16 L. Ed. 534; Rogers v. Marsh, 33 Me. 106.

For the English rule, see: Elbinger Actien-Gesellschaft v. Claye, L. R. 8 Q. B. 313; Green v. Kopke, 18 C. B. 549; Wilson v. Zulueta, 14 Ad. & Ell. N. S. (Q. B.) 405; Paice v. Walker, L. R. 5 Ex. 173; Armstrong v. Stokes, L. R. 7 Q. B. 603; Hutton v. Bulloch, L. R. 9 Q. B. 572.

In Victoria: Cheong v. Lohmann, [1907] Vict. L. R. 571; British Columbia: Taylor v. Davenport, 14 West. L. Rep. 257.

[17] Thus in Dahlstrom v. Gemunder, 198 N. Y. 449, 19 Ann. Cas. 771, it is held that the agent of a known and disclosed principal, in selling goods for the latter, may give his own personal warranty in addition to that of the principal; but that the two warranties would not be so independent of each other that the buyer could recover damages upon both, and to the extent which the buyer obtains satisfaction from the principal to that extent would the agent be relieved. See also, Shordan v. Kyler, 87 Ind. 38.

may be made expressly or be deduced from the attendant circumstances. In the former case only does he really act as agent; in the latter he is dealt with as an independent party. The differences in the cases are material. In the former case, the principal or the agent may be held; the principal because he authorized the contract and it is made on his account, even though (sealed and negotiable instruments excepted), he is not named in it; the agent, because he has made the contract in his own name. Such a personal undertaking is based upon a sufficient consideration [18] and is not necessarily inconsistent with his character as agent; and where he has so promised personally, the mere addition of the word "agent," "trustee," "president," etc., to a written promise, will ordinarily, as has been seen, be regarded as mere *descriptio personae*.[19]

In the second case, the agent only and not the principal is bound, for, by the hypothesis, the principal has been expressly excluded as a party.

§ 1420. ——— The result is to disclose three possible situations in which a known and authorized agent may place himself: (1) contracting only in the name of his principal, he may altogether escape personal liability; (2) he may make the contract in such form that either the principal or the agent may be responsible; (3) he may make the contract in such form that he only is liable upon it.

The first of these situations has been so fully discussed as to need no further consideration here. The second case is more difficult. Yet even here it is possible that either the principal or the agent may be bound,—the principal because he is such and authorized the contract, and the agent because he has contracted in his own name,—and this is true, according to the weight of authority (negotiable instruments and

Agent personally bound: Sadler v. Young, 78 N. J. L. 594; Carroll v. Bowen, 113 Md. 150; Jones v. Gould, 200 N. Y. 18.

[18] See Sayre v. Edwards, 19 W. Va. 352.

[19] See *ante*, Book III, Chapter III. See also, Duval v. Craig, 2 Wheat. (U. S.) 45, 4 L. Ed. 180; Townsend v. Hubbard, 4 Hill (N. Y.), 351; Quigley v. De Haas, 82 Pa. 267; Whitehead v. Reddick, 12 Ired. (N. Car.) L. 95; Oliver v. Dix, 1 Dev. & Bat. (N. C.) Eq. 158; Appleton v. Binks, 5 East. 147; Tippets v. Walker, 4 Mass. 595; Bryson v. Lucas, 84 N. C. 680, 37 Am. Rep. 634; De Bebian v. Gola, 64 Md. 262; Landyskowski v. Lark, 108 Mich. 500; Cream City Glass Co. v. Friedlander, 84 Wis. 53, 36 Am. St. Rep. 895, 21 L. R. A. 135; Hardman v. Kelly, 19 S. D. 608; Manly v. Sperry, 115 Ala. 524; Maine Red Granite Co. v. York, 89 Me. 54; Burkhalter v. Perry, 127 Ga. 438, 119 Am. St. R. 343; Candler v. DeGive, 133 Ga. 486; Mott Iron Works v. Clark, 87 S. Car. 199; Fowler v. McKay, 88 Neb. 387; Eddy v. American Amusement Co., 9 Cal. App. 624; Benedict v. Wilson, 10 Cal. App. 719.

sealed instruments excepted), even though the agency was known and the contract was in writing and made in the agent's name, without disclosing the name of the principal.[20]

[20] The leading case upon this question is doubtless Calder v. Dobell, L. R. 6 C. P. 486. There the defendant had authorized one Cherry, a broker, to buy cotton for him but not to disclose his name. The broker's credit not being good enough to enable him to buy the cotton on his own responsibility, he disclosed the name of the defendant. Bought and sold notes were then made in which the broker was named as the buyer, and the defendant's name was not mentioned. The broker advised the defendant that he had bought the cotton of the plaintiffs for him, and the defendant did not object. The plaintiffs first demanded that the broker should accept and pay for the cotton, but not obtaining payment from him, they sued the defendant. It was held that the fact of the defendant's name being disclosed at the time of the contract did not preclude the plaintiffs from having recourse to him; that parol evidence of the circumstances under which the contract was made was admissible; and that the insertion of the broker's name in the contract, though his principal was known at the time, and the subsequent demands upon the broker for payment, did not necessarily amount to an election on the part of the plaintiffs to give credit to the broker, and to him only. Willes, J., in the opinion, said: "I do not agree that two persons cannot be severally liable on the same contract. The question is whether there was anything in the circumstances of this case to negative or exclude the liability of both principal and agent, or to substitute the liability of the latter for that of the former. The facts were properly submitted to the jury; and they have come to a conclusion upon them to which it was competent to them to come. There is nothing to prevent the seller from insisting upon having both principal and agent liable to him at the same time, with the additional advantage of knowing the principal's name at the time. The very object of the plaintiffs' insisting upon being informed of the name of the principal was to make him liable; and Cherry's name was inserted in the contract for the purpose of enabling them to charge him, at their option. To hold that asking the name of the principal at the time is to discharge the principal, would seem to me to be contrary to common sense."

The decision was affirmed in the Exchequer Chamber, where, among others, Kelly, C. B., said: "I think this case is free from doubt or difficulty. The contract was made in the name of Cherry, the agent; but the case shows that it was made on behalf of a principal who was named at the time. I think the plaintiffs had a right to sue either the agent or the principal, at their election. No doubt, the election being once determined, there is an end to the matter; as, where the agent has been sued to judgment. Here, however, nothing was done to determine the election at the time this action was brought against the principal. The question was, I think, properly left to the jury, and upon proper evidence; and the verdict was quite right."

So in Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314, it was held that the fact that a person knew, when he entered into a contract in writing not under seal, purporting on its face to be made on the other part by A, and signed by "A, agent," that A was in fact contracting as agent for B, will not prevent him from maintaining an action against B on the contract. Said the court: "We are of opinion that the plaintiffs' knowledge does not make their case

In the third case, as has been pointed out, the agent really does not act as agent at all. The credit is given to him personally. He is the principal in the transaction, and there is no ground for adding any other.

§ 1421. —— In view of the possible forms which the contract may thus take, the question arises, has the agent bound the principal alone, has he bound himself and the principal, or has he bound himself alone? Where the negotiations take on an express form, little question ordinarily arises; the difficulty is with those cases in which the matter is not made precise and definite at the time of the transaction, but is to be determined later, when one party affirms and the other denies that the agent's responsibility in some form was pledged. The question then becomes, To whom was the credit given, and, if given to the agent at all, was it an alternative or an exclusive one? How shall this question be determined?

§ 1422. —— **How determined.**—Where the promise is in writing, its construction and effect are ordinarily questions of law to be determined by the court. The question is for the court also where, though the promise is not in writing, only one inference can legally be

any weaker than it would have been without it. Whatever the original merits of the rule, that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency."

The leading case on the other side is, doubtless, Chandler v. Coe, 54 N. H. 561, 22 Am. Rep. 437, in which it was held that where a written contract is made in the name of an agent of a then known principal, the making of the contract itself constitutes an election to hold the agent and the principal cannot afterwards be held. It was conceded that the rule would be different if the principal had not then been known. Said the court: "But if the principal was known when the contract was made and signed the case is different. If the party who received from an agent a written contract executed in the name of the agent, knowing that he acted for a principal, seeks to hold the principal, it must be on the ground that it was intended to be and was received by him as the contract of the principal; because, if he received it as the contract of the agent, knowing that he was an agent, that constitutes a conclusive election to look alone to the agent. Parol evidence, therefore, if admitted in such a case, does show that the contract which the parties intended to make was not what the writing indicates, but different. It shows that an error was committed in writing it. Its admission, therefore, allows 'the uncertain testimony of slippery memory' to come in and control what the parties have deliberately written and signed, and this is inadmissible because the writing furnishes the best evidence of the actual contract." See also, Ferguson v. McBean, 91 Cal. 63, 14 L. R. A. 65; Gillig v. Lake Bigler Road Co., 2 Nev. 214; Heffron v. Pollard, 73 Tex. 96, 15 Am. St. Rep. 764.

drawn from the facts. In other cases, the question whether the credit was given to the agent personally is always one of fact to be determined from all the circumstances of the case.[21] In either event, the law aims to ascertain the intent of the parties, and when that is ascertained it is usually conclusive if it can be made so without conflicting with established rules of law.[22]

In searching for the intention, several considerations may be called in aid. Thus, where dealings are had with one known to be acting as the agent of a disclosed principal, the legal presumption is that the credit was given to the principal rather than to the agent personally, and this presumption will prevail in the absence of evidence that the credit was given to the agent, and the burden of proof rests upon the party alleging it.[23] So the fact that the agent was known to be insolvent may be taken into consideration in determining whether the credit was given to the agent or his principal.[24]

So, too, in determining the intention, the fact that under one construction the contract will have validity and force, while under the other it will have neither may be taken into consideration.[25]

[21] Anderson v. Timberlake, 114 Ala. 377, 62 Am. St. Rep. 105; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Steamship Co. v. Merchants' Desp. Trans. Co., 135 Mass. 421; Hovey v. Pitcher, 13 Mo. 191; Fleming v. Hill, 62 Ga. 751; Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Paterson v. Gandasequi, 15 East, 62; Addison v. Gandasequi, 4 Taunt. 574.

[22] Whitney v. Wyman, *supra;* Worthington v. Cowles, 112 Mass. 30; Phinizy v. Bush, 129 Ga. 479.

[23] Anderson v. Timberlake, 114 Ala. 377, 62 Am. St. Rep. 105; Spry Lumber Co. v. McMillan, 77 Ill. App. 280; Ketchum v. Sears, 154 Ill. App. 52; Mead v. Altgeld, 186 Ill. 298; Michael v. Jones, 84 Mo. 578; Huston v. Tyler, 140 Mo. 252; Blount v. Tomlinson, 57 Fla. 35, 48 So. 751; Meade Plumbing Co. v. Irwin, 77 Neb. 385; Meeker v. Claghorn, 44 N. Y. 349, 352; Foster v. Persch, 68 N. Y. 400; Ferris v. Kilmer, 48 N. Y. 300; Hall v. Lauderdale, 46 N. Y. 70; Bank of Genesee v. Patchin Bank, 19 N. Y. 312; Title Guarantee Co. v. Sage, 131 N. Y. Supp. 278; Key v. Parnham, 6 Har. & J. (Md.) 418; Johnson v. Welch, 42 W. Va. 18; Alexander, etc., Lumber Co. v. McGeehan, 124 Wis. 325; Boyd Grain Co. v. Thomas (Ark.), 142 S. W. 1150; Jewell v. Colonial Theater Co., 12 Cal. App. 681; Walker v. Cross, 87 C. C. A. 324, 160 Fed. 372. Says Swayne, J., in Whitney v. Wyman, *supra*, "Where the principal is disclosed, and the agent is known to be acting as such, the latter can not be made personally liable unless he agreed to be so."

Where a physician summoned to attend a tramp run over by a railway engine telephones the general superintendent of the company asking if he shall go and the latter replies, yes, there can be no presumption that the superintendent intended to bind himself personally for the physician's pay. Michigan College of Medicine v. Charlesworth, 54 Mich. 522.

[24] Garrett v. Trabue, 82 Ala. 227; Ferris v. Kilmer, 48 N. Y. 300.

[25] Thus in Knickerbocker v. Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595, a letter written by the cashier of a

§ 1423. ——— What facts not conclusive.—In endeavoring to determine to whom the credit was given, a number of common facts may be considered which, while ordinarily significant, are not neces-

national bank upon the official letterhead of the bank, requesting the person addressed to furnish a bond for certain persons named in the letter and saying "They are good customers of ours and if you will sign said bond we will stand between you and all harm," was signed "L. T. Wilcox, Cashier." In an action against Wilcox brought by the person addressed who furnished the bond and now demanded indemnity, the court held that the letter could not bind the bank because such an undertaking would be *ultra vires*. Did it, then, bind Wilcox? It is well settled that such a signature as this contrary to the ordinary rule of *descriptio personae*, is regarded as the signature of the bank. It being legally impossible to hold the bank, can the promise be regarded as an individual one? The court below directed a verdict for the defendant. The supreme court held this error, saying: "The paper not being the contract of the bank, then, can it be said to be the contract of Wilcox himself? Does it, upon its face, appear so clearly to have been *intended* as the undertaking of the bank, executed through Wilcox as its cashier and agent, as to bring it within the rule that his want of authority to bind the bank, for which he assumed to act, does not render him individually liable, when the facts and circumstances indicate that no such liability was intended by either of the parties? In deciding this question, weight must be given to the argument that the writing of this letter will not lightly be assumed to have been a mere idle ceremony. We must assume that the parties to it intended it to have some effect. The cases in Missouri, (Michael v. Jones, 84 Mo. 578; Humphrey v. Jones, 71 Mo. 62; and Cement Co. v. Jones, 8 Mo. App. 373), relied on by counsel for defendant, were all cases in which the guardian of an insane person had traded with his ward's estate, contrary to the provisions of law, and had suffered losses. The persons dealing with him had done so with full knowledge of the fact that he was acting not for himself, but for his ward. It was held that where the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent.

"We cannot apply that rule to this case, for the reason that it does not clearly and unequivocally appear that Wilcox was claiming to act for the bank, and that he was not intending to bind himself. To say that he intended to bind the bank is to suppose him ignorant of the plain rules of law governing the institution of which he was a principal officer. There are many cases in which it has been held that the addition to one's signature of his title does not make the paper the contract of the corporation in which he is an officer. Such designation has been treated as a mere description of the person. Tilden v. Barnard, 43 Mich. 376, 38 Am. Rep. 197; Hayes v. Brubaker, 65 Ind. 27."

While the rule stated in the text is believed to be sound the conclusion in the case just referred to, is believed to be questionable. Where the agent adopts a form of signature which is the common and accepted form when it is intended to bind the principal, can any fair inference be drawn that he intended to bind himself personally in this case because the contract was one not within the power of the principal? In Mer-

sarily conclusive. Thus the fact that goods sold were charged to the agent "is no conclusive evidence that the credit was given by the vendors exclusively to the agent, and that they intended to look to him solely for their pay;"[26] the fact that the other party accepts a written obligation signed by the agent alone is not conclusive;[27] and even, by the weight of authority at least, as has been seen, the fact that the other party with knowledge of both principal and agent, enters into a written contract, in which the agent alone is named as a party, is not conclusive of his intention not to hold the principal also.[28]

chants' & Planters' Packet Co. v. Streuby, 91 Miss. 211, the facts and the opinion are so brief that they may be reproduced entire. Opinion by Calhoon, J.: "This action is to hold Streuby liable personally as a subscriber on his signature to the capital stock of a corporation. His signature is in these words: 'F. Streuby, for Levy Bros. Oil Mills, Ltd.' The oil mill was a corporation, and so it was powerless, in this state, to subscribe for stock of another corporation. This was equally known to him and appellant corporation, and no fraud or fraudulent representation appears. We have, therefore, not a case where the principal was or could have been bound by the subscription in any event; it being *ultra vires*. We hold that the signatures did not bind Streuby personally, and adopt the reasoning of Judge Brewer in the two cases of Holt v. Winfield Bank (C. C.), 25 Fed. 812, and Abeles v. Cochran, 22 Kan. 405, 31 Am. Rep. 194."

In the opinion of Brewer, J., in Abeles v. Cochran, *supra*, there is a very exhaustive examination of the question.

See also Thilmany v. Iowa Paper Bag Co., 108 Iowa, 357, 75 Am. St. Rep. 259.

[26] Meeker v. Claghorn, 44 N. Y. 349; so also, Foster v. Persch, 68 N. Y. 400.

So where the question was whether painting had been done for the wife or for her husband as her agent in the contracting, the fact that after the painter had been told that the house belonged to the wife, he made out his bill against the husband, while perhaps evidence of an intention to look to the husband alone, was not absolutely conclusive of such a purpose, and of an abandonment of any claim against the wife. Dyer v. Swift, 154 Mass. 159.

The mere fact that one is an independent contractor for the erection of a building is not conclusive that in the particular case he did not act as agent for the proprietor. Lambert v. Phillips, 109 Va. 632. See also, Gardner v. Bean, 124 Mass. 347; Raymond v. Eagle Mills, 2 Metc. (Mass.) 319.

[27] Coleman v. First Nat. Bank of Elmira, 53 N. Y. 388; Gates v. Brower, 9 N. Y. 205, 59 Am. Dec. 530.

[28] Calder v. Dobell, L. R. 6 C. P. 486; Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314.

In York Co. Bk. v. Stein, 24 Md. 447, it was said: "The law is well settled that the principal is personally responsible in all cases of contracts made by an agent, within the scope of his authority, and this is not varied by the fact that the agent contracts in his own name, whether he discloses his agency or not, provided the circumstances of the case do not show that an exclusive credit was given to the agent."

In Merrell v. Witherby, 120 Ala. 418, 74 Am. St. R. 39, it is said: "From the authorities, the rule is deducible that, when a sale is made to one who is acting in the purchase

Where, under the circumstances, it is properly found that the agent has pledged his own responsibility, the fact that he did not intend to do so, will not relieve him.[29]

as agent for a principal who is known to the vendor, and only the personal obligation of the agent is taken for the price of the property sold, the *prima facie* presumption arises that the personal credit is given to the agent alone."

Contra: The leading case to the contrary as has been seen is Chandler v. Coe, 54 N. H. 561, 22 Am. Rep. 437. See Anderson v. Timberlake, 114 Ala. 377, 62 Am. St. Rep. 105, *supra*, where it is said that in order to make the agent liable the credit must have been given *exclusively* to him. In Calder v. Dobell, *supra*, Hannen, J., in the Exchequer Chamber, referred with approval to Story on Agency, § 160*a*. With reference to this authority, the court, in Chandler v. Coe, expressed itself as follows:

"It is laid down in Story on Agency, sec. 160*a*, that the doctrine maintained in the more recent authorities' is, that 'if the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued and be entitled to sue thereon, and his principal also will be liable to be sued, and be entitled to use thereon, in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it.' This section first appeared in the second edition of the work, published a short time before the death of the distinguished author. A careful examination of the numerous authorities there cited in support of it will show that perhaps not one of them sustains it to the full extent of holding it to be immaterial whether the principal is 'known or unknown,' unless Bateman v. Phillips, decided in 1812, 15 East, 272, may be an exception. On the contrary, this unguarded statement of our great jurist has occasioned most of the decisions which might now be cited as going to that extent. The dictum of Baron Parke, which we have already quoted from Higgins v. Senior, the leading case cited by Story, does indeed sustain him, and it was doubtless the authority on which he chiefly relied; but the point did not arise in that case, the question there being, not whether parol evidence is admissible to charge the principal in such a case, but whether it is admissible to discharge the agent,—which was decided in the negative, and is everywhere well settled. But in Calder v. Dobell, before cited, the precise question arose, and the decision sustains the section quoted from Story to the fullest extent; and such is now, unquestionably, the law in England."

Chandler v. Coe, is approved and followed in Ferguson v. McBean, 91 Cal. 63, 14 L. R. A. 65, and Gillig v. Lake Bigler Road Co., 2 Nev. 214, though the latter case involved a negotiable instrument.

The syllabus in McIntosh-Huntington Co. v. Rice, 13 Colo. App. 393, also contains a statement of the proposition which is contrary to Calder v. Dobell, but the case shows that the contract was under seal and the court refers to Rice v. Bush, 16 Colo. 484, in which case the contract was also under seal.

So in Heffron v. Pollard, 73 Tex.

[29] McConnell v. Holderman, 24 Okla. 129.

§ 1424. ——— Principal also may be bound—Election.—Where, within the rules above referred to, it is found that the agent has pledged his own responsibility, he will of course be bound accordingly.[30] Where both the principal and the agent are liable, the liability of the agent continues until the other party has done something showing that he intends to enforce it against the principal alone. Whether he has done so or not is usually a question of fact to be decided with reference to the significance of the acts relied upon as evincing an election,[31] although there are certain acts which may constitute an election as a

96, 15 Am. St. Rep. 764, in which Chandler v. Coe, *supra*, is cited with apparent approval. It is said: "If however the principal be disclosed, and the face of the writing shows that the agent is bound, it is presumed that the other party has elected in the contract itself to look to the agent and the principal is not liable upon it."

[30] Bell v. Teague, 85 Ala. 211; Manly v. Sperry, 115 Ala. 524; Mead v. Altgeld, 136 Ill. 298; Miller v. Early (Ky.) 58 S. W. 789; Ziegler v. Fallon, 28 Mo. App. 295; Ross v. McAnaw, 72 Mo. App. 99; Landyskowski v. Lark, 108 Mich. 500; Maine Red Granite Co. v. York, 89 Me. 54; Dockarty v. Tillotson, 64 Neb. 432; McBratney v. Heydecker, 8 Misc. 309; O'Rorke v. Geary, 207 Pa. 240; Hardman v. Kelley, 19 S. D. 608; Cream City Glass Co. v. Friedlander, 84 Wis. 53, 36 Am. St. Rep. 895, 21 L. R. A. 135; Higgins v. Senior, 8 M. & W. 834.

In order to hold the agent upon a written contract, it is of course essential that the contract shall contain apt words to bind him. Johnson v. Welch, 42 W. Va. 18.

Where an agent in selling goods for a principal, makes an oral warranty for himself, and afterward makes a written contract for his principal, with a warranty by the principal, his personal oral warranty is not merged in the written warranty of his principal; and in an action on a note payable to the agent, for the goods, evidence of the oral warranty is admissible. Shordan v. Kyler, 87 Ind. 38. See also, Dahlstrom v. Gemunder, 198 N. Y. 449, 19 Ann. Cas. 717; Luckes v. Meserole, 132 App. Div. N. Y. 20.

[31] As to the effect, as constituting an election, of such acts as taking the note of one party, charging the goods to him, filing a claim against his estate and the like, see *post*, Book IV, Chap. V, under *Undisclosed Principals*. Also see, Gardner v. Bean, 124 Mass. 347; Raymond v. Crown, etc., Mills, 2 Metc. (Mass.) 319; Dyer v. Swift, 154 Mass. 159.

Where a note signed by an agent, as accommodation maker for his principal, came to the hands of the plaintiff without knowledge of the agency of the signer: after the disclosure to him of the principal, the principal became insolvent, and the plaintiff presented his claim against the estate and received a dividend. The plaintiff contended that his action was solely for the purpose of keeping alive the agent's claim against his principal's estate. The court held that this did not constitute such an election to hold the principal as to preclude the plaintiff from recovering the residue from the agent. Hoffman v. Anderson, 112 Ky. 893.

Where the facts show that the third party has manifested an intention to hold the principal exclusively, he cannot thereafter hold the agent. Provenchere v. Reifess, 62 Mo. App. 50.

matter of law. Whether the commencement of an action against the principal is *per se* an election, or whether the action must be prosecuted at least to judgment, is a question upon which there has been some difference of opinion, but the weight of authority is with the latter view.[32]

Where on the other hand the credit was originally given to the agent exclusively, the election is made at the time of the contract and the other party cannot afterward resort to the principal.[33]

§ 1425. ——— Agent alone liable on negotiable and sealed instruments.—The rule that either the principal or the agent may usually be held liable even upon written contracts made in the agent's name is, as has already been suggested, subject to two well-defined exceptions.

In the case of negotiable instruments, the rule is well settled that no one can be charged as a party who does not appear as such upon the face of the instrument. If, therefore, within the rules already laid down,[34] the instrument is not so executed as to bind the principal by its terms, he cannot be held upon the instrument at all. In such a case (except in the rare event in which the instrument is so executed

[32] So held in Codd Co. v. Parker, 97 Md. 319; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Murphy v. Hutchinson, 93 Miss. 643, 21 L. R. A. (N. S.) 785, 17 Ann. Cas. 611; Buckingham v. Trotter, [1901] 1 State Rep. N. S. Wales, 253.

The question commonly arises, as would naturally be expected, in actions against the principal, in which it is claimed that the other party has elected to hold the agent. The principle, however, seems to be the same in both cases, and the weight of authority is clearly to the effect that nothing short of a prosecution of the claim to judgment operates *per se* as an election.

See *post*, Book IV, Chap. V, under *Undisclosed Principal*. Priestly v. Fernie, 3 H. & C. 977; Kingsley v. Davis, 104 Mass. 178; Lindquist v. Dickson, 98 Minn. 369, 6 L. R. A. (N. S.) 729, 8 Ann. Cas 1024; Ferry v. Moore, 18 Ill. App. 135; Steele Smith Gro. Co. v. Potthast, 109 Iowa, 413; Tuthill v. Wilson, 90 N. Y. 423.

In McLean v. Sexton, 44 N. Y. App. Div. 520, it was held that under the mechanics' lien act of New York, one action may be maintained against both principal and agent, although only one satisfaction can be had.

[33] Silver v. Jordan, 136 Mass 319; Watle v. Thayer, 56 Ill. App. 282. In the Matter of Bateman, 7 Misc. (N. Y.) 633.

If the seller of a chattel takes the promissory note of the agent of the buyer, knowing him to be such and intending to receive it as payment and to give exclusive credit to the agent, he cannot, upon its dishonor, recover of the principal. Perkins v. Cady, 111 Mass. 318.

Where an agent contracts for his principal with the distinct understanding that the agent is to pay for the work, he is liable therefor, and the act of the plaintiff in erroneously joining the principal as a party defendant is not an act which will release the agent. Ross v. McAnaw, 72 Mo. App. 99.

[34] See *ante*, § 1123 *et. seq.*

that no one is bound), the agent alone is bound.[35] What the forms of execution are, which impose personal liability upon the agent, has been so fully considered in an earlier chapter[36] that nothing further need be added to it here. As has there been seen, where the promise is otherwise an individual one, words indicating a representative character are usually regarded as mere *descriptio personae.*

The case of the instrument under seal furnishes the second exception. Here also under well-settled rules, that person only is bound who appears on the face to be the party to the deed. If that person be the agent, he alone is liable. A fuller discussion of this exception will be found in a later section.[37]

§ 1426. Agent may be jointly liable with principal.—The cases referred to in the preceding sections are chiefly cases in which the principal was the only party having any real interests. It is perhaps scarcely necessary to mention that there may be cases in which the agent will have such an interest of his own, together with his principal, that the principal and the agent may both be bound upon the contract.[38] And even though the agent may have no personal interest in the transaction, no reason is apparent why in binding a disclosed principal he may not bind himself jointly with that principal. It is, however, difficult to see, how he can bind himself jointly with an undisclosed principal.[39]

§ 1427. Agent may bind himself by collateral contract.—Still further, it is possible that the agent may bind his principal only upon the main or principal contract and may bind himself only by a subsidiary contract collateral to the main one. Thus an agent in selling his principal's goods, for example, may add to the contract of sale which he makes for his principal his own collateral agreement to warrant the quality of the goods so sold.[40] In such a case, of course,

[35] See *ante*, Book III, Chap. III.

[36] See Book III, Chap. III.

[37] See *post*, Book IV, Chap. V.

[38] Gill v. General Electric Co., 129 Fed. 349; Moore v. Booker, 4 N. D. 543.

Where an agent acts in behalf of himself and an undisclosed principal both are liable upon the contract. Lull v. Anamosa Nat. Bank, 110 Iowa, 537.

[39] See the curious case of Tew v. Wolfsohn, 77 N. Y. App. Div. 454, in the Court of Appeals, 174 N. Y. 272, in which there was much discussion and the judges in both courts were divided in opinion. The only thing, however, which seems to be decided is that the anomalous complaint in the case was not open to demurrer upon the ground that two causes of action had been improperly joined, the majority in the court of appeals holding that the complaint stated but one cause of action upon a contract either of the principal alone made by the agent or by the principal and agent jointly.

[40] Wilder v. Cowles, 100 Mass. 487; Rondquist v. Higham, 33 Minn. 490;

there is no room for election, because both are not bound to the same undertaking.

§ 1428. How in case of public agent.—It is also competent for a public agent to bind himself personally, if he so elects, but it is not presumed that he will or has done so. Indeed, the presumption that the agent of a known principal intends to bind the latter rather than himself, is stronger in the case of a public agent than in that of the agent of an individual. It is incumbent, therefore, upon him who seeks to hold a known public agent personally responsible, to adduce clear proof of an intention so to be bound.[42]

§ 1429. Agent's right of set-off and recoupment.—When an agent who has made himself liable on a contract made for his principal is sued thereon, a question may arise respecting his right of set-off or recoupment against the plaintiff's claim. With respect of claims of his own of which he may desire to avail himself, there would seem to be no doubt of his right to do so. With respect of claims belonging to his principal the case is not so clear. The editors of the ninth American edition of Smith's Leading Cases express the opinion that the agent should be allowed to set off a claim due from the plaintiff to his principal, provided the principal consents; but they are also of opinion that the authorities are opposed to their view.[43] The cases actually in point are very few. In the case most frequently referred to,[44] where the agent was being sued upon a contract for services made for a principal, but alleged to bind the agent personally, the court held that the defendant could not set-off, against the plaintiff's claim, a demand which the principal had against the plaintiff arising out of an entirely separate transaction. There was no evidence as to whether the principal was willing or unwilling. No question was involved respecting a claim growing out of the same transaction, but the court said: "If the principal had made payments to the plaintiff (as distinguished from a set-off) for and on account of his work, that would have presented a different question."

Argersinger v. Macnaughton, 114 N. Y. 535, 11 Am. St. Rep. 867; Shordan v. Kyler, 87 Ind. 38; Dahlstrom v. Gemunder, 198 N. Y. 449, 19 Ann. Cas. 771; Luckes v. Meserole, 132 N. Y. App. Div. 20.

[42] New York, etc., Co. v. Harbison, 16 Fed. 688; Hall v. Lauderdale, 46 N. Y. 70; Gill v. Brown, 12 Johns. (N. Y.) 385; Miller v. Ford, 4 Rich. (S. C.) L. 376, 55 Am. Dec. 687; Hodgson v. Dexter, 1 Cranch (U. S. C. C.), 109, Fed. Cas. No. 6,565; Macbeath v. Haldimand, 1 T. R. (Durnf. & E.) 172; Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Walker v. Swartwout, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334; Roach v. Rutter, 40 Mont. 167.

[43] 2 Smith's Leading Cases, 9th Am. Ed. page 1370.

[44] Forney v. Shipp, 4 Jones (N. C.), Law, 527.

In a case in New York [45] counsel contended, "that an agent who is sued to compel him to pay a claim for which he has made himself liable can recoup any claim which his principal would have, arising out of the contract on which the agent is liable, but that he cannot recoup a claim of the principal arising out of another contract." The court said: "This is a correct statement of the law."

3. *Where the Agent has Received Money.*

§ 1430. In general.—The question of the liability of the agent to third persons, for money received by him, may arise under two states of fact. It may be money which the agent has received from such third persons to be paid over to his principal, but which, for some reason, they are desirous of recovering before it reaches the hand of his principal. Or it may be money received by the agent from his principal to be paid to such third persons, but which the agent has failed or refused to pay to them, either for some purposes of his own, or because he has been directed by his principal so to do.

The reasons why the party paying, in the first class of cases, may desire to recover the money may be very numerous. He may have paid it under mistake of law or fact, either as to his own liability to pay or the principal's right to receive. He may have paid it because he was induced or coerced by the fraud or extortion of the principal alone, of the agent alone, or of both. He may also desire to recover it because, though he would concede that the principal had the right to receive it at the time it was paid, he contends that something has since occurred that terminates the right of the principal to receive it.

a. Where Money has been Paid to Agent for Principal.

§ 1431. No liability where money properly paid to which principal was entitled.—Before taking up the cases in which there is alleged to have been some infirmity in the payment, it may be profitable to observe that where money has been paid to an authorized agent which was properly paid and which the principal had the right to receive and retain, the person paying it can not recover it from the agent, even though the agent fails or refuses to pay it to his principal. The agent owes a duty to his principal to pay it to the latter; the principal has ample remedies to compel payment; and it is no concern of the person paying that the agent does not perform this his duty to his principal.[46]

[45] Elwell v. Skiddy, 77 N. Y. 282. Same: Leterman v. Charlottesville Lumber Co., 110 Va. 769.

[46] Smith v. Essex Bank, 22 Barb. (N. Y.) 627; Hall v. Lauderdale, 46 N. Y. 70; Fisher v. Meeker, 118 App. Div. (N. Y.) 452; Colvin v. Holbrook, 2 N. Y. 126.

§ 1432. Liability for money paid to him by mistake.—An agent acting for a known principal and duly authorized, to whom money has, by mistake or other similar cause, been voluntarily paid for the use of his principal, is not liable to the person so paying it where, before notice of such mistake, he has paid it over to his principal, even though the principal had no legal right to receive it. In such event, the person paying it must look to the principal.[47]

The agent, however, may in most cases be held liable if, after being apprised of the mistake and required not to pay it over, he then pays the money to his principal.[48]

Where a third person buys goods of an agent and properly pays him for them, and later on demand pays again directly to the principal, he cannot recover from the agent. Fisher v. Meeker, *supra*.

[47] Hauenstein v. Ruh, 73 N. J. L. 98; Shepard v. Sherin, 43 Minn. 382; Gulf City Const. Co. v. Louisville, etc., Ry. Co., 121 Ala. 621; Lang v. Friedman, 166 Mo. App. 354, 148 S. W. 992; Ashley v. Jennings, 43 Mo. App. 142; La Farge v. Kneeland, 7 Cow. (N. Y.) 455; Law v. Nunn, 3 Ga. 90; Granger v. Hathaway, 17 Mich. 500; Buller v. Harrison, 2 Cowp. 565; Wallis v. Shelly, 30 Fed. 747; Morrison v. Currie, 4 Duer (N. Y.), 79; Pool v. Adkisson, 1 Dana (Ky.), 110; Duffy v. Buchanan, 1 Paige (N. Y.), 453; Cabot v. Shaw, 148 Mass. 459; Garland v. Salem Bank, 9 Mass. 408, 6 Am. Dec. 86; Silliman v. Wing, 7 Hill (N. Y.), 159; Upchurch v. Norsworthy, 15 Ala. 705; Tripple v. Littlefield, 46 Wash. 156; Gable v. Crane, 24 Pa. Super. 56. See also Ledwith v. Merritt, 74 N. Y. App. Div. 64, aff'd, 174 N. Y. 512. But in Baylis v. Bishop of London, [1913] 1 Ch. 127, it was held, distinguishing Sadler v. Evans, 4 Burr. 1984, that this rule did not apply to the Bishop of London, who had received tithe rent charges which had been paid in mistake of fact, and by him duly paid out or accounted for. It was held that the Bishop was not an agent within the meaning of the rule.

[48] See Buller v. Harrison, 2 Cowp. 565, (where plaintiff paid money, believed to be due on an insurance policy, to defendant as agent of the insured, but the loss was misrepresented); O'Connor v. Clopton, 60 Miss. 349, (where the plaintiff paid to defendant usurious interest on a note which defendant's principal held against plaintiff); United States Nat'l Bank v. National Park Bank, 59 Hun (N. Y.), 495, (affirmed without opinion, 129 N. Y. 647), (where plaintiff bank paid by mistake to defendant bank, which was agent of another party for collection, $5,000 on a draft which was originally drawn for a much smaller amount, the figures having been fraudulently raised); Garland v. Salem Bank, 9 Mass. 408, 6 Am. Dec. 86 (where the plaintiff, an endorser, had paid to the defendant, a collecting bank, the amount of the note, mistakenly believing that his liability as endorser had been fixed); Griffith v. Johnson, 2 Harr. (Del.) 177, (where the defendant, a collecting agent, by error in computation, had received more than was due on the amount he was authorized to collect.)

In Cox v. Prentice, 3 Maule & S. 344, the defendant had received a bar of silver from his principal. He sold it to plaintiff who paid him at the rate it assayed. The plaintiff upon discovering a mistake in the assay, recovered from the defendant the excess payment occasioned by the mistake.

Although the agent may thus be held, it is usually true that the other party may, at his option, hold the principal liable.

Even though the money has not yet actually come into the principal's hands, it is in the hands of his agent, and wherever at least the principal can be deemed to have authorized the agent to receive it, the party paying may recover it from the principal as though the principal had in fact received it.[49]

§ 1433. ——— The situation here seems to be this: the party paying the money to the agent, influenced by a mistake under which the principal may or may not also labor, has paid the money to the agent, with the understanding that he is to pay it to his principal. If, before he is notified of the mistake, the agent does the very thing he is expected to do,—namely, pays the money to his principal,—the other party can certainly have no claim upon him for its repayment. If, however, the agent is notified of the mistake before he has paid the money over, two situations may present themselves, (1) If the principal and the other party were mutually mistaken as to the right of the principal to receive the money, and the principal authorized the agent to receive it, and the other party paid it to the agent for the principal, it might very well be held that, even though the money has not yet been paid over, it is, in contemplation of law, in the hands of the principal, and the action should be against him only for its recovery. Against this view it may be urged that the principal was not really entitled to the money, that the authority to receive it was conferred by mistake, that the party paying is clearly entitled to have it back, and that he should be entitled to intercept it before it has gone further.

In Shepard v. Sherin, 43 Minn. 382, it was said: "The notice of the mistake, and requirement not to pay the principal, need not be formal. The rule that, if he pays over without notice, he is not liable, is for the agent's protection; and, to deprive him of the protection, the notice to him should be sufficient to apprise him what the mistake is and that by reason of it the party paying it to him intends to reclaim it."

Even if the agent be liable, the proper action, in the absence of fraud, is for money had and received and not for conversion. Mathews v. O'Shea, 45 Neb. 299.

[49] Cook v. Cook, 28 Ala. 660; Eufaula Grocery Co. v. Missouri National Bank, 118 Ala. 408.

In Eufaula Grocery Co. v. Missouri National Bank, *supra*, it is said: "The general proposition can not be well denied, that where a person, as authorized agent of another, receives and holds money which *ex equo et bono* belongs to a third, the latter may elect to hold either the principal or the agent responsible (the latter, by giving him notice of the election before he pays the money over to the principal), and maintain an action for money had and received against the party so elected

(2) Where the mistake is the mistake of the party paying only, the case is somewhat changed. Here the principal never thought that he was entitled to the money; he has given the agent no authority to receive it; he ought not to take it if the agent should offer to pay it to him, and there would seem to be no ground upon which such a payment, which the principal has not actually received, should be deemed a payment to him. The right to recover from the agent the money which is still in his hands would seem to be clear.

§ 1434. Liability for money received by him through wrongful act of principal alone.—The same rules should apply where the party paying has been led to make the payment as the result of the fraud or coercion of the principal alone, the agent being in no way a party to it.

In the cases in this section and the preceding one, the party paying, although his action may have been induced by mistake or fraud, really intended that the money should be paid to the principal, and if it has been so paid by the agent, before the other party demands it back, the agent should not be liable.[50] Inasmuch, however, as the principal in these cases had no right to the money, and there could really be no agency to receive it, the other party should be enabled to regain it if he can intercept it before it leaves the agent's hands.[51]

§ 1435. ——— Change in agent's situation as equivalent of payment.—Within the contemplation of the rule of the two preceding sections, the agent should not be liable where, before notice of the mistake or fraud, he has done some act upon the assumption that the payment was good, by which he will be prejudiced if it be held invalid.[52]

to be held.—2 Greenl. Ev. (15th ed.) 125, and authorities there cited. Story on Agency, 266–68, 300, 301; Paley on Agency (by Lloyd), pp. 388–94; Kennedy v. Balt. Ins. Co., 3 Har. & J. (Md.) 367, 6 Am. Dec. 499; 2 Ency. Pl. & Pr. 1021. The case of Cook v. Cook, 28 Ala. 660, is also directly in point. An election to hold the one is a renunciation of all remedy against the other. If the principal be sued, he must be at liberty to receive the money from the agent. The plaintiff cannot coerce money out of him, and, pending the proceeding for that purpose, stop it in the hands of the agent, depriving him, the principal, of the means of obtaining it to meet the plaintiff's recovery against him. For the same reason, if the election is to hold the agent, and the proper notice is given to stop the money in his hands, the principal could not, thereafter, be properly sued. The remedies are, indeed in every respect, inconsistent, not concurrent."

[50] Agent not liable for money received by him as result of duress or extortion practiced by principal without the agent's knowledge where he has paid over the money to the principal before notice or demand. Owen v. Cronk, [1895] 1 Q. B. 265.

[51] Herrick v. Gallagher, 60 Barb. (N. Y.) 566.

[52] See La Farge v. Kneeland, 7 Cow. (N. Y.) 455; Mowatt v. McLean, 1

But so long as he stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal or done something equivalent to it, he remains liable if he be liable at all.[53]

The mere forwarding of his account to his principal and placing the money to his credit, is not such a change of circumstances as will relieve him.[54]

§ 1436. Liability where principal's right terminated after payment.—The question of the right to recover the money may also arise, as has been pointed out, where, though it is conceded that the principal had a right to it at the time it was paid to the agent, it is contended that his right to it had ceased before it was paid over by the agent. Here, by the hypothesis, the principal's right to the money was clear at the time it was paid, and if the agent has paid it over to the principal, before the change in circumstances relied upon, there would be no ground for contending that the agent was liable to the party paying.[55] But suppose that after payment to the agent and before he has paid it to his principal or altered his situation respecting

Wend. (N. Y.) 173; Langley v. Warner, 3 N. Y. 327; McDonald v. Napier, 14 Ga. 89; Holland v. Russell, 1 B. & S. 424; Buller v. Harrison, 2 Cowp. 565.

The application of the money, with the principal's consent, to a debt he owed the agent, and a closing of the account between them, constitutes a payment to the principal within the rule. Mowatt v. McLean, *supra;* McDonald v. Napier, *supra;* Holland v. Russell, *supra.*

In LaFarge v. Kneeland, *supra*, the agent had by the direction of his principals, who were partners, closed the account with them and transferred the money to the individual account of one of the partners. This was held equivalent to payment.

[53] Elliott v. Swartwout, 10 Peters (35 U. S.), 137, 9 L. Ed. 373; Buller v. Harrison, *supra;* Cox v. Prentice, 3 Maule & Sel. 348.

[54] Cox v. Prentice, *supra;* Buller v. Harrison, *supra.* See also, Smith v. Binder, 75 Ill. 492; Garland v. Salem Bank, 9 Mass. 408, 6 Am. Dec. 86.

In Buller v. Harrison, *supra*, it was said: "In this case, there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced. In short no alteration in the situation which the defendant and his principal stood in towards each other."

So in Smith v. Binder, 75 Ill. 492, quoting from Vol. I of Chitty on Pleadings, it is said: "The mere passing of such money in account with his principal, or makng a rest, without any new credit given to him, fresh bills accepted, or further sums advanced to the principal in consequence of it, is not equivalent to a payment of the money to the principal."

That merely crediting the amount to the principal's account is not enough, see also, United States Nat'l Bank v. National Park Bank, 59 Hun, 495, (affirmed without opinion, 129 N. Y. 647); National Park Bank v. Seaboard Bank, 114 N. Y. 28, 11 Am. St. R. 612; Bank of Commerce v. Union Bank, 3 N. Y. 236.

[55] Cooper v. Tim, 16 N. Y. Misc. 372; Gable v. Crane, 24 Pa. Super. 56.

it, it is contended that the principal's right has terminated. May the other party now recover the money from the agent? Where the agent of a fire insurance company had issued a policy and received the premium, but, before he had paid the premium to the company, the company was rendered insolvent by the great fire in Chicago during the term of the policy, whereupon the insured demanded back the premium from the agent, it was held that the insured could recover the premium from the agent.[56]

§ 1437. ——— Where a judgment had been obtained, but a writ of error had been sued out to reverse it, but the amount had been collected upon execution and paid over to the plaintiff's attorney who knew of the writ of error, it was held that, upon the reversal of the judgment, while the money was still in the attorney's hands, the judgment debtor could not recover it from the attorney.[57] So, where the money had been paid to the attorney before any steps were taken to reverse the judgment, it was held that the attorney was not liable, although the money remained in his hands when the judgment was subsequently reversed. The money, it was held, belonged to his principal, and the action should be against the latter.[58]

§ 1438. ——— Where money to apply upon the purchase price of land under a contract for its sale had been paid to the agent of the seller authorized to receive it, and the buyer afterward rescinded the contract and brought an action against the agent to recover the part payment which was still in his hands, it was held by the supreme court of Pennsylvania that the action against the agent could not be maintained.[59] Said the court: "He entered into no contract with the plain-

[56] Smith v. Binder, 75 Ill. 492.

The decision here was based upon the theory that, upon the insolvency of the company, there was a total failure of consideration, and it had no right to the premium.

[57] Langley v. Warner, 3 N. Y. 327, reversing s. c. 1 Sandf. 209. Here, the attorney had retained the money in pursuance of an agreement with his client that he might apply it on what the client owed him; but the court said that, upon collection, the money became the property of the client and he could do what he pleased with it.

[58] McDowell v. Napier, 14 Ga. 89; Wright v. Aldrich, 60 N. H. 161. In Bank of U. S. v. Bank of Washington, 6 Peters (31 U. S.), 8, 8 L. Ed. 299, the defendants paid a judgment to the agent of the plaintiff and gave him verbal notice of their intention to appeal; they did appeal and the judgment was reversed; they now demand of the agent the money so paid to him. It was held that they could not recover.

[59] Kurzawski v. Schneider, 179 Pa. 500. See to same effect: Gable v. Crane, 24 Pa. Super. 56; Huffman v. Newman, 55 Neb. 713; Bogart v. Crosby, 80 Cal. 195; Ellis v. Goulton, [1893] 1 Q. B. 350.

So in Wilson v. Wold, 21 Wash. 398, 75 Am. St. Rep. 846, respondent was the agent of the purchaser of land at execution sale and had col-

tiff, and violated no duty which he owed him. An agent who receives money paid on account of a contract for the purchase of real estate made with his principal cannot be held liable in an action by the purchaser to recover the money back on proof of facts which would entitle the purchaser to rescind the contract."

This conclusion seems to be the sound one for the class of cases here being considered. At the time of payment, by the hypothesis, the money belonged to the principal and the payment was rightfully made. Payment to the agent, under these circumstances, was payment to the principal, and the agent is responsible to the principal for it. The agent had made no contract with the person paying, and was guilty of no breach of duty toward him. Even though the agent may have the money still in his possession, he holds it for his principal, and the action should be against the principal,[60] especially where there may be controversy respecting the existence of such a change in circum-

lected rents for him. Later appellant redeemed the land and brought this action against respondent to recover the rents collected during the period of redemption. It was held that the action could not be maintained against the respondent. Said the court: "Respondent was merely the agent of the purchaser. The fact of his agency was known to the appellant. At the time of their collection the law entitled him to collect these rents, and, had not the appellant subsequently redeemed the property, respondent's principal would have been entitled to retain the rents so collected. So that originally the money was rightfully received by respondent as agent for his principal, the purchaser at the sale. The fact of agency being known, appellant's right of action was against the principal and not against the agent."

Where an agent authorized to do so, received a payment on the sale of land, promising to refund it if the owner did not approve of the sale, and then paid the money over to his principal, the purchaser cannot recover the money of the agent upon breach, by the principal, of the promise to refund. Tripple v. Littlefield, 46 Wash. 156. See also, Gulf City Const. Co. v. Louisville, etc., Ry. Co., 121 Ala. 621; Edgell v. Day, L. R. 1 C. P. 80; Bamford v. Schuttleworth, 11 Ad. & E. 926.

But where a sum of money, as part payment on the purchase price of land, was paid by the buyer to an agent of the seller on the signing of the contract, with an understanding that the balance would be paid when good title was made, but title was not made, it was held that the buyer, on demand, could recover this sum from the agent, although the agent claimed the same as commission due him from his principal. Gosslin v. Martin, 56 Oreg. 281.

In Wells v. Birtchnell, 19 Vict. L. R. 473, it is said that where an agent authorized to sell land receives a deposit in respect of it and then does not effect a sale, the money may be recovered from the agent. See also, Walder v. Cutts, [1909] Vict. L. R. 261. But compare Ellis v. Goulton, [1893] 1 Q. B. 350; Christie v. Robinson, 4 Comw. L. R. (Australia) 1338. See also *post*, § 1445.

[60] Where a lessee paid rent to duly authorized agents of lessors, agreeing to treat the payment as conditional upon a payment of rent by a co-

stances as will justify the party paying in demanding back his money. That is a question which should be litigated with the principal and not with the agent.

§ 1439. Agent liable for money mispaid though paid over, if agency was not known.—Where, however, the third person who paid money to an agent under a mistake of fact had no notice of the agency, he may recover the money so paid from the agent although the latter has paid it over to his principal.[61] In such a case, as has been pointed out,[62] "there is of course no presumed consent or direction that he may pay over, and payment to his principal will be no defence. In such a case, having acted as a principal, he will not be permitted to defend on the ground that he was not the principal."

lessee, who failed to pay, *held*, the rent could not be recovered from the agents who were fully authorized, even though they had not accounted to the principal, but resort must be had to their principal. Cooper v. Tim, 16 N. Y. Misc. 372, citing Colvin v. Holbrook, 2 N. Y. 126 (where a deputy sheriff received money rightfully paid to him, in his official capacity, by a third person, and this payment so affected the rights of plaintiff, that the plaintiff was entitled to the money, he could not recover of the deputy sheriff who acted with authority and owed a duty only to the sheriff, even though the money still remained in the deputy's hands); Hall v. Lauderdale, 46 N. Y. 70.

A life insurance agent who receives an application for a policy accompanied by a payment of the first premium, and gives a receipt, on a form provided by the company and headed with its name, stating that if the application is not accepted the payment will be returned,—all being done by the general authority of the company,—is not personally liable for the return of the money if the policy be not issued as agreed. The liability is upon the company. Bleau v. Wright, 110 Mich. 183.

An attorney foreclosed a mortgage for his client, the first mortgagee, and from the proceeds of the sale, paid the costs and the first mortgage debt; a surplus remained in his hands, and the plaintiff in this action, claiming under a second mortgage, seeks to recover the surplus from the attorney. *Held*, the action would not lie against him, but against the first mortgagee, his client. Costigan v. Newland, 12 Barb. (N. Y.) 456.

Where money is deposited with an agent for his principal to be returned by the principal if the principal does not perform, the agent is not liable for the return of the money on the principal's default. Cohen v. Barry, 108 N. Y. Supp. 573 (lease); Finnegan v. Geoghegan, 111 N. Y. Supp. 656 (lease); Levine v. Field, 114 N. Y. Supp. 819 (sale).

[61] Smith v. Kelley, 43 Mich. 390; Newall v. Tomlinson, L. R. 6 C. P. 405; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287; Needles v. Fuson, 24 Ky. L. Rep. 369, 68 S. W. 644; Klotz v. Gordon, 117 N. Y. Supp. 240.

In Holt v. Ross, 54 N. Y. 472, 13 Am. Rep. 615, the rule was applied to an express company which collected a check through a forged endorsement. The court (one judge dissenting) held that the nature of its business, etc., was not sufficient notice of its agency. "To shield themselves from liability for their acts they must give the names of their principals."

[62] United States v. Pinover, 3 Fed. 305.

§ 1440. Agent liable without notice for money illegally obtained.—An agent who has obtained money from third persons illegally, as by compulsion or extortion,—the persons paying it having done so involuntarily and with no intent or purpose that he should pay it to his principal—is liable to the persons from whom he received it, although he has paid it over to his principal without notice not to do so.[63]

Where the agent in these cases acts from some wrong motive of his own, he is clearly liable; but even though he acts in good faith supposing that the demand he makes is justified, still if he coerces the other into paying what he was not legally liable to pay, the agent will be liable.

Money so paid is not paid voluntarily nor really on the account of the principal, since no authority he could derive from his principal would justify it, but merely as the result of the agent's illegal demands.

This principle has been frequently applied to the cases of excise and custom-house officers, tax collectors, sheriffs, and other officers who by virtue of their office have exacted and enforced the payment of illegal fees, taxes and duties.

The rule, however, does not apply to an agent who has merely been the innocent conduit through whom money illegally exacted by another has been paid over to the principal.[64]

§ 1441. Agent liable without notice for money obtained through his misconduct.—For similar reasons, the agent will be liable, even though he may have paid it over, for money which his principal had not authorized him to receive, and which the agent obtained by his own misconduct or default.[65]

[63] Ripley v. Gelston, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271; Frye v. Lockwood, 4 Cow. (N. Y.) 456; Hearsey v. Pruyn, 7 Johns. (N. Y.) 179; Messer-Moore Ins. Co. v. Trotwood Park Land Co., 170 Ala. 473, Ann. Cas. 1912 D. (25 A. & E. Ann. Cas.) 718; Elliott v. Swartwout, 10 Pet. (U. S.) 137, 9 L. Ed. 373; First National Bank v. Watkins, 21 Mich. 483; Bocchino v. Cook, 67 N. J. L. 467; Snowdon v. Davis, 1 Taunt. 359; Miller v. Aris, 3 Esp. 231. See Grover v. Morris, 73 N. Y. 473.

[64] Owen v. Cronk, [1895] 1 Q. B. 265.

[65] Thus where a lawyer was overpaid the amount of a judgment in favor of a non-resident client,—the over-payment being attributable to his failure to inform the judgment debtor of a previous payment thereon by his debtor, of which he had no notice—the transmission of the overpayment to the client before discovery of the mistake was held to be no protection against liability for its re-payment to the judgment debtor. The court said that the rule that payment to the principal exonerates the agent does not apply "where the agent receives the money outside of his agency and of his own wrong." Metcalf v. Denson, 63 Tenn. (4 J. Baxt.) 565.

Where a debtor pays money in fraud of the state insolvent law to an agent of his creditor, the agent hav-

§ 1442. Agent liable where money is proceeds of act which principal could not lawfully authorize.—As will be seen in another place, the agent will not ordinarily be protected, even though he acts in good faith, where the act is one which the principal could not lawfully authorize.[66] Thus an agent who in good faith receives from his principal and sells by his direction, property which did not belong to the principal, is ordinarily held liable to the true owner, even though he may have paid over the proceeds to his principal before he was notified of the true owner's claim.[67] In a recent case,[68] before the appellate division of the supreme court of New York, in which it was sought to recover of the defendant rents which he had collected and paid over to one who had represented himself to be, but was not in fact, the true owner of the premises (although there was some evidence that the real owner had in fact authorized the act of the apparent owner), the court, while recognizing the general rule above referred to, said that to that general rule, "there is an exception in the case of money and negotiable instruments."[69]

This action however was not brought by the person who had paid the rent, but by the personal representative of the true owner. In a somewhat similar case, lately before the supreme court of Tennessee, defendant was an agent who had been collecting rents for the owner and who continued to collect and pay over the rents to his principal, after the premises had in fact been conveyed to the plaintiff, but with-

ing reasonable ground to believe the payee to be insolvent, the assignee of the debtor may recover it of the agent, although he has paid it to his principal. Larkin v. Hapgood, 56 Vt. 597. To same effect: *Ex parte* Edwards, 13 Q. B. Div. 747.

Where an agent by false representation, sells securities, known by him to be worthless, the buyer can recover the money paid from the agent, although the agent had paid it over to his principal. Moore v. Shields, 121 Ind. 267.

An express company, knowing that goods received by it for delivery C. O. D., have been so damaged in transit as to be practically worthless, owes a duty to disclose that fact to the consignee, and if it fails to disclose it and demands the money from him before delivering the goods (the defect not being discoverable by him until after delivery), it is liable to the consignee for the money collected, although it has transmitted it to the consignor. Hardy v. American Express Co., 182 Mass. 828, 59 L. R. A. 731.

Agent is personally liable for money won in illegal gambling transactions carried on by him for his principal. Lilienthal v. Carpenter, 148 Ky. 50.

[66] See *post*, § 1456.

[67] See *post*, § 1457.

[68] Ledwith v. Merritt, 74 App. Div. 64. Affirmed without opinion by the Court of Appeals, 174 N. Y. 512.

[69] The court referred to Spraights v. Hawley, 39 N. Y. 441, 100 Am. Dec. 452. Also to Truesdell v. Bourke, 145 N. Y. 612, 618. Also as a "case quite apposite to the present discussion" to Duffy v. Buchannan, 1 Paige (N. Y.), 453.

out actual notice of that conveyance. It was held that the defendant was not liable for the rents collected and paid over under such circumstances.[70]

§ 1443. Agent liable for money received without authority and not paid over to the principal.—Several different situations of this sort may arise: (1) The defendant receives money from the plaintiff, representing that he has the authority from a principal to so receive it; if the prospective principal fails to ratify the defendant's act, the defendant is liable to the plaintiff for the money received.[71] (2) The defendant may receive the money under such circumstances that the plaintiff knows there is no existing authority in the defendant to receive it, but both parties expect a ratification; if the ratification fails the defendant is liable. (3) The defendant may, as in the first case, assume an authority and may receive the money, but before the matter is submitted to the prospective principal for the purpose of having it ratified, the plaintiff may demand back the money. He would seem to be entitled to recover it. (4) The defendant may, as in the second case, receive the money as one without authority but one whose act the parties expect to be ratified, but before the prospective principal is made aware of the act, the plaintiff demands it back; here also, it would seem, the defendant is liable.

§ 1444. Agent personally liable for return of deposits where he has pledged his own responsibility.—An agent who receives payments or deposits upon condition that they shall be returned in a given event, may in this, as in other cases, pledge himself personally for the return; and where he has done so the fact that he was an agent is no defence.[72]

§ 1445. Where agent is a mere stakeholder.—Where an agent, who stands in the situation of a stakeholder, receives money to be paid over upon the happening of a certain contingency or the performance of given conditions, and pays it over before the happening of the contingency or the performance of the conditions, such payment will be no defense to an action by the party ultimately found to be entitled to receive the money.[73]

[70] Embry v. Galbreath, 110 Tenn. 297. Compare Wilson v. Wold, 21 Wash. 398, 75 Am. St. Rep. 846.

[71] Simmonds v. Long, 80 Kan. 155, 23 L. R. A. (N. S.) 553.

[72] Coble v. Denison, 151 Mo. App. 319. Cases of deposits of money upon preliminary contracts for the sale of lands. Goodridge v. Wood, 133 Ill. App. 483; Cox v. Borstadt, 49 Colo. 83; Mead v. Altgeld, 33 Ill. App. 373, 136 Ill. 298.

Same, on sale of stocks: White v. Taylor, 113 Mich. 543.

[73] Burrough v. Skinner, 5 Burr. 2639; Edwards v. Hodding, 5 Taunt.

So where the person who receives the money is a mere stakeholder and not the agent of the opposite party, and the money is put into his hands as a stakeholder and not for the opposite party, the person who deposited the money with him may recover it of him if the transaction fails, even though he may have paid it over to the other party in contravention of the arrangement.

§ 1446. Agent for undisclosed principal liable for returnable deposit.—If a person has received deposits which are now returnable,—as where the contract which they were given to secure has not been or can not be performed—and is personally liable for their return, the fact that he was merely agent for an undisclosed principal is no defense. The other party can not be forced to look to the undisclosed principal or to accept performance from him in any case at least in which any personal considerations are involved.[74]

b. Where Money has been Paid to Agent for Third Person.

§ 1447. When agent's liability to such third person attaches—Revocation by principal.—Where money has been delivered by a principal to his agent to be, by the latter, paid over to a third person, the duty to make such payment is one which the agent owes, in the first instance, to the principal only. Between the agent and the third

815. In both of these cases the defendant was an auctioneer. As to the distinction between a stakeholder, like an auctioneer, and an agent, like a solicitor, see Bamford v. Shuttleworth, 11 Ad. & E. 926; Edgell v. Day, L. R. 1 C. P. 80; Ellis v. Goulton, [1893] 1 Q. B. 350. See also, Martin v. Allen, 125 Mo. App. 636; Conness v. Baird (Tex. Civ. App.), 124 S. W. 113.

Agent or stakeholder.—It is not always easy to determine whether the person to whom the money was paid was an agent for the opposite party or a mere stockholder, presumably indifferent between them; and the cases can not all be reconciled. If he be the agent for the opposite party and the money is paid to the agent for his principal, it belongs to the latter and recourse must be sought against him, even though the money may not yet have been paid over to him by his agent. See Ellis v. Goulton, [1893] 1 Q. B. 350; Kurzawski v. Schneider, 179 Pa. 500; Bogart v. Crosby, 80 Cal. 195 (here the money had been paid to the principal and then returned to the agent); Huffman v. Newman, 55 Neb. 713 (here agent claimed right to keep the money as commissions). See also, Christie v. Robinson, 4 Comw. L. R. (Australia) 1338.

If he be merely a stakeholder, it may be recovered from him by the payer. See Read v. Riddle, 48 N. J. L. 359 (agent still had the money); Gosslin v. Martin, 56 Ore. 281 (agent claimed right to retain money as commissions); Martin v. Allen, 125 Mo. App. 636 (here money had been paid to principal); Walder v. Cutts, [1909] Victoria L. R. 261; Wells v. Birtchnell ,19 Vict. L. R. 473. Edwards v. Hodding, *supra*, which treats an auctioneer as a stakeholder is followed in Gray v. Gutteridge, 3 Car. & P. 40, and Furtado v. Lumley, 6 Times L. R. 168. See also, *ante*, § 1438, and note 59.

74 Pancoast v. Dinsmore, 105 Me. 471, 134 Am. St. Rep. 582.

person, there is primarily no privity. The former has entered into no relations with the latter by virtue of which he owes to him the performance of any duty other than those imposed upon every member of society.

Until the agent has paid over the money to the third person, or has assumed to the latter the obligation to do so, the principal may at any time revoke or countermand his directions to the agent to make the payment.[75]

In order to create a liability against the agent, it is necessary to show that he has in some way, in dealings with such third person, so recognized and assented to the appropriation of the money to the latter as to create a privity between them.[76] When this has been done, the principal can no longer revoke the appropriation, nor can the agent refuse to perform it.[77]

Where, however, the agent has previously assumed obligations to third persons for the accommodation of the principal, against which the latter has expressly or impliedly agreed to indemnify him, a delivery of money to the agent for that purpose can not be revoked by the principal;[78] neither can an appropriation of money in the agent's hands be revoked by the principal where, upon the faith of such appropriation the agent has assumed liabilities to third parties.[79] In the concise language of Maule, "An act done in performance of a binding contract is not revocable."[80]

§ 1448. ——— What constitutes assent—Consideration.—No express form of words is ordinarily requisite to constitute an assent on the part of the agent to the appropriation. Like other promises, this may be implied.

[75] Williams v. Everett, 14 East, 582; Brind v. Hampshire, 1 Mees. & Wels. 365; Scott v. Porcher, 3 Mer. 652; Stewart v. Fry, 7 Taunt. 339; Tiernan v. Jackson, 5 Pet. (30 U. S.) 580, 8 L. Ed. 234; Seaman v. Whitney, 24 Wend. (N. Y.) 260, 35 Am. Dec. 618; Denny v. Lincoln, 5 Mass. 385.

See also, Dixon v. Pace, 63 N. Car. 603; Mayer v. Bank, 51 Ga. 325; Kelly v. Babcock, 49 N. Y. 318; Beers v. Spooner, 9 Leigh (Va.), 153; McDonald v. American Nat. Bank, 25 Mont. 456.

Where P directs A to pay certain money to T which A starts to do, but before T knows of or assents to the arrangement or A attorns to T, the money is garnished by P's creditors, the garnishment is effective and A is not thereafter liable to T. Center v. McQuesten, 18 Kan. 476.

[76] Williams v. Everett, 14 East, 582.

[77] Wyman v. Smith, 2 Sandf. (N. Y.) 331; Williams v. Everett, 14 East, 582; Stevens v. Hill, 5 Esp. 247; Walker v. Rostron, 9 Mees. & Wels. 411; Griffin v. Weatherby, L. R. 3 Q. B. 753; Yates v. Hoppe, 9 Man. G. & S. (9 Com. B.) 541; Crowfoot v. Gurney, 9 Bing. 372; Goodwin v. Bowden, 54 Me. 424.

[78] Yates v. Hoppe, *supra*.

[79] Walker v. Rostron, *supra*.

[80] In Yates v. Hoppe, *supra*.

The direction from the principal to the agent may often be in substance or in form an ordinary bill of exchange, to which the rules relating to the acceptance of such paper will apply. As is said by a learned writer,[81] an acceptance, according to the law merchant, may be (1) expressed in words, or (2) implied from the conduct of the drawee. (3) It may be verbal or written. (4) It may be in writing on the bill itself or on a separate paper. (5) It may be before the bill is drawn or afterward. And (6) there may be absolute, conditional and qualified acceptances.

By the statutes of many of the states, however, the rule of the law merchant has been changed, and an acceptance must be in writing.

The question of the consideration for the appropriation by the principal may, in certain cases, become material. When it is so, the ordinary rules of law apply. The existence of a debt, although it be not due, is a good consideration for such an appropriation to pay it.[82]

No new or separate consideration moving from the third person to the agent is necessary to sustain the latter's assent to the appropriation of the money,[83] when directed by the principal.

§ 1449. Action at law by beneficiary against agent.—When in accordance with the rules laid down in the preceding sections, the agent has brought himself under obligations to third persons, the person entitled may sue the agent at law to recover the money in an action for money had and received.[83a] Where there is, not simply a direction by the principal to the agent to pay the money to the third person, but a contract between the principal and the agent for the benefit of the third person, but no enforceable promise by the agent to the latter, the question whether the third person may enforce the obligation against the agent by an action at law is a question upon which there is much conflict of authority, and which belongs more properly to a treatise upon the law of contracts. The English rule, and the rule prevailing in several of the states, is that no such action may be maintained, but the rule prevailing in the majority of states permits the beneficiary to sue. Professor Williston has collected and arranged the cases in the various states, according to the alphabetical order of the states, in an

[81] 1 Daniel Neg. Inst. § 496.

[82] Walker v. Rostron, 9 Mees. & Wels. 411, 420; McKee v. Lamon, 159 U. S. 317, 40 L. Ed. 165.

[83] See Goodwin v. Bowden, *supra;* Wyman v. Smith, *supra.*

[83a] Goodwin v. Bowden, *supra;* Keene v. Sage, 75 Me. 138; Wyman v. Smith, *supra;* Seaman v. Whitney, *supra;* Crowfoot v. Gurney, *supra.*

Where A receives money from B to pay to C, and C requests A to pay it to D, but A, instead of actually paying D, retains it for what he wrongfully claims D owes him, D may recover it of A. Keene v. Sage, *supra.*

article first published in the Harvard Law Review [84] and afterwards substantially reproduced in his edition of Wald's Pollock on Contracts,[85] to which the reader must be referred.

§ 1450. Trusts for the benefit of third persons.—Instead of putting the money into the hands of an agent as such, and expressly or impliedly reserving the power to change the directions to the agent, at any time before the directions have been executed or the agent has assumed obligations to the third person, as in the cases considered in the preceding sections, the money or property may be put into the hands of the agent as a trustee so finally and conclusively that no power to revoke or to change the directions can be conceded. The question whether a mere revocable agency or an irrevocable trust has been created seems to depend on the intention of the principal as evidenced by his words and conduct. Where a trust has been created, it may be enforced by the beneficiary as in other cases.[86]

II.

IN TORT.

§ 1451. In general.—The question of the liability of the agent to third persons in tort cases involves very different considerations from those which govern his liability upon contracts. In the contract case the question whether any contract at all shall be made is one which the parties may determine for themselves, and if they decide to make a contract, they may determine with whom it shall be made. They have the power to determine in advance who shall be the party to be bound by the contract, and may so shape the contract as to impose its liabilities upon the party so selected.

In the case of the tort, the situation is ordinarily entirely different. The question of whether a tort shall be committed has not been left to the determination of the injured party; he has had no opportunity nor power to determine by whom the tort shall be committed; the situation lacks every element of consent and is the result of the unauthorized and unlawful breaking in of one person upon the rights or security of another.

§ 1452. Agency usually no defense in tort cases.—It is sometimes said that "in torts the relation of principal and agent does not exist. They are all wrongdoers and the liability of each and all does not

[84] 15 Harvard Law Review, 767.
[85] Edition, 1906, p. 237 *et seq.*
[86] McKee v. Lamon, 159 U. S. 317, 40 L. Ed. 165; Rogers Locomotive Wks. v. Kelley, 88 N. Y. 234.

cease until payment has been made or satisfaction rendered or something equivalent thereto."[87] While this statement undoubtedly requires some qualification, it is, nevertheless, declaratory of a more or less general principle, and it is, as will be seen, in many cases true that the fact that the wrongdoer purported to do the act as agent for another is entirely immaterial so far as his own liability is concerned. That fact may make the alleged principal liable also, but it will in many cases have no tendency to exonerate the alleged agent.

§ 1453. Agent liable for negligent acts outside the scope of his agency.—Before taking up the more difficult questions, certain simple cases may be disposed of, concerning which there could not well be any difference of opinion. Thus, if an agent, while doing an act which has some relation to his agency, but is really beyond the scope of it, wilfully or negligently injures a third person, he would undoubtedly be personally liable to the person injured. In such a case, the reputed principal would not be liable and the agent would be the real principal. Thus, for example, if a servant or agent, acting entirely outside the scope of his employment, should take his master's horse and wagon and go off upon a frolic of his own and in doing so should wilfully or negligently so manage the horse and wagon as to cause injury to a third person, the servant or agent would undoubtedly be personally liable.

§ 1454. When agent ostensible principal.—It has been seen in the earlier portion of this chapter, that the agent may often make himself liable to third persons in contract by concealing his real principal or by pledging his own responsibility. So far as such a liability is based upon theories of estoppel, it must be less frequent in tort cases than in those involving contractual relations, since the suffering of torts is much more rarely induced by appearances than the making of contracts. There may be cases, however, in which such a liability would arise, especially in torts arising out of contractual dealings.

Thus an agent carrying on a business as ostensible principal has been held personally liable to a servant employed by him who was injured in the course of the work.[88] It has also been held that such an agent is personally liable to third persons for the torts of a servant employed by him while carrying on a business really as agent but ostensibly as principal.[89] This conclusion is very much more difficult

[87] See Berghoff v. McDonald, 87 Ind. 549; Carraher v. Allen, 112 Iowa, 168.

[88] Yarslowitz v. Bienenstock, 130 N. Y. Supp. 931. See also, Malone v. Morton, 84 Mo. 436.

[89] Cockran v. Rice, 26 S. Dak. 393.

to sustain, where the third person was not misled by the appearances; and it can only be upheld upon the ground that, although the defendant was really an agent, he had in the particular employment actually made himself the employer of the negligent servant,[90] or upon the ground, considered in a later section, that as the agent had actual control of the servant and negligently exercised it, the injury can be attributed to the agent's own default.

§ 1455. Liability of agent for trespass.—It is in general true that every person who does an act which invades or violates the right of property or security of another, does so at the peril of being able to furnish legal justification for his act if he be called upon legally to account for it. Such a justification cannot be found either in the general or the specific command or direction of one who had no legal right to command or direct that the act be done. It is therefore the general rule that an agent who trespasses upon the person or property of another is liable to the person so injured and the fact of his agency furnishes no excuse.[91]

[90] That there can ordinarily be no liability in tort cases based upon mere appearances, see Smith v. Bailey, [1891] 2 Q. B. 403; Shapard v. Hynes, 45 C. C. A. 271, 104 Fed. 449, 52 L. R. A. 675.

[91] A surveyor is personally liable for a trespass committed by him, though the act was done in behalf and under the direction of a highway board by which he was employed. Mill v. Hawker, L. R., 10 Ex. 92. To same effect: Smith v. Colby, 67 Me. 169. An agent who fences in a portion of the highway is liable for an injury caused thereby, though he does it for and under the direction of his principal, a railway company. Blue v. Briggs, 12 Ind. App. 105. An agent who commits an assault on a third person is personally liable even though he did it in the principal's interest and for the protection of his property. New Ellerslie Fishing Club v. Stewart, 123 Ky. 8, 9 L. R. A. (N. S.) 475; Canfield v. Chicago, etc., Ry. Co., 59 Mo. App. 354.

Same, where he negligently shot a trespassing slave. Carmouche v. Bouis, 6 La. Ann. 95, 54 Am. Dec. 558.

An agent who, while acting for his principal, sues out an attachment against the plaintiff's property without reasonable cause for believing that the statements, upon which it was obtained, were true, may be held liable for the malicious prosecution. Carraher v. Allen, 112 Iowa, 168. An agent who, without justification, though acting for his principal, caused a distress for rent to be made, is personally liable. Bennett v. Bayes, 5 H. & N. 391. See also, Hazen v. Wight, 87 Me. 233; Welsh v. Stewart, 31 Mo. App. 376; Horner v. Lawrence, 37 N. J. L. 46; Baker v. Davis, 127 Ga. 649; Burns v. Horkan, 126 Ga. 161.

But where the principal would not have been liable for doing the act, the agent who does it by the principal's authority, will not be. Strong v. Colter, 13 Minn. 82.

Where the agent entirely disclaimed responsibility for having a piece of work done, *e. g.*, digging a ditch, alleged to be a trespass or nuisance, the mere fact that he promised to see that the work was paid for if done upon some one else's authority, does not make him liable. Crandall v. Loomis, 56 Vt. 664.

§ 1456. ——— Principal's knowledge or direction no defense.—It does not relieve the agent that the wrong was committed with the knowledge of the principal, or by his consent or express direction,[92] because no one can lawfully authorize or direct the commission of a wrong. *A fortiori,* it is no defense that the agent in committing the wrong violated his instructions from his principal.[93] Neither is it material that the agent derives no personal advantage from the wrong done.[94] The fact that the agent acted in good faith, supposing the principal had a legal right to have done what was done, is no defense. He who intermeddles with property not his own must see to it that he is protected by the authority of one who is himself, by ownership or otherwise, clothed with the authority he attempts to confer.[95]

§ 1457. Liability of agent for conversion.—In accordance with the principles of the preceding section, it is generally held that an agent who, for his principal, takes, sells or otherwise disposes of, the goods or chattels of another, without legal justification, is personally liable, even though he acted in good faith, supposing the goods to be his principal's,[96] and although he may have delivered the goods taken

[92] Weber v. Weber, 47 Mich. 569; Lee v. Mathews, 10 Ala. 682, 44 Am. Dec. 498; Baker v. Wasson, 53 Tex. 157; Johnson v. Barber, 5 Gilm. (Ill.) 425, 50 Am. Dec. 416.

[93] Starkweather v. Benjamin, 32 Mich. 305; Johnson v. Barber, *supra.*

[94] Weber v. Weber, *supra*

[95] Spraights v. Hawley, 39 N. Y. 441, 100 Am. Dec. 452; Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581; Everett v. Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Williams v. Merle, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604.

[96] Lee v. Mathews, 10 Ala. 682, 44 Am. Dec. 498; Perminter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177; Merchants & Planters' Bank v. Meyer, 56 Ark. 499; Swim v. Wilson, 90 Cal. 126, 25 Am. St. Rep. 110, 13 L. R. A. 605; Berghoff v. McDonald, 87 Ind. 549; Warder, etc., Co. v. Harris, 81 Iowa, 153; Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581; McPheters v. Page, 83 Me. 234, 23 Am. St. Rep. 772; Wing v. Milliken, 91 Me. 387, 64 Am. St. Rep. 238; Milliken v. Hathaway, 148 Mass. 69, 1 L. R. A. 510; Coles v. Clark, 3 Cush. (Mass.) 399; McPartland v. Read, 11 Allen (Mass), 231; Edgerly v. Whalan, 106 Mass. 307; Robinson v. Bird, 158 Mass. 357, 35 Am. St. Rep. 495; Kearney v. Clutton, 101 Mich. 106, 45 Am. St. Rep. 394; Koch v. Branch, 44 Mo. 542, 100 Am. Dec. 324; Arkansas City Bank v. Cassidy, 71 Mo. App. 186; Mohr v. Langan, 162 Mo. 474, 85 Am. St. Rep. 503; Gage v. Whittier, 17 N. H. 312; Spraights v. Hawley, 39 N. Y. 441, 100 Am. Dec. 452; Thorp v. Burling, 11 Johns. (N. Y.) 285; Farrar v. Chauffetete, 5 Den. (N. Y.) 527; Everett v. Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Spencer v. Blackman, 9 Wend. (N. Y.) 167; Williams v. Merle, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; Fowler v. Hollins, L. R. 7 Q. B. 616; Perkins v. Smith, 1 Wils. 328; Stephens v. Elwall, 4 Maule & Sel. 259; McCombie v. Davies, 6 East, 538; Baldwin v. Cole, 6 Mod. 212; Pearson v. Graham, 6 Ad. & El. 899.

Contra: See Frizzell v. Rundle, 88 Tenn. 396, 17 Am. St. Rep. 908; Roach v. Turk, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360.

to his principal or to some other person for and on account of his principal.[97]

Where the conversion charged against the agent consists of the fact that he has refused to surrender, upon demand by one who is really the rightful owner and entitled to possession, goods which were

The Minnesota court has also, in Leuthold v. Fairchild, 35 Minn. 99, laid down doctrines which cannot be reconciled with the preceding cases. See this case distinguished in Dolliff v. Robbins, 83 Minn. 498, 85 Am. St. Rep. 466.

See also McLennan v. Elevator Co., 57 Minn. 317.

[97] Miller v. Wilson, 98 Ga. 567, 58 Am. St. Rep. 319; McConnell v. Prince (Ga. App.), 76 S. E. 754; Edgerly v. Whalan, 106 Mass. 307; Lee v. Mathews, 10 Ala. 682, 44 Am. Dec. 498; Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581; Spraights v. Hawley, 39 N. Y. 441, 100 Am. Dec. 452; Thorp v. Burling, 11 Johns. (N. Y.) 285; Williams v. Merle, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; Perkins v. Smith, 1 Wils. 328; Stephens v. Elwall, 4 Maule & Sel. 259.

Sewing machine agent who without the authority or consent of her husband secures from a married woman an old sewing machine and some money, both belonging to her husband, in exchange for a new machine, and delivers the old machine to his company, is guilty of conversion of the machine. No demand for the return of the old machine is necessary. Rice v. Yocum, 155 Pa. 538.

The essence of the conversion lies in the fact that the agent has done or participated in doing some act which denies, repudiates, or destroys the true owner's title and right to possession, as where he sells, delivers or otherwise disposes of the property in such a way as to cut off or impede the owner's right. Swim v. Wilson, 90 Cal. 126, 25 Am. St. Rep. 110, 13 L. R. A. 605; Porter v. Thomas, 28 Ga. 467; Cassidy Bros. v. Elk Grove Cattle Co., 58 Ill. App. 39; Fort v. Wells, 14 Ind. App. 531, 56 Am. St. Rep. 316; Shearer v. Evans, 89 Ind. 400; Kearney v. Clutton, 101 Mich. 106, 45 Am. St. Rep. 394; Lafayette Co. Bk. v. Metcalf, 40 Mo. App. 494; Stevenson v. Valentine, 27 Neb. 338; Bercich v. Marye, 9 Nev. 312; Hoffman v. Carow, 20 Wend. (N. Y.) 21; Iredale v. Kendall, 40 L. T. N. S. 362; Fine Arts Society v. Union Bank of London, 17 Q. B. Div. 705; Consolidated Co. v. Curtis (1892), 1 Q. B. Div. 495; Barker v. Furlong, [1891] 2 Ch. Div. 172; Perkins v. Smith, 1 Wils. 328; Pearson v. Graham, 6 Ad. & El. 899; Ewbank v. Nutting, 7 C. B. 797; Ganly v. Ledwidge, 10 Irish Rep. C. L. 33; Cranch v. White, 1 Bing. N. C. 414, 6 Car. & Payne, 767.

But this rule is held not to apply where an agent in good faith and without negligence takes by delivery negotiable instruments and transfers them again by delivery, paying the proceeds to his principal and deriving no profit himself. Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491.

In National Safe Deposit Co. v. Hibbs, 32 App. Cas. D. C. 459, it is held that if the purchaser from the innocent agent acquires an indefeasible title, as in the case of the sale of negotiable or quasi negotiable securities, the agent is not liable. See also, Higgins v. Lodge, 68 Md. 229, 6 Am. St. Rep. 437; Jones v. Hodgkins, 61 Me. 480, *post*.

So one who receives from his principal the property of another and afterward returns it to his principal is not guilty of a conversion, even though he may have reason to believe that the principal is not the

delivered to him by his principal to be held for the latter, somewhat different considerations apply. A mere refusal to surrender is not necessarily a conversion; it may be open to explanation. "Thus," it is said in one case,[98] "it is no conversion for the bailee of a chattel, who has received it in good faith from some person other than the owner, to refuse to deliver it to the owner making demand for it until he has had time to satisfy himself in regard to the ownership."[99] In the case of a servant who has received the chattel from his master, it has been held that he ought not to give it up without first consulting the master in regard to it.[1] But if, after having had an opportunity to confer with his master, he relies on his master's title and absolutely refuses to comply with the demand, he will be liable for a conversion.[2]

owner. Loring v. Mulcahy, 3 Allen (Mass.), 575; Wando Phosphate Co. v. Parker, 93 Ga. 414; National Merc. Bk. v. Rymill, 44 L. T. N. S. 767.

So it is not ordinarily a conversion, where what the agent has done amounts to simply changing the location of the property, but not in any way denying or interfering with the owner's title. Burditt v. Hunt, 25 Me. 419, 43 Am. Dec. 289; Metcalf v. McLaughlin, 122 Mass. 84; Gurley v. Armstead, 148 Mass. 267, 12 Am. St. Rep. 555, 2 L. R. A. 80; Archibeque v. Miera, 1 N. M. 419.

However, where the agent takes goods from the plaintiff and delivers them to a third person under circumstances indicating a denial of the owner's right, the agent may be held liable for the conversion. Mead v. Jack, 12 Daly (N. Y.), 65.

Selling after termination of authority.—In Jones v. Hodgkins, 61 Me. 480, where an agent, who had been given authority to sell a quantity of logs in a boom, sold and delivered them in good faith after his principal had sold them to the plaintiff—the plaintiff not having taken actual possession and the agent having no notice—it was held that the agent was not liable in trover to the plaintiff, the first purchaser. Three judges dissented. This case is not easy to sustain, unless it be upon the ground—relied upon in such cases as National Safe Deposit Co. v. Hibbs, *supra*—that because the second purchaser would be protected, having bought in ignorance of the first sale and the first purchaser not having taken possession (see such cases as Lanfear v. Sumner, 17 Mass. 110), the agent is entitled to the same protection.

[98] Singer Mfg. Co. v. King, 14 R. I. 511.

[99] Citing: Carroll v. Mix, 51 Barb. (N. Y.) 212; Lee v. Bayes, 18 C. B. 599, 607; Sheridan v. The New Quay Co., 4 C. B. N. S. 618; Coles v. Wright, 4 Taunt. 198. To same effect: see Goodwin v. Wertheimer, 99 N. Y. 149; Mount v. Derick, 5 Hill (N. Y.), 455; Arthur v. Balch, 3 Fost. (23 N. H.) 157.

[1] Citing: Mires v. Solebay, 2 Mod. 242, 245; Alexander v. Southey, 5 B. & A. 247; Berry v. Vantries, 12 Serg. & R. (Pa.) 89.

[2] Citing: Lee v. Bayes, 25 L. J. C. P. 249, 18 C. B. 599; 1 Addison on Torts, § 475; Greenway v. Fisher, 1 Car. & P. 190; Stephens v. Elwall, 4 M. & S. 259; Perkins v. Smith, 1 Wils. 328; Gage v. Whittier, 17 N. H. 312. To same effect. Elmore v. Brooks, 6 Heisk. (53 Tenn.) 45.

The mere fact that he refuses for the benefit of his principal will not protect him." [3]

§ 1458. Agent's liability for fraud, misrepresentation or deceit.—No one can give to another any lawful authority to practice wilful fraud, misrepresentation or deceit upon a third. An agent, therefore, who intentionally defrauds a third person whom he induces to deal with him or injures him by wilful misrepresentation or deceit, is personally liable for the injury he inflicts.[4] The principal may or may not be liable also according as he may or may not be deemed to have authorized or approved the wrongful acts. Where, however, the agent acted in good faith and the fraud or deceit was the principal's act alone, the agent would not be liable.[5]

In accordance with these principles an agent who fraudulently induces a person to take out an insurance policy is liable to an action

[3] Citing: Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581. See also, Kimble v. McDermott, 154 Mo. App. 209.

[4] Wilder v. Beede, 119 Cal. 646; Hamlin v. Abell, 120 Mo. 188; Reed v. Peterson, 91 Ill. 288; Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572; Moore v. Shields, 121 Ind. 267; Salisbury v. Iddings, 29 Neb. 736; Weber v. Weber, 47 Mich. 569; Starkweather v. Benjamin, 32 Mich. 305; Clark v. Lovering, 37 Minn. 120; Alpha Mills v. Watertown Steam Engine Co., 116 N. C. 797; Norris v. Kipp, 74 Iowa, 444; Hedin v. Minn. Med. Inst., 62 Minn. 146, 54 Am. St. Rep. 628, 35 L. R. A. 417; Wimple v. Patterson (Tex. Civ. App.), 117 S. W. 1034; Poole v. Houston, etc., R. Co., 58 Tex. 134; Mann v. McVey, 3 W. Va. 232; Eaglesfield v. Londonderry, L. R. 4 Ch. Div. 693; Sheppard Pub. Co. v. Press Pub. Co., 10 Ont. L. R. 243.

See also, Kleine Bros. v. Gidcomb, — Tex. Civ. App. —, 152 S. W. 462.

Fraud of agent not sufficiently proved: Ray County Sav. Bank v. Hutton, 224 Mo. 42.

Conspiracy to defraud: Miller v. John, 111 Ill. App. 56.

Joining principal and agent in one action. Krolik v. Curry, 148 Mich. 214.

An agent who knowingly participates with his principal in defrauding the other party is, of course, liable either with or without his principal. Lewis v. Hoeldtke (Tex. Civ. App.), 76 S. W. 309.

Misrepresentation or deceit respecting his authority has been considered in the preceding subdivision. See also, Wilkins, etc., Realty Co. v. Jones, — Colo. —, 127 Pac. 224.

[5] Thus in Cullen v. Thomson, 4 Mac Q. 424, 439, it is said by Lord Wensleydale: "In some cases a man may innocently assist in a transaction which is a fraud on some one. Of course, such a person cannot be responsible criminally or civilly. Or he may be a partaker in the fraud to a limited extent, as, for instance, in the supposed case adverted to in the course of the argument, the printer of the alleged false statement, who may know it to be false, and yet may not have intended or known sufficiently the fraudulent purpose to which it was meant to be applied, to make him responsible for the injurious consequences of it."

A disclosed agent is not liable for the fraud of the principal in carrying out the contract made, *e. g.*, forging signatures on a note which he gives for a loan obtained through the agent. Huston v. Tyler, 140 Mo. 252.

for the injury sustained;[6] in such a case the party deceived has two remedies; he may retain the policy and sue for damages, or he may rescind the contract and recover from the agent the premium paid. So an insurance agent who misrepresents material facts to the insured by reason of which the insured loses his claim against the company for a loss sustained, is personally responsible to the insured for the amount.[7] An agent is responsible individually to the purchaser for a fraud committed by him in the sale of property, though he does not profess to sell the property as his own, but acts throughout in his capacity as an agent.[8]

As pointed out in the preceding sections, it is entirely immaterial that the agent derived no personal benefit from the wrong done.[9]

§ 1459. Agent's liability for his wilful or malicious acts.—An agent or servant is undoubtedly liable for his own wilful or malicious acts. Under rules formerly prevailing and not yet entirely inoperative, holding the principal or master not liable in such a case, there would be no one liable if the agent or servant could not be held. The master or principal is now held liable in many cases of this sort,[10] but this additional liability of the principal does not destroy the liability of the agent.[11]

§ 1460. Agent liable to third persons for negligent injuries committed by him while acting in performance of agency.—So if an agent or servant, while acting upon his master's business, so negli-

[6] Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25.

[7] Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718.

[8] Campbell v. Hillman, 15 B. Monr. (Ky.) 508, 61 Am. Dec. 195. As where he makes misrepresentations concerning title, quantity, or incumbrances. Garrett v. Sparks, 61 Wash. 397; Riley v. Bell, 120 Iowa, 618; Willard v. Key, 83 Neb. 850. But a failure to disclose information received for his own guidance, is not fraud. Armstrong v. Campbell, 140 Iowa, 564. So there would be no liability where the representation is one which the buyer had no right to rely upon, as where it is the misrepresentation of a selling agent, dealing at arm's length, as to what is the lowest price at which the principal will sell the property. Ripy v. Cronan, 131 Ky. 631, 21 L. R. A. (N. S.) 305.

[9] Weber v. Weber, 47 Mich. 569.

[10] See *post*, §§ 1629 *et seq.*

[11] Horner v. Lawrence, 37 N. J. L. 46; Able v. Southern Ry. Co., 73 S. C. 173; Schumpert v. Southern Ry., 65 S. C. 332, 95 Am. St. Rep. 802; Gardner v. Southern Ry. Co. & Pierson, 65 S. C. 341; Holmes v. Wakefield *et al.*, 94 Mass. (12 Allen), 580, 90 Am. Dec. 171; Hewett v. Swift, 85 Mass. (3 Allen), 420.

Many of these were cases in which the question was whether the master and servant could be joined in the same action, but they all concede the liability of the agent.

Criminal liability.—Agency is ordinarily no defence in a prosecution for crimes or penal acts. See State v. Jones, 88 Minn. 27; Com. v. Leslie, 20 Pa. Super. 529.

gently acts as to cause direct and immediate injury to the person or property of a third person, whether he be one to whom the master owes a special duty or not, under circumstances which would impose liability on the agent or servant, if he were acting under the same conditions on his own account, he will be personally liable.[12] In practically every case in which the master could be held liable for the negligence of his servant, the servant himself is personally liable. This must be so from the very nature of the case. The whole theory of the master's liability is that the servant has done a legal wrong, for which the law imposes a liability upon the master however innocent he may be. The person actually and primarily at fault, however, is the servant, and if he would not be liable, the master ordinarily cannot be. The liability of the servant is the direct and primary one; that of the master is a secondary and imputed one. In actual practice, the liability of the servant or agent is usually ignored because it is more convenient or effective to pursue the master, but the servant's liability nevertheless exists. Thus, if a servant while running upon his master's errand should negligently knock down a by-stander, under circumstances which would make the servant liable if he were running upon his own errand, he would be personally liable. And so if a servant while driving his master's horse, operating his master's machine, or managing or conducting any other property of his principal over which he has control, so drives or manages as to inflict injury upon third persons under circumstances which would render him liable if he were doing the same thing on his own account, he will be personally liable. In such a case the servant or agent is the actor, and the fact that he is acting for a principal is only the occasion or the opportunity for his act, but not its justification. The principal or mas-

[12] Humphreys Co. v. Frank, 46 Colo. 524; Miller v. Staples, 3 Colo. App. 93; Phelps v. Wait, 30 N. Y. 78; Hewett v. Swift, 3 Allen (85 Mass.), 420.

Thus the director of a corporation may be held personally liable for an assault which he orders (Peck v. Cooper, 112 Ill. 192, 54 Am. Rep. 231) or in which he participates (Brokaw v. N. J., etc., Railroad Co., 32 N. J. L. 328, 90 Am. Dec. 659). So of a malicious prosecution: Hussey v. Norfolk, etc., R. Co., 98 N. Car. 34, 2 Am. St. Rep. 312. So directors have been held personally liable for their negligent (Cameron v. Kenyon Co., 22 Mont. 312, 74 Am. St. Rep. 602, 44 L. R. A. 508) or wilful conduct in the management of the corporation. Nunnelly v. Iron Co., 94 Tenn. 397, 28 L. R. A. 421; and for the infringement of patents. National Cash Register Co. v. Leland, 37 C. C. A. 372, 94 Fed. 502. The president of an incorporated club may be held personally liable for the negligent discharge of fireworks under his direction. Jenne v. Sutton, 43 N. J. L. 257, 39 Am. Rep. 578.

ter might also be liable in such a case, but that would not excuse or exonerate the agent.[13]

It is also immaterial that the servant or agent violates a duty he owes to his principal or master at the same time. Thus the servant who, while driving his master's team, negligently crushes the wagon of a third person, is liable to the latter, though he may by the same negligent act crush his master's wagon and be liable to him also.

§ 1461. ——— The liability of the agent in these cases is not affected by the fact that there is no privity of contract between himself and the person injured. His liability does not depend upon privity, but upon the general duty imposed on every one to so govern his conduct as not to negligently injure another. Many illustrations may be found in the reported cases. A railway engineer who negligently runs his master's engine at a high rate of speed through a populous district would be liable if it were his own engine or if it were an engine which he had hired or borrowed for the occasion, and the case should not be different where it is an engine under his control, because he is in the service of a railroad company.[14] If the running at that rate in that place was the result of the specific command of the company, a somewhat different case would be presented, although even then he would not be justified in obeying specific commands in the face of obvious danger. So a bricklayer who negligently drops a brick upon a passer-by should be personally liable. It is his own act of negligence, in a case in which he owes a duty of care, and the fact that he did it while working for a master does not excuse him.[15] For similar reasons, an engineer of a switch engine and a switchman are personally liable for negligently running down another servant of the same company in disregard of signals given them by the person in-

[13] Eaglesfield v. Londonderry, 4 Ch. Div. 693 (per Jessel, M. R.); Breen v. Field, 157 Mass. 277; Corliss v. Keown, 207 Mass. 149.

It is true that Blackstone declares that "if a smith's servant lames a horse while he is shoeing him, an action lies against the master, but not against the servant." But, as has often been pointed out, this was probably not true even in Blackstone's time, and is certainly not true to-day.

The case of Burch v. Caden Stone Co., 93 Fed. 181, is apparently contrary to the rule of the text.

[14] Southern Ry. Co. v. Grizzle, 124 Ga. 735, 110 Am. St. Rep. 191; Southern Ry. Co. v. Reynolds, 126 Ga. 657; Able v. Southern Ry. Co., 73 S. C. 173; Ellis v. Southern Ry. Co., 72 S. C. 465, 2 L. R. A. (N. S.) 378; Martin v. Louisville & Nashville Ry. Co., 95 Ky. 612; Illinois Central Ry. Co. v. Coley, 121 Ky. 385, 1 L. R. A. (N. S.) 370; Illinois Central Ry. Co. v. Houchins, 121 Ky. 526, 1 L. R. A. (N. S.) 375.

[15] Mayer v. Thompson-Hutchison Bldg. Co., 104 Ala. 611, 53 Am. St. Rep. 88, 28 L. R. A. 433.

jured;[16] and servants of a house-mover are liable for their negligent acts in moving a house.[17] So where an agent, while acting for his principal, opened a gap in another's fence and left it open, trusting to his own supervision to see that no injury was caused thereby, he was held personally liable for the loss of animals escaping through the opening.[18]

§ 1462. Agent must have been an actor, not a mere automaton.—It would seem to be a necessary limitation upon the liability of the agent in any case, that he can fairly be deemed to have been an actor in the transaction rather than a mere automaton or mechanical instrumentality. Thus, in a case in which the question was whether two agents, Bayes and Pennington, could be held liable for directing a distress for rent to be made in behalf of their principals, the landlords, by one Harrison, another agent, it was said by Baron Bramwell in the court of exchequer:[19] "It occurred to my brother, Channell, and myself, who, together with my brother Martin, heard this case, that it was doubtful whether, under the circumstances, Bayes and Pennington could be liable for the act of Harrison, whether in fact they were anything more than a mere conduit-pipe for communicating authority from the landlords to Harrison. For my own part, and I believe I may say for my brother Channell, if there had been nothing more, we should have continued to entertain great doubt whether they would have been liable. It is certain that a messenger who delivers a letter containing a warrant of distress, not knowing the contents of the letter, is not responsible; and I cannot help thinking that if a servant were sent with this message to a broker, 'My master desires you to distrain for rent due to him,' the servant would not be liable as a person ordering or committing the trespass. So, if a person wrote a letter in these terms, 'My friend, having a bad hand, is unable to write, and he re-

[16] Mayberry v. Northern Pac. Ry. Co., 100 Minn. 79, 12 L. R. A. (N. S.) 675, 10 Ann. Cas. 754. Compare Bryce v. Southern Ry. Co., 125 Fed. 958.

In Coalgate Co. v. Bross, 25 Okla. 244, 138 Am. St. Rep. 915, it was held that an engineer operating an engine hoisting cars was liable to a fellow-servant for injury caused by negligence in not obeying a signal given by another fellow-servant. In Galvin v. Brown & McCable, 53 Or. 598, a general superintendent of a corporation was held liable for negligently ordering five timbers to be carried in a sling, instead of four, on account of which one fell on plaintiff. In Moyse v. Northern Pac. Ry. Co., 41 Mont. 272, defendants, part of yard crew, were held liable for allowing cars to escape and collide with the car in which plaintiff, a conductor, was riding.

[17] Bickford v. Richards, 154 Mass. 163, 26 Am. St. Rep. 224.

[18] Horner v. Lawrence, 37 N. J. L. 46.

[19] Bennett v. Bayes, 5 H. & N. 391

quests me to write and tell you to distrain on his tenant,' it is difficult to say that a person so writing would be liable to an action."

§ 1463. ——— Mere intermediate agent not liable.—For analogous reasons, a mere intermediate agent who has not the control, does not participate in the act, and is guilty of no fault, can not be held liable. The liability must rest upon the master and the direct agent, and not upon the intermediate one.[20]

§ 1464. Agent's liability for negligent omissions—Misfeasance—Nonfeasance.—When the question of the agent's liability to third persons for negligent omissions to act is reached, a problem of greater difficulty is presented. The doctrine very early found expression in English law, that while a servant could be personally charged for his active wrongdoing, the responsibility for his negligence rested on his master only. Thus Chief Justice Holt in 1701 declared that "a servant or deputy *quatenus* such cannot be charged for neglect, but the principal only shall be charged for it. But for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or a servant, but as a wrongdoer." [21]

More than a hundred years before, in an action involving the liability of an under-sheriff, Coke, in arguing in the King's Bench, had said: "I grant that an action for any falsity or deceit, lyeth against the under-sheriff, as for embesseling, rasing of writs, and so forth, but upon nonfeasans, as the case is here, the not retorn of the summons, it ought to be brought against the sheriff himself." [22]

[20] In Brown v. Lent, 20 Vt. 529, it is said: "A mere intermediate agent between the master and the direct agent cannot be held constructively responsible for the acts of the latter." Approved but distinguished in Bileu v. Paisley, 18 Oreg. 47, 4 L. R. A. 840. So in Hewett v. Swift, 3 Allen (85 Mass.), 420, it was held that the president of a corporation was not liable where, in his capacity as president and as a "mere conduit for communication between the corporation and the agent" who did the wrong, he transmitted to the latter the orders of the corporation directing the doing of the act. An intermediate agent like a steward or general manager is not personally liable for the acts of servants hired by him for his principal, and whose act he neither directed, caused or participated in. Stone v. Cartwright, 6 Term Rep. (Durn. & E.), 411; Bath v. Caton, 37 Mich. 199; Johnson v. Memphis, 77 Tenn. (9 Lea) 125; Canfield v. Chicago, etc., R. Co., 59 Mo. App. 354.

See also, Nicholson v. Mounsey, 15 East, 384.

Agent not at fault.—Within the same reasoning, the agent cannot be held liable where he had no duty or power in the matter. Dudley v. Illinois, etc., Ry. Co., 127 Ky. 221, 13 L. R. A. 1186.

He must also have such connection with and part in the act that he would be liable if he were not an agent. Frorer v. Baker, 137 Ill. App. 588.

[21] In Lane v. Cotton, 12 Mod. 472, 488.

[22] Marsh v. Astrey, 1 Leonard, 146.

And in a very much more recent case in Louisiana, the court said: "At common law, an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done; the agent in the latter case being liable to his principal only. For non-feasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he has become directly bound or amenable for his conduct. * * * An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations toward third persons, other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so he wrongs no one but his principal, who alone can hold him responsible."[23]

§ 1465. ——— Certain rules quoted.—Before attempting to work out any more definite principles certain rules which have been widely quoted may well be noticed. Thus, in one case,[24] before the supreme judicial court of Massachusetts, Chief Justice Gray, later of the supreme court of the United States, used the following language: "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for non-feasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for

[23] Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456.

So in Kahl v. Love, 37 N. J. L. 5, it is said: "It is not everyone who suffers a loss from the negligence of another that can maintain a suit on such a ground. The limit of the doctrine relating to actionable negligence is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business, is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies, if the ill effects of the negligence of men could be followed down the chain of results to the final effect. Under such a doctrine, the careless manufacturer of iron might be made responsible for the destruction of a steamer from the bursting of a boiler, into which his imperfect material, after passing through many hands and various transactions, had been converted. To avoid such absurd consequences, the right of suit for such a cause has been circumscribed within the bounds already defined."

[24] Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437.

the non-feasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance or doing nothing, but it is misfeasance, doing improperly."

In another case in the same court,[25] in which an agent had been charged with negligence in admitting water into the pipes of a building without first seeing that they were in proper condition, Judge Metcalf said: "Non-feasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all. The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was a non-feasance. But if he had not caused the water to be let on, that non-feasance would not have injured the the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither non-feasance nor misfeasance. As the facts are, the non-feasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a non-feasance."

So in the Louisiana case above referred to, it is said: "Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character and which the law imposes upon him independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men. * * * The whole doctrine on that subject culminates in the proposition that wherever the agent's negligence, consisting in his own wrongdoing, therefore in an act, directly injures a stranger, then such stranger can recover from the agent damages for the injury." [26]

[25] Bell v. Josselyn, 3 Gray (Mass.), 309, 63 Am. Dec. 741.

[26] Bermudez, C. J., in Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456.

§ 1466. Attempted distinction between misfeasance and nonfeasance.—The attempted distinction between misfeasance and nonfeasance has been very much criticized and often denied to exist. It is undoubtedly true that the Latin names employed may not be very appropriate or illuminating. Notwithstanding this, however, it is believed to be true that there is a real distinction lying back of these phrases which it is important to discover and which is not more vague or indefinite than many other distinctions which it is necessary in our law to recognize.[27]

It is sometimes said that the only distinction, if one exists, is to be

[27] In the following cases acts of alleged negligent omission have been dealt with criminally. Rex v. Friend, Rus. & Ry. 20, where a master was held guilty of a misdemeanor for not providing proper food and clothing for his apprentice, causing loss of health. Regina v. Lowe, 3 C. & K. 123, where an engineer, employed to run an engine to draw miners out of a coal pit, deserted his post and left an ignorant boy in charge, and a miner was injured. The court held "that a man may, by neglect of duty, render himself liable to be convicted of manslaughter, or even murder." But in Regina v. Smith, 11 Cox C. C. 210, where the servant employed to watch at a crossing, there being no duty on the master to keep a servant there, deserted his post, it was held that the servant was not criminally liable because he owed no duty to the public. Regina v. Nicholls, 13 Cox C. C. 75, where a grandmother, who was compelled to leave home to work during the day, left an infant of tender years in the care of her nine-year-old son, and the child died from want of food, the court charged that there must be "wicked negligence" or recklessness to make the defendant criminally liable. In Regina v. Downes, 13 Cox C. C. 111, a father from religious motives, neglected to furnish proper medical attention for his son. The court said, "In this case there was a duty imposed by the statute on the prisoner to provide medical aid for his infant child, and there was the deliberate intention not to obey the law; whether proceeding from a good or bad motive is not material." Regina v. Instan (1893), 1 Q. B. 450, a niece was held criminally liable for failing to provide food and medicine for an aunt, seventy-three years old, with whom the niece lived. "The prisoner," said the court, "was under a moral obligation to the deceased from which arose a legal duty towards her." In Rex v. Smith, 2 C. & P. 449, it was held that a brother was not criminally liable for neglecting to provide food, warmth, etc., for an idiot brother in his house. "There is strong proof that there was some negligence; but my point is, that omission, without a duty, will not create an indictable offense." For an elaborate discussion of The Moral Duty to Aid Others as a Basis for Tort Liability, see articles by F. H. Bohlen, 56 Univ. of Pa. Law Review, 217, 316. For the liability, under a statute, for not furnishing sufficient food to a child whose care the defendant had undertaken, see Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464. For not furnishing medical attendance where the parties believed in "Christian Science," etc., see People v. Pierson, 176 N. Y. 201, 98 Am. St. Rep. 666, 63 L. R. A. 178; Westrup v. Commonwealth, 123 Ky. 95, 6 L. R. A. (N. S.) 685.

found in the fact that in one case the agent has, while in the other case he has not, actually entered upon the performance of an undertaking which he has assumed for his principal. In the latter case, it is said that if he had never entered upon the performance at all, as he had agreed to do, he is liable to his principal for not performing, but that he will not be liable to third persons, although they may have also suffered injury by reason of his non-performance. In these cases, the agent's duty will often be merely a contractual one and the third persons are not parties to the contract. Even if it be a non-contractual one, it will usually arise out of some act, condition or relation which is personal to the principal and the agent, and therefore will not sustain an action by third persons, who are strangers to it.

§ 1467. ——— This aspect of the matter may be made somewhat clearer by some further distinctions. In the case in hand, it may be, (1) that the principal was under no obligations to the third person; or (2) that the principal had undertaken some duty to the third person which he relied upon the agent to perform. The principal, for example, is party to an action involving a question in which several others are equally but separately interested. The principal has agreed with an attorney that the latter shall argue his case. But the attorney wholly neglects to undertake it. It is conceded that if he had argued it, he would probably have won it. In any event, its determination would have settled the question not only for his own client, but for all the others similarly interested and would have saved the latter the expense and trouble of settling it for themselves. The attorney is liable to his own client for the loss he may have sustained, but no one would suggest that he is liable to the other parties. Or the principal is proprietor of a steamboat and has undertaken to carry a company of people across a stream at a certain time. He has engaged a captain to pilot the boat across. At the appointed time the passengers are present, the captain is upon the ground, everything is in readiness, but the captain utterly refuses to go upon the boat or in any respect to enter upon or perform his undertaking. The loss or inconvenience to the assembled passengers may be very great. Can any one of them maintain an action against the captain?

§ 1468. ——— **Further of this distinction.**—It is said, however, that while the agent may not be liable if he never enters upon his undertaking, yet if he has actually entered upon the performance of his duties he will be liable to third persons who are injured by reason of his failure to exercise reasonable care and diligence in their performance. In this case also some distinctions are possible. Suppose that,

though the agent owes his principal a duty, the principal himself owes no duty to third persons who may sustain loss by reason of the agent's neglect. The principal confides to the charge of his agent certain premises which it is the agent's duty to his principal to keep in good condition and repair; the agent fails to perform this duty, permits the premises to become dilapidated, and disreputable, and he is clearly liable to his principal for the injury he sustains. But is the agent liable to the adjoining proprietors because their premises are rendered less attractive or rentable or saleable or valuable by reason of the condition in which the agent has thus permitted his principal's premises to be, that condition not constituting in law a nuisance? The principal owes no duty to the adjoining proprietors and the agent would owe them no duty if he were himself the principal.

§ 1469. ——— Suppose, next, that the principal is under some obligation to the other party. A principal has contracted with a third person to supply a horse fit for a lady to ride. He instructs his agent to go into the market and buy a horse fit for a lady to ride, but says nothing further to the agent respecting the use to which the horse is to be put. The agent goes into the market and negligently buys a horse unfit for a lady to ride and delivers it to his principal. The principal delivers the horse to the other party in pursuance of the agreement, and the other party—a woman, let us say—is injured while riding the horse as a result of its vicious character. Is the agent liable to her? If the purchaser gives the horse to her daughter, and the daughter is injured, is the agent liable to the daughter?[28]

The principal is the proprietor of a steamboat, as in the case already supposed in a previous illustration. The pilot, instead of refusing to go at all, starts with the passengers for the desired destination. After going part way, however, the pilot turns the boat about, and sets the passengers all down again, unharmed, at the point from which they started. Is he now liable to them?

The principal again is a carrier of passengers. He has undertaken to exercise at least reasonable care and dispatch to bring a passenger to his destination at a particular time. The principal entrusts the conduct of the vehicle to an agent, who knows the facts. The agent so negligently manages the vehicle that the passenger does not arrive

[28] See Cameron v. Mount, 86 Wis. 477, 22 L. R. A. 512, where the defendant undertook to sell to plaintiff's husband a horse fit for a woman to drive. At defendant's request, the wife drove the horse to try it and, while doing so, was injured because of the vicious character of the horse. *Held*, that she might recover damages from the proposed seller. See also *post*, § 1481.

on time, and thereby sustains great loss. May the passenger recover damages from the agent?

§ 1470. ——— A client, again, about to buy real estate, submits the abstract of title to his attorney for examination. The attorney examines the abstract and gives to his client a written opinion that the title is good. As a matter of fact, the attorney has negligently failed to observe a defect in the title. The client buys the land and holds it without discovering the defect. He then offers to sell the land to another and exhibits to him the opinion of the attorney concerning the title. The purchaser buys in reliance upon the opinion without making further investigation. The client conveys the land without warranty and never suffers in any way from the defective title. The purchaser, however, does suffer from it. In the absence at least of anything to indicate that the attorney had reason to believe that his opinion would be put to such a use, is he liable to this second purchaser for the injury he sustains?

Without attempting here to answer categorically these and countless other similar questions which will at once occur to the mind, let us see how the rules already laid down by the courts in this connection would apply to certain of them.

§ 1471. ——— **Effect of beginning performance.**—In the first place, as has been seen, it is constantly said that there is a radical distinction in the liability of the servant or agent depending upon whether he has or has not entered upon the performance of his undertaking, and it will be worth while to examine this distinction more closely to see what it really contains. It is said by Gray, C. J.,[29] in the quotation already given in a preceding section, "that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects so to do, the principal is the only person who can maintain any action against him for the non-feasance." Applying this to the case of the steamboat suggested above, if the servant never starts upon the voyage, his refusal to start as he had agreed with his principal to do, will not render him liable in tort to the expectant passengers. Neither could they have any remedy against him in contract except upon some theory of a contract made for their benefit and enforceable by them.

§ 1472. ——— Chief Justice Gray, however, continues by saying: "But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third per-

[29] In Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437.

sons which may be the natural consequence of his acts; and he cannot by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguard." Here are two ideas: (1) Negligence in the performance of his undertaking; and (2) negligently abandoning performance and leaving things in a dangerous condition. Applying these rules to the case of the boat, if the servant starts upon his journey but negligently injures his passengers or third persons by his management of the boat while on the way, he would be personally liable. There is nothing new in this. It is the now familiar rule already referred to which makes the servant or agent liable for direct and immediate injuries caused by his negligence while in the performance of his undertaking.[80]

He is also said to be liable for injuries caused "by abandoning his execution midway and leaving things in a dangerous condition." If, then, in the case of the boat, the servant negligently (*a fortiori* if he does it wilfully) abandons the boat, or abandons its management in midstream, and thereby causes injury to the passengers, he would be liable to them.

§ 1473. ——— But suppose the servant or agent in the case of the boat does neither of these things, but, as in one of the cases supposed, after taking the boat and the passengers in safety half-way across the stream, he then, against their protests, turns the boat about and puts them down in safety again at the place from which they started. Is he now liable to them? Unless the liability of the servant in these cases is to be confined to acts of physical injury to person or property, would he not be liable for so *negligently* managing the boat that instead of making his proper destination he makes some other; or even comes around again to the point from whence he started? Or, if he does it wilfully, would he not be liable to passengers rightfully on the boat and rightfully headed toward their destination, if against their will he wilfully turns them about and carries them in the opposite direction? Has he any more right to bring them back to the place from which they started than to take them to some other destination than that originally agreed upon?

[80] In Schlosser v. Great North. Ry. Co., 20 N. D. 406, the liability of the defendant is put upon this ground, though it seems a misapplication under the facts.

In Consolidated Gas Co. v. Connor, 114 Md. 140, 32 L. R. A. (N. S.) 809, a gas company, having arranged with the city to supply gas to lamps owned by the city, was held to stand in the attitude of an agent of the city and to be liable to a third person for negligence in performing its undertaking.

§ 1474. Agent liable for condition of premises over which he has control.—On analogy to cases already considered, the agent should be held responsible for injuries caused by the condition of premises in the possession or under the control of the agent where the condition is one for which he is responsible and the injury is such as he would be liable for if he were controlling the premises on his own account. Thus, if an agent, having control of premises, should permit or maintain a nuisance thereon for which he would be liable if he were the principal in the transaction, he should be equally liable notwithstanding the fact that he is but an agent.

For similar reasons, the agent should be held responsible for injuries caused by his neglect to keep in repair premises under his control where he is charged by his principal with the duty to repair and has the necessary means, in any case in which he would be liable for the same injury if he were controlling the premises on his own account. In these cases in which the agent has both the duty (to his principal) and the power to repair, and fails to do so, the injury can fairly be regarded as the consequence of his own act.[81] If an agent would be

[81] *Cases holding agent not liable.*—The case most frequently cited and perhaps most thoroughly considered in which the agent was held not liable is Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456. This was an action to charge defendants with liability for an injury resulting from the defective condition of premises, for the owner of which they were rental agents. The owner of the premises resided in France, the premises were a two-story building in New Orleans; the defendants were agents of the owner, "having control as such of the property." Half of the building was rented and half vacant. A balcony extended along the front of the entire building and needed repair, as the defendants knew. But there is nothing in the case to show that they had as to their principal either any duty or any authority to repair or any money with which to pay for repairs. On two or more occasions defendants had permitted the vacant half to be used for purposes of amusement. On the night in question, a dance was given in the vacant portion of the building, without the knowledge or consent of the defendants, by a person who had obtained the key from a neighbor, and taken possession of the premises. During the evening twelve or thirteen of the dancers rushed out upon the balcony, which gave way under them, and they were thrown to the ground. One of them, a boy about fourteen years of age, was killed by the fall. His parents brought this action against the agents. It was held that the agents were not liable. The case was very fully considered with reference to the English, Roman and French law. Some quotations from the opinion have already been made in the text. This gist of the conclusion is found in the following extract: "An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations toward third persons other than those of his principal. Those duties are not imposed upon

responsible for negligently driving his principal's team against a third person, as he would undoubtedly be, is he any the less responsible

him by law. He has agreed with no one, except his principal, to perform them. In failing to do so, he wrongs no one but his principal, who alone can hold him responsible."

It is not at all clear that the facts of this case bring it within the rule of the text. If they do, the answer which it is submitted may be made to the argument of the court, is that the duty is one not merely imposed upon the defendants as agents by their contracts with their principals, but imposed upon them by law as individuals having control of property not to so control it as to cause injury to third persons. To same effect as the principal case, is, Carey v. Rochereau, 16 Fed. 87.

Another case frequently cited is that of Feltus v. Swan, 62 Miss. 415, wherein the principal and agent were sued together to recover damages for not keeping open a drain upon land adjoining the plaintiff's, and alleged in the declaration to have been under the charge and control of the defendants, one as owner thereof and the other as manager and agent thereof. Nothing is alleged to show that the agent had any actual control of the premises or any power or duty in the matter. It was held that the agent was not liable and under the allegations of the declaration the conclusion would seem to be sound.

In Dean v. Brock, 11 Ind. App. 507, the action was brought against both principals and agents but the principals did not appear and seem not to have been served with process. It was alleged in the complaint that the agents were employed to rent the building, collect the rents, pay the taxes and make the necessary repairs to keep the building in a tenantable condition. Plaintiff was injured, as he alleged, because of the rotten condition of certain sills which had not been examined or repaired for more than twenty years, as the agents knew, as he also alleged, and he charged the agents with negligence in not knowing the conditions and in not making repairs. It was held that the agents were not liable, on the ground that their neglect, if there was any, was mere non-feasance.

It would be possible to make some distinctions with reference to this case, but it undoubtedly proceeds upon a theory which cannot be reconciled with the rule laid down in the text.

The same conclusions were reached in the similar case of Drake v. Hagan, 108 Tenn. 265, where the doctrine of Delaney v. Rochereau, *supra*, is approved. In Kuhnert v. Angell, 10 N. D. 59, 88 Am. St. Rep. 675, it was held that the agent had not such control as to make him liable.

In Labadie v. Hawley, 61 Tex. 177, 48 Am. Rep. 278, an agent was held not liable to an adjoining proprietor for an injury sustained by him by reason of excessive heat and smoke caused by hot fires in a cooking range which the agent had permitted the tenant to erect in his principal's building. The case is put upon the ground that in any event it was a mere non-feasance, but it does not appear that the agent had any real control over the premises, nor that it was negligent to permit the range to be erected, nor that there was any negligence in its construction. The injury arose from the manner in which the tenant used the range.

See Scheller v. Silbermintz, 50 N. Y. Misc. 175; Dudley v. Ill. Cent. R. Co., 127 Ky. 221, 128 Am. St. Rep. 335.

Cases holding the agent liable.— The following cases hold the agent liable where he had the control and

because he negligently fails to guide the team or negligently permits it to go unguided or negligently leaves it unattended and injury thereby results? If the agent is not in control or has neither the duty nor the power to repair, the failure to repair cannot be regarded as his act. But where these conditions are present it is difficult to see why it is not properly to be regarded as his act. It is, of course, in one sense a not-doing, a non-feasance; but his act of control is a doing, a feasance, and his failure to properly control is a misfeasance, if any

the power and the duty to make the repairs. Baird v. Shipman, 132 Ill. 16, 22 Am. St. Rep. 504, 7 L. R. A. 128, where agents for a non-resident owner, with general power to lease and make repairs, were held liable for negligently allowing a stable door to get into a dangerous condition so that an expressman delivering goods to the tenant was injured. Carson v. Quinn, 127 Mo. App. 525, where the agent with general control over the premises, a flat building, constructed a new walk in the court and left a hole uncovered. Ellis v. McNaughton, 76 Mich. 237, 15 Am. St. Rep. 308, where the agent had general oversight over the erection of a building. One of the workmen, against the agent's orders, removed a part of the sidewalk, but the agent, after knowledge of its removal, allowed it to so remain for some time until the injury. Banningan v. Woodbury, 158 Mich. 206, where plaintiff was injured while passing along the street, by glass falling from window of building over which defendant had control to rent. Lough v. Davis, 30 Wash. 204, 94 Am. St. 848, 59 L. R. A. 802; same case, 35 Wash. 449. Here the agent was authorized to rent, repair and manage. Railing around veranda was allowed to become old and rotten. In Campbell v. Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503, plaintiff was injured by falling through a hole in a wharf. The court said: "The general agents who had the care of this wharf and who had agreed with the lessees to make all needful repairs, are certainly in no better position than their principal." In Stiewel v. Borman, 63 Ark. 30, it was held that the mere fact that defendant was operating a mine as agent did not make him liable for injury caused by the collection of gas, unless it appeared that he had a duty and power to do what was necessary.

In Carter v. Atlantic Coast Line R. Co., 84 S. Car. 546, it was held that a railroad section boss was liable for allowing weeds to accumulate on the right-of-way, where they caught fire and burned plaintiff's house. See also, Patry v. Northern Pac. Ry. Co., 114 Minn. 375, 34 L. R. A. (N. S.) 586. In Orcutt v. Century Bldg. Co., 201 Mo. 424, 8 L. R. A. (N. S.) 929, the defendant was a trustee under a deed of trust with power to rent, collect rent, pay taxes, and all expenses in connection with the maintenance, repair and management of an office building. An elevator was allowed to become out of repair. In Hagerty v. Montana Ore Purchasing Co., 38 Mont. 69, 25 L. R. A. (N. S.) 356, the agent, a general manager of the mine, allowed a shaft to become defective. Applying the same principles: Mayer v. Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 53 Am. St. Rep. 88, 28 L. R. A. 433; Illinois Cent. R. Co. v. Foulks, 191 Ill. 57; Murray v. Cowherd, 148 Ky. 591; Consolidated Gas Co. v. Connor, 114 Md. 140, 32 L. R. A. (N. S.) 809; Greenberg v. Whitcomb Lumb. Co., 90 Wis. 225, 48 Am. St. Rep. 911, 28 L. R. A. 439; Ferrier v. Trepannier, 24 Can. S. C. 86; Owens v. Nichols, 139 Ga. 475.

importance is to be attached to these terms. It would seem to need no argument to show that the mere not-doing of a particular act which is in itself but a mere incident in the larger act of doing, ought not to be regarded a such a non-feasance as will excuse the agent within any proper meaning of that term.

Not all the cases, it is true, are in harmony with the rules above laid down, but these rules are believed to be sound, and to be sustained by the weight of modern authority.

§ 1475. ——— Agent must be responsible.—It is, of course, essential to the liability of the agent in these cases, that he shall be responsible for the condition. If the premises were in the defective condition when they came under his charge, and he has neither the power nor the authority to change them, or if the defect arose while they were in his charge, but he had no power or authority to correct it, he could ordinarily not be held responsible. Thus, where an agent who was carrying on a mill was charged with responsibility for injuries caused by maintaining the dam at too high a level, but it appeared that the dam was erected at that height long before he became agent and he had no power or authority to change it, it was held that he was not liable.[82]

§ 1476. ——— Duration of liability.—How long the liability of the agent in these cases would continue, is a question of torts rather than of agency. It would doubtless continue while the conditions continue to which it owes its existence, and would cease when the principal by personally assuming control or otherwise interrupted the causal relation between the agent and the injury.[83]

§ 1477. ——— Other cases involving the same principle.—Many other cases involving the same principle as that referred to in the preceding section may be determined in the same way. Thus, an agent having complete charge and control of building operations owes a duty not only to his principal to see that the work is properly done, but also to third persons to see to it that while doing it and with reference to matters over which he has complete control, he does not negligently

[82] Brown Paper Co. v. Dean, 123 Mass. 267. Where a manufacturing company having a feeble and insufficient dam across a stream of water, ordered its servant to shut the gate and keep it shut until ordered to raise it, and the servant obeyed the order, by means of which the water was raised so high that the dam broke away, and an injury was done to the plaintiff, it was held that the servant was not liable. Hill v. Caverly, 7 N. H. 215, 26 Am. Dec. 735.

[83] See Curtin v. Somerset, 140 Pa. 70, 23 Am. St. Rep. 220, 10 L. R. A. 322; Memphis Asphalt Co. v. Fleming, 96 Ark. 442; Daugherty v. Herzog, 145 Ind. 255, 57 Am. St. Rep. 204.

injure them, whether it be by his direct act or by his failure to take the precautions, without which he ought not to act at all.[34]

So the managing agent of a lumber company having full charge and control of its mill and machinery and of assigning employees to work at various machines, is personally liable for an injury caused by setting an inexperienced and ignorant employee at work upon a dangerous machine.[35]

So an agent having complete control and management of a mine with power and authority to do whatever is reasonably necessary to prevent injury from its operation is personally responsible for an injury caused by his neglect to take necessary precautions against the accumulation of dangerous gas therein.[36]

So an agent who takes complete charge and control of an office building, employing, supervising and discharging the necessary servants, and controlling and directing the operation of the elevators in the building, is personally liable for injury caused by the careless supervision and management of the elevator by an employee whom he has placed in charge thereof.[37]

An agent who has personal charge and control of a building, which he rents for his principal, is personally liable to a tenant for injuries caused to his goods because the agent, after the water had been shut off from the building for a time, caused it to be turned on again without seeing that pipes and faucets were in proper condition.[38]

The managing directors of a corporation are personally responsible for loss caused to a third person because they negligently permitted an undue quantity of high explosives to be accumulated upon the premises under their control.[39]

[34] Mayer v. Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 53 Am. St. 88, 28 L. R. A. 433. To same effect: Lottman v. Barnett, 62 Mo. 159; Harriman v. Stowe, 57 Mo. 93; Lee v. Dodd, 20 Mo. App. 271. But see Steinhauser v. Spraul, 127 Mo. 541, 27 L. R. A. 441, in which the doctrine of non-liability for alleged nonfeasance is carried to the extreme. See also, Ellis v. Southern Ry. Co., 72 S. C. 465, 2 L. R. A. (N. S.) 378; Fort v. Whipple, 11 Hun (N. Y.) 586.

[35] Greenberg v. Whitcomb Lumb. Co., 90 Wis. 225, 48 Am. St. Rep. 911, 28 L. R. A. 439. Compare O'Neil v. Young, 58 Mo. App. 628.

[36] Stiewel v. Borman, 63 Ark. 30. To same effect: see, Hindson v. Markle, 171 Pa. 138, where the superintendent of a mine was held liable for the pollution of a stream which caused plaintiff injury.

[37] Orcutt v. Century Bldg. Co., 201 Mo. 424, 8 L. R. A. (N. S.) 929.

[38] Bell v. Josselyn, 3 Gray (Mass.), 309, 63 Am. Dec. 741.

[39] Cameron v. Kenyon-Connell Com. Co., 22 Mont. 312, 74 Am. St. Rep. 602, 44 L. R. A. 508.

To same effect: Nunnelly v. Southern Iron Co., 94 Tenn. 397, 28 L. R. A. 421.

The president of an incorporated

There are, of course, courts, notably those in New York,[40] which would probably regard these cases as cases of non-feasance merely, and therefore as imposing no liability upon the agent directly to third persons. But the weight of authority is clearly the other way.

§ 1478. ——— Within the principle of the preceding section would also doubtless be included the case of a superior agent, like a foreman or manager, who has the actual control of servants of his principal, and who would be liable to third persons for injuries resulting to them from his negligent exercise of that power of control; though, of course, he would not be liable for the mere negligence of one of the servants in doing or not doing that whose doing or not doing involved no negligence on the part of the superior agent.[41]

Such a superior agent or servant would also be liable to the servants under his control for injuries caused to them by his negligence in exercising that control.

omnibus line directed its drivers to exclude colored persons. He was held individually liable for an injury caused by a driver in obeying such order, and he was not exonerated from such liability because the corporation might also have been liable. Peck v. Cooper, 112 Ill. 192, 54 Am. Rep. 231. But compare Bullock v. Gaffigan, 100 Pa. 276.

In Brower v. Northern Pacific Ry. Co., 109 Minn. 385, 25 L. R. A. (N. S.) 354, an engineer, charged with the duty of keeping a water gauge in repair, negligently put in a gauge and also negligently failed to put the usual guard around the gauge. Plaintiff was injured by an explosion. *Held*, the engineer was liable. The negligent putting in of the gauge was misfeasance, even if the leaving off the guard was mere non-feasance. "The distinction between misfeasance and non-feasance is sometimes fanciful."

Agent having no power to correct defect.—The doctrine of the foregoing cases, of course, cannot apply where, however great the defect, the agent sought to be held was without duty, power or means to correct it. Dudley v. Illinois, etc., Ry. Co., 127 Ky. 221, 128 Am. St. Rep. 335.

[40] Thus in Murray v. Usher, 117 N. Y. 542, it was held that the general manager of a saw mill was not personally liable to an employee injured by reason of defective equipment which it was within the power and the duty of the manager to keep in safe condition.

The same principles were applied in Van Antwerp v. Linton, 89 Hun (N. Y.), 417, affirmed by the court of appeals on the opinion below, in 157 N. Y. 716. In Potter v. Gilbert, 130 App. Div. 632, aff'd 196 N. Y. 576, where an architect owed the contractual duty to the owner to see that the contractor complied with the plans and plaintiff, a servant of the contractor, was injured by the falling of a wall defectively constructed; the architect was held not liable, it not being contended that the plans themselves were negligently drawn. See also, Henshaw v. Noble, 7 Ohio St. 226.

[41] The master of a ship at sea is not liable for injuries to a passenger caused by the negligence of the crew, there being no personal negligence on his part. Stacpoole v. Betridge, 5 Vict. L. R. 302. The master of a ship in harbor is not liable for injuries caused by the mere negli-

§ 1479. Cases in which agent held not liable.—On the other hand, there are a number of cases, usually called cases of non-feasance, and some of which probably were really such, in which the agent was held not liable. Thus it has been held, that the agent is not liable to a third person for the breach of his duty to his principal to give the latter notice of information coming to his attention and which a third person was interested in having communicated to the principal.[42]

So it is held that the transfer agent of a corporation is not responsible to a third person for refusing to permit him to make a transfer of stock upon the transfer books of the corporation in the custody of the agent. The remedy, it was said, was by an action against the corporation itself.[43]

For similar reasons it has been held that the treasurer of a corporation is not liable in his individual capacity to a stockholder for refusing to pay him a dividend.[44]

So it is held that a depositor cannot maintain an action against the cashier of a bank for the misapplication of funds, but the action must be against the bank itself.[45]

And, generally, it is held that no action at law can be maintained by stockholders in a corporation against the directors personally to recover for losses sustained by reason of the misconduct of the directors.

gence of the crew. Clancy v. Harrison, 4 Vict. L. R. 437.

[42] In Reid v. Humber, 49 Ga. 207, the court said: "A party shipped his cotton to his factor; he then told the agent of that factor, who was at another depot from where the cotton was shipped, that he did not wish the cotton sold until further orders. Was there a legal obligation on that agent towards the shipper to transmit his directions to the factor? From what did it spring? The agent was bound to his principal, and would have been responsible to him for any damages recovered against the principal, on account of the agent's failure. And the shipper may have been entitled to recover against the principal, either for the neglect of the agent in not forwarding the instructions, or for the violation of them by the principal, if they had been communicated. But we cannot see that there was any such relation between the agent and the shipper as to render the agent liable to him for the neglect. Had the shipper made the agent his own agent in the matter for a consideration, the case would be different."

Where an agent, being duly authorized, impounded cattle trespassing on the principal's land, he was not liable for damage suffered by the cattle on account of the principal's failure to care for them properly while they were impounded. Kimbrough v. Boswell, 119 Ga. 201.

[43] Denny v. Manhattan Co., 2 Denio (N. Y.), 115, 5 id. 639.

See also, Eames v. Brunswick Construction Co., 104 N. Y. App. Div. 566.

[44] French v. Fuller, 23 Pick. (Mass.) 103.

[45] Wilson v. Rogers, 1 Wyo. 51.

The directors do not owe the proper performance of their duties as such directly to the stockholders.[46]

§ 1480. ——— So in the case of persons employed in a professional capacity. The duties which they owe are ordinarily held to be owing to their immediate employers only, and not to third persons, even though the latter may in some way sustain injury because this duty is not performed. Thus, in a case often referred to, it was held that an attorney at law was not liable to a third person who had relied upon an opinion of title negligently erroneous, which the attorney had given to his client.[47] In another the attorney of a testator was held not liable to a donee under the will for so negligently drafting the will that it did not secure to the donee the benefits which the testator intended to give him.[48] In another, mortgagees who had advanced money upon the strength of a certificate given by an architect and surveyor to his employer, the mortgagor, concerning the stage of progress of a building, were held to have no remedy against the architect for his negligence in making the certificate.[49] The same question has also arisen a number of times with reference to the makers of abstracts of title; and while in general the abstractor has not been held liable to anyone except his immediate employer, special circumstances have in several cases been held to be sufficient to extend his liability, as was suggested in the note respecting the attorney.[50]

[46] See Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; Niles v. New York, etc., R. Co., 176 N. Y. 119, and many other cases to be found in the books on Corporations.

[47] National Savings Bk. v. Ward, 100 U. S. 195, 25 L. Ed. 621. It is easy, however, to imagine circumstances under which a different rule would be applicable; as, for example, where the attorney knew or ought to have known, that the opinion which he rendered was to be relied upon by such persons as the plaintiff. Thus in this case, it was said by Waite, C. J., with whom Swayne and Bradley, JJ., concurred, and who thought that the facts in the case brought it within the rule: "I think if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which by the use of ordinary professional care and skill he might have found."

[48] Buckley v. Gray, 110 Cal. 339, 52 Am. St. Rep. 88, 31 L. R. A. 861. See also, the comments upon the subject in Alton v. Midland Ry. Co., 19 C. B. (N. S.) 213 at p. 244.

[49] Le Lievre v. Gould, [1893] 1 Q. B. 491.

[50] In Day v. Reynolds, 23 Hun (N. Y.), 131, plaintiff, on being applied to for a loan to be secured by a mortgage, requested the borrower to procure a search from the county clerk's office. The search was made by defendant, the county clerk, (paid by the borrower), without knowledge of the purpose for which it was

§ 1481. ——— With reference to certain of the cases here under consideration, it may well be that a ground for the agent's or servant's

to be used. *Held*, the defendant owed the plaintiff no duty in the matter and was not liable for failing to note a recorded conveyance by the borrower to a third person. In Talpey v. Wright, 61 Ark. 275, 54 Am. St. Rep. 206, it was held that an indorsee of notes secured by a deed of trust could not maintain an action against the abstracter for negligently preparing an abstract for the borrower and lender. Houseman v. Girard Mutual B. & L. Ass'n, 81 Pa. 256, to same effect (*semble*).

In Schade v. Gehner, 133 Mo. 252, the plaintiff was the devisee of her husband whom defendant had undertaken to assist in examining the title to land to be purchased. The court said: "Conceding the defendant's negligence. . . . That a right of action could not accrue to anyone else who was not privy to the contract, although damage may have resulted to such person by reason of the negligence, is the uniform doctrine of the authorities." In Zweigardt v. Birdseye, 57 Mo. App. 462, it was held that the purchaser had no cause of action against the abstracter for negligently preparing an abstract for the seller. In Mallory v. Ferguson, 50 Kan. 685, 22 L. R. A. 99, the court said: "We think the great weight of authority is to the effect that the party making the examination and certificate is liable only to his employer and never to a stranger or third party." In Mechanics Bldg. Ass'n v. Whitacre, 92 Ind. 547, speaking of the liability of a register who makes a search and certifies to a title, the court said, "he would be liable to the party who employed him, but not to such as might simply see and rely upon such certificate." In Morano v. Shaw, 23 La. Ann. 379, it was held that the vendee of a purchaser at sheriff's sale has no right of action against the recorder of mortgages for having given an imperfect certificate whereby his vendor was induced to purchase. The same thing was held in Smith v. Moore, 9 Rob. (La.) 65. In Brown v. Sims, 22 Ind. App. 317, 72 Am. St. Rep. 308, the abstracter was informed that the abstract was to be used to induce plaintiff to make a loan, and before the loan was made the abstracter told plaintiff in person that the title was clear and that he might rely on the abstract. The court said, "Where the abstracter has no knowledge that some person other than his employer will rely in a pecuniary transaction upon the correctness of the abstract, the general rule that his duty extends only to his employer must be maintained." But held: "We think it cannot properly be said that the appellee did not owe a duty to the appellant arising under the contract, the attending circumstances indicating that it was the understanding of all the parties that the service was to be rendered for the use and benefit of the appellant. . . . " In Dickle v. Abstract Co., 89 Tenn. 431, 24 Am. St. Rep. 616, it was held that the abstract company was liable to a purchaser for negligence in furnishing an abstract to the seller. The deed was drawn up by the abstract company. The court said: "The allegations of the bill clearly make a privity of contract between the purchasers and the defendant." See Siewers v. Commonwealth, 87 Pa. 15. In Peabody B. & L. Ass'n v. Houseman, 89 Pa. 261, 33 Am. St. Rep. 757, the defendant left certain mortgages off the search on promise by the borrower that they would be paid and "the defendant's search clerk knew when he issued the searches that the plaintiffs were about to loan money on the faith of them." Defendant held liable.

liability to third persons may be found in the rule which has been invoked to make liable a manufacturer of goods, dangerous inherently or dangerous through negligent manufacture, to a remote purchaser and user, even though no contractual relation between the parties exists. The agent or servant might be liable with his employer, and no reason is apparent why, in many cases, the agent or servant who is really at fault should not be held liable, though no case is now in mind in which this has been attempted.

§ 1482. Agent not liable in tort to third persons for breach of principal's contracts with them.—An agent is not usually liable to third persons for the breach of his principal's contracts with such third persons even though the performance of those contracts was confided to the agent by the principal. The agent clearly is not liable on the contract, nor can he ordinarily be liable to the third party in tort for the breach of the contract.

Whether upon an analogy to the rule which gives an action against a third person in certain cases for *inducing* the breach of a contract,[51] an action in tort might be maintained against an agent who wilfully *disables* his principal from performing by withholding his own performance, seems nowhere to have received much attention.

The moral considerations may often be stronger in the latter case than in the former. As a "short cut" to the party really at fault, such an action would have some justification. There is, however, less need for giving a new action here than in the former case. There, there is no remedy against the party at fault unless it be one in tort; here, there is always the contractual remedy of the third person against the principal, and of the latter against the agent.

§ 1483. Liability of servant or agent to fellow servant or agent.—Where, under the rules herein laid down, an agent or servant would be liable to a third person for his negligence, he will ordinarily be equally liable although the person injured be another agent or servant in the employment of the same principal or master, and even though, under the so-called fellow-servant doctrine, the principal or master would not be liable.[52]

[51] See discussion in Yale Law Journal for November 1910. 20 Yale L. Jour. 69.

[52] Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437 (overruling Albro v. Jacquith, 4 Gray (Mass.), 99, 64 Am. Dec. 56); Rogers v. Overton, 87 Ind. 410; Hinds v. Overacker, 66 Ind. 547, 32 Am. Rep. 114; Hinds v. Harbou, 58 Ind. 121; Ward v. Pullman Co., 131 Ky. 142, 25 L. R. A. (N. S.) 343; Hare v. McIntire, 82 Me. 240, 17 Am. St. Rep. 476, 8 L. R. A. 450; Griffiths v. Wolfram, 22 Minn. 135; Brower v. Northern Pacific Ry. Co., 109 Minn. 385, 25 L. R. A. (N.

§ 1484. No liability for negligence of fellow agent or servant.—One who is merely a co-agent or fellow servant is not liable to third persons for the negligence or default of his co-agent or fellow servant where he himself is free from fault and has no authority or duty with reference to the acts of the other.[53]

§ 1485. Liability in respect of sub-agents.—Whether a sub-agent is to be considered the agent of the agent or of the principal is a question which has been already considered.[54] Where in accordance with the rules there laid down it is determined that the sub-agent is to be regarded as the agent of the agent, the latter will be liable to the sub-agent, the principal and third persons as a principal. But where, on the other hand, the sub-agent is found to be the agent of the principal, then the intermediate agent will not be liable to the sub-agent or to third persons as a principal.[55]

The sub-agent, like the agent, is personally responsible to third persons for his own misfeasances, although the agent or the principal may be responsible also.[56] He would not, however, be liable to third persons for mere non-feasance, in the sense already explained. On these subjects, the rules laid down above respecting the liability of the agent to third persons, apply, *mutatis mutandis*, to the sub-agent.

§ 1486. ——— Agent who conceals principal liable as principal to sub-agent.—The rule that an agent who conceals his principal may himself be charged as principal, has been applied in favor of sub-agents who have received injuries while in the employment of the agent as an ostensible principal. In such cases the agent is liable to the sub-agent in the same manner as though he were in fact the real principal.[57]

§ 1487. Joinder of agent and principal in same action.—Whether the agent and the principal may be joined as defendants in the same action is a question involving a variety of considerations and leading to much difference of opinion. Inasmuch, however, as the question is substantially the same, whether approached from the standpoint of joining the principal with the agent or the agent with the principal,

S.) 354; Malone v. Morton, 84 Mo. 436; Kenney v. Lane, 9 Tex. Civ. App. 150.

Contra: Southcote v. Stanley (dictum), 25 L. J. Exch. 339.

[53] Cargill v. Bower, 10 Ch. Div. 502.

[54] See *ante*, § 326.

[55] Stone v. Cartwright, 6 T. R. 411; Bennett v. Bayes, 5 H. & N. 391; Brown v. Lent, 20 Vt. 529.

[56] Stone v. Cartwright, *supra*; Bush v. Steinman, 1 Bos. & Pul. 404; Denison v. Seymour, 9 Wend. (N. Y.) 11; Rapson v. Cubitt, 9 M. & W. 710; Quarman v. Burnett, 6 M. & W. 499.

[57] Malone v. Morton, 84 Mo. 436; McGowan v. St. Louis, etc., R. R. Co., 61 Mo. 528; Yarslowitz v. Bienenstock, 130 N. Y. Supp. 931.

and as the latter question is discussed in a later chapter,[58] upon the liability of the principal to third persons, no attempt will be made to enter upon its discussion here. It will suffice here to say that there is a large and constantly growing number of cases in which it is held that such a joinder is proper.[59]

B. PUBLIC AGENTS.

§ 1488. What here included.—It is the purpose of this work to deal primarily with the private agent, although from time to time references have been made to the rules which apply in the case of public agents. In the first edition of this work, however, some space was given to the discussion of the general liability to third persons of the more important classes of public agents or officers. It is less necessary than ever to renew that discussion here because, since the first edition of this work appeared, the writer has very much more fully discussed these questions in a separate treatise [60] to which the reader may be referred. A very brief statement, however, of the most important of these rules, may not be entirely out of place here, and will be given.

I.

LIABILITY FOR THEIR CONTRACTS.

§ 1489. Already considered.—What may be pertinent to say respecting the liability of public officers to third persons in contract has already been said in various sections in the preceding subdivision, and nothing further will be added here.[61]

[58] See *post*, Chap. V.

[59] See Knuckey v. Butte Ry. Co., 41 Mont. 314; Southern Ry. Co. v. Rowe, 2 Ga. App. 557; Dowell v. Chicago, Rock Island, etc., Ry., 83 Kan. 562; Willard v. Key, 83 Neb. 850; Coalgate Co. v. Bross, 25 Okla. 245, 138 Am. St. R. 915; Englert v. New Orleans Ry., 128 La. 473; Louisville, etc., Ry. v. Gollehur, 40 Ind. App. 480; Lefkovitz v. Sherwood (Tex. Civ. App.), 136 S. W. 850; Moore v. Kopplin (Tex. Civ. App.), 135 S. W. 1033; Kirkpatrick v. San Angelo Bank (Tex. Civ. App.), 148 S. W. 362; Jewell v. Bolt & Nut Co., 231 Mo. 176, 140 Am. St. R. 515; Cincinnati, etc., Ry. v. Martin, 146 Ky. 260; Lilienthal v. Carpenter, 148 Ky. 50; Galvin v. Brown, 53 Ore. 598; Shepherd Pub. Co. v. Press Pub. Co., 10 Ont. L. R. 243; Turcotte v. Ryan, 39 Can. Sup. Ct. R. 8.

[60] See Mechem on Public Officers, Callaghan & Co., Chicago.

[61] See *ante*, §§ 1371, 1428.

II.

LIABILITY FOR THEIR OWN TORTS.

§ 1490. In general—Classification.—Public agents may be classified according to several lines of distinction. They may, for example, be divided into two classes based upon the character and the manner in which they serve the public. One class embraces those whose duty is owing primarily to the public collectively and not to any particular individual,—who act for the public at large and who are ordinarily paid out of the public treasury. The other class includes those who, while they may not owe to the public as such the performance of any given duty, come, by virtue of an employment by an individual to do some act for him in an official capacity, under a special and particular obligation to him as an individual. Officers or agents of this class usually receive their compensation from fees paid by each individual who employs them.

Another classification may be made based upon the nature of the duties to be performed. One class, for example, includes those whose duties are of a purely *judicial* nature; another, those whose duties are of a *quasi-judicial* or *discretionary* character; another, those whose duties are *legislative*, and still another those whose duties are *ministerial* in their nature.

In respect of this classification it will be found that it is not always easy to determine whether the given duty is judicial or discretionary, or whether it is ministerial in its nature, particularly in view of the fact that the same officer may often, in the same transaction even, be compelled to exercise both sorts of function.

It will be evident that the question of the liability of the public agent may involve not only his responsibility for his own torts, but for those of his subordinates, assistants and employees.

§ 1491. No action by individual for breach of duty owing solely to the public.—The first question for determination in considering the liability of a public officer to private action, is whether such officer owes any duty to the individual. Public officers are chosen upon public grounds, they are part of the machinery of the government, and they owe the performance of the duties imposed upon them primarily to the public.

Many of them, in the course of the performance of their duties, incur obligations to individuals, but these obligations are so incurred as a part of their public duty attaching to these individuals as distributive

members of the public, and not because the performance of these duties, for these particular individuals, was the object and end of their appointment.

Other of the public agents may never come under any obligation to individuals at all.

Unless, therefore, it appears that the duty violated was one owing to the individual complaining of its non-performance, and unless it appears that he has sustained a special injury therefrom, no civil action can be maintained against the officer. Recourse in such a case must be had by a public prosecution.[62]

§ 1492. Liable for wrongs committed in private capacity.—It will be understood that it is the liability of public agents for wrongs committed while they were acting, or assuming to act, in their public capacity, that is now to be considered, and not their liability for those wrongs which they may commit as private individuals. For the latter they are, of course, liable like any other private individuals, and their official character affords them no defense.

1. Superior Governmental Officers.

§ 1493. Not usually subject to private action.—With reference to the higher executive officers of the government, such as the president of the United States, the governors of the states, the heads of departments, and the like, it seems to be everywhere agreed that they are not subject to private actions for damages for their official discretionary acts within their jurisdiction.[63] With respect of the governors of the states, there is a considerable body of authority both for asserting [64] and denying [65] that their ministerial action may be controlled by

[62] See Moss v. Cummings, 44 Mich. 359; Butler v. Kent, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219; McPhee v. Guaranty Co., 52 Wash. 154.

[63] See Marbury v. Madison, 1 Cranch (U. S.), at p. 170, 2 L. Ed. 60; United States v. Commissioner, 5 Wall (U. S.), 563, 18 L. Ed. 692; Decatur v. Paulding, 14 Pet. (U. S.) 497, 10 L. Ed. 559; New York Ins. Co. v. Adams, 9 Pet. (U. S.) 573, 9 L. Ed. 234.

[64] See Martin v. Ingham, 38 Kan. 641; Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432; Middleton v. Low, 30 Cal. 596; Tennessee R. R. Co. v. Moore, 36 Ala. 371; Wright v. Nelson, 6 Ind. 496; Baker v. Kirk, 33 Ind. 517; Gray v. State, 72 Ind. 567; Magruder v. Swann, 25 Md. 173; Groome v. Gwinn, 43 Md. 572; Chamberlain v. Sibley, 4 Minn. 309; Chumasero v. Potts, 2 Mont. 242; State v. Blasdel, 4 Nev. 241; Cotten v. Ellis, 7 Jones (N. C.), L. 545; State v. Chase, 5 Ohio St. 528.

[65] See Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec. 346; State v. Warmouth, 22 La. Ann. 1, 2 Am. Rep. 712; Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564; State v. Warmouth, 24 La. Ann. 351, 13 Am. Rep. 126; People

mandamus. With reference, however, to heads of departments and state officers below the rank of governor, there is quite general agreement that, where ministerial duties of a clear and positive nature, are imposed upon them by the law, mandamus will lie to compel their performance.[66]

2. *Judicial Officers.*

§ 1494. Judicial officers not liable when acting within their jurisdiction.—It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions without apprehension of personal consequences to himself. No civil action, therefore, can be maintained against a judicial officer by one claiming to have been injured by his judicial action within his jurisdiction.[67] From the very nature of the case, he is called upon to exer-

v. Governor, 29 Mich. 320, 18 Am. Rep. 89; Jonesboro Turnpike v. Brown, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713; Vicksburg R. R. Co. v. Lowry, 61 Miss. 102, 48 Am. Rep. 76; State v. Drew, 17 Fla. 67; Low v. Towns, 8 Ga. 360; People v. Bissell, 19 Ill. 229; People v. Yates, 40 Ill. 126; People v. Cullom, 100 Ill. 472; Dennet v. Governor, 32 Me. 508; Rice v. Austin, 19 Minn. 103, 18 Am. Rep. 330; Western R. R. Co. v. DeGraff, 27 Minn. 1; State v. Governor, 39 Mo. 388; State v. Price, 1 Dutch. (N. J.) 931.

[66] See Martin v. Ingham, 38 Kan. 641; State v. Doyle, 40 Wis. 175, 220; State v. Wrotnowski, 17 La. Ann. 156; State v. Houston, 40 La. Ann. 393, 8 Am. St. R. 532; State v. Barker, 4 Kan. 379; State v. Secretary of State, 33 Mo. 293; Northwestern, etc., R. R. Co. v. Jenkins, 65 N. C. 173; State v. Dubuclet, 26 La. Ann. 127; People v. Schuyler, 79 N. Y. 189; Citizens' Bank v. Wright, 6 Ohio St. 318; People v. Auditor-General, 9 Mich. 134; Employers' Assur. Co. v. Commissioner of Insurance, 64 Mich. 614.

[67] Some of the cases on this subject are the following: Houlden v. Smith, 14 Ad. & El. (N. S.) 841, 19 L. J. Q. B. 170; Holroyd v. Breare, 2 B. & Ald. 473; Basten v. Carew, 3 B. & C. 652; Garnett v. Ferrand, 6 B. & C. 611; Fawcett v. Fowlis, 7 B. & C. 394; Fray v. Blackburn, 3 B. & S. 576, Pike v. Carter, 3 Bing. 78; Mills v. Collett, 6 Bing. 85; Miller v. Seare, 2 Bl. 1145; Dicas v. Lord Brougham, 6 C. & P. 249; Floyd v. Barker, 12 Coke, 25; Kemp v. Neville, 10 C. B. (N. S.) 528; Mostyn v. Fabrigas, 1 Cowp. 172; Lowther v. Earl of Radnor, 8 East, 113; Scott v. Stansfield, 3 L. R. Ex. 220; Ackerly v. Parkinson, 3 Maule & S. 411; Miller v. Hope, 2 Shaw, 125; Ward v. Freeman, 2 Ir. C. L. Rep. 460; Randall v. Brigham, 7 Wall. (74 U. S.) 535, 19 L. Ed. 285; Bradley v. Fisher, 13 Wall. (80 U. S.) 335, 20 L. Ed. 646; Johnson v. Tompkins, 1 Bald. (U. S. C. C.) 571; Cooke v. Bangs, 31 Fed. 640; Hamilton v. Williams, 26 Ala. 527; Craig v. Burnett, 32 Ala. 728; Busteed v. Parsons, 54 Ala. 393, 25 Am. Rep. 688; Irion v. Lewis, 56 Ala. 190; Woodruff v. Stewart, 63 Ala. 206; Heard v. Harris, 68 Ala. 43; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Broom v. Douglass, —— Ala. ——, 57 So. 860; Borden v. State, 11 Ark. 519, 54 Am. Dec. 217; McIntosh v. Bullard, 95 Ark.

cise *his judgment,* and his duty to the individual is performed when he has exercised it, however erroneous or disastrous in its consequences it may appear either to the party or to others.

§ 1495. Liability not affected by motive.—This immunity of judicial officers from civil liability is not affected by the motives with which they are alleged to have performed their duties. If the officer

227; Inos v. Winspear, 18 Cal. 397; Porter v. Haight, 45 Cal. 631; Pickett v. Wallace, 57 Cal. 555; Wyatt v. Arnot, 7 Cal. App. 221; Hughes v. McCoy, 11 Colo. 591; Phelps v. Sill, 1 Day (Conn.), 315; Ambler v. Church, 1 Root (Conn.), 211; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102; Holcomb v. Cornish, 8 Conn. 375; Bailey v. Wiggins, 5 Harr. (Del.) 462, 60 Am. Dec. 650; Flack v. Harrington, Breese (Ill.), 165, 12 Am. Dec. 170; Garfield v. Douglass, 22 Ill. 100, 74 Am. Dec. 137; State v. Flinn, 3 Blackf. (Ind.) 72, 23 Am. Dec. 380; Barkeloo v. Randall, 4 Blackf. 476, 32 Am. Dec. 46; Walker v. Hallock, 32 Ind. 239; Elmore v. Overton, 104 Ind. 348, 54 Am. Rep. 343; Londegan v. Hammer, 80 Iowa, 508; Jones v. Brown, 54 Iowa, 74, 37 Am. Rep. 185; Clark v. Spicer, 6 Kan. 440; Connelly v. Woods, 31 Kan. 359; Kennedy v. Terrill, Hardin (Ky.), 490; Gregory v. Brown, 4 Bibb (Ky.), 28, 7 Am. Dec. 731; Walker v. Floyd, 4 Bibb (Ky.), 237; Bullett v. Clement, 16 B. Mon. (Ky.) 193; Morgan v. Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Revill v. Pettit, 3 Metc. (Ky.) 314; Terrail v. Tinney, 20 La. Ann. 444; Lilienthal v. Campbell, 22 La. Ann. 600; Spencer v. Perry, 17 Me. 413; Morrison v. McDonald, 21 Me. 550; Downing v. Herrick, 47 Me. 462; Pratt v. Gardner, 2 Cush. (56 Mass.) 63, 48 Am. Dec. 652; Chickering v. Robinson, 3 Cush. (57 Mass.) 543; Raymond v. Bolles, 11 Cush. (65 Mass.) 315; Piper v. Pearson, 2 Gray (68 Mass.), 120, 61 Am. Dec. 438; Clarke v. May, 2 Gray (68 Mass.), 410, 61 Am. Dec. 470; Sullivan v. Jones, 2 Gray (68 Mass.), 570; Ela v. Smith, 5 Gray (71 Mass.), 136, 66 Am. Dec. 356; Way v. Townsend, 4 Allen (86 Mass.), 114; Doherty v. Munson, 127 Mass. 495; White v. Morse, 139 Mass. 162; Wall v. Trumbull, 16 Mich. 228; Ross v. Griffin, 53 Mich. 5; Stewart v. Cooley, 23 Minn. 347, 23 Am. Rep. 690; Wilcox v. Williamson, 61 Miss. 310; Bell v. McKinney, 63 Miss. 187; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131; Wertheimer v. Howard, 30 Mo. 420, 77 Am. Dec. 623; Evans v. Foster, 1 N. H. 374; Burnham v. Stevens, 33 N. H. 247; Jordan v. Hanson, 49 N. H. 199, 6 Am. Rep. 508; Little v. Moore, 4 N. J. L. 74, 7 Am. Dec. 574; Mangold v. Thorpe, 33 N. J. L. 134; Grove v. Van Duyn, 44 N. J. L. 654, 43 Am. Rep. 412; Yates v. Lansing, 5 Johns. (N. Y.) 282, 9 Id. 395, 6 Am. Dec. 290; Butler v. Potter, 17 Johns. (N. Y.) 145; Adkins v. Brewer, 3 Cow. (N. Y.) 206, 15 Am. Dec. 264; Cunningham v. Bucklin, 8 Cow. (N. Y.) 178, 18 Am. Dec. 432; Bissell v. Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Everston v. Sutton, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217; Rogers v. Mulliner, 6 Wend. (N. Y.) 597, 22 Am. Dec. 546; Tompkins v. Sands, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46; Millard v. Jenkins, 9 Wend. (N. Y.) 298; Wickware v. Bryan, 11 Wend. 545; Harman v. Brotherson, 1 Denio (N. Y.), 537; Wilson v. Mayor, 1 Denio (N. Y.), 595, 43 Am. Dec. 719; Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80; East River Gas L. Co. v. Donnelly, 93 N. Y. 557; Evarts v. Kiehl, 102 N. Y. 296; Root v. Rose, 6 N. D. 575; Ramsey v. Riley, 13 Ohio, 157; Truesdell v. Combs, 33 Ohio St. 186; Jones v. Hughes, 5 S. & R. (Pa.) 298, 9 Am. Dec. 364; Kennedy v. Barnett, 64 Pa. 141; Sining

be in fact corrupt, the public has its remedy, but the defeated suitor can not maintain an action against the judge, by alleging that the judgment against him was the result of corrupt or malicious motives.[68]

§ 1496. This immunity extends to judicial officers of all grades.—This exemption from civil action extends to every judicial officer, from the highest judge in the land to the humblest justice who tries petty cases.[69] Whoever is invested with judicial office, whether of high or low degree, cannot be called to account to the private individual for his acts within his jurisdiction although, as has been seen, the aggrieved party may allege that the act was corrupt or malicious.[70] For such acts, the officer must account only to his conscience and the state.

3. Quasi-judicial Officers.

§ 1497. Quasi-judicial officer exempt from civil liability for his official actions.—The same reasons of private interest and public policy which operate to render the judicial officer exempt from civil liability for his judicial acts within his jurisdiction, apply as well to

v. Bentham, 2 Bay (S. C.), 1; Brodie v. Rutledge, 2 Bay (S. C.), 69, State v. Johnson, 2 Bay, 385; Reid v. Hood, 2 Nott & McC. (S. C.) 168, 10 Am. Dec. 582; Kelly v. Rembert, Harp. (S. C.) L. 65, 18 Am. Dec. 643; McRep. 641; Webb v. Fisher, 109 Tenn. Call v. Cohen, 16 S. Car. 445, 42 Am. 701; Rains v. Simpson, 50 Tex. 495, 32 Am. Rep. 609; Fuller v. Gould, 20 Vt.' 643; Johnston v. Moorman, 80 Va. 131; Carter v. Dow, 16 Wis. 298; Steele v. Dunham, 26 Wis. 393.

[68] Bradley v. Fisher, 13 Wall. (U. S.) 335; Rains v. Simpson, 50 Tex. 495, 32 Am. Rep. 609; Weaver v. Devendorf, 3 Den. (N. Y.) 117; Pratt v. Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; Cunningham v. Bucklin, 8 Cow. (N. Y.) 178, 18 Am. Dec. 432; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131; Henke v. McCord, 55 Iowa, 378; Jones v. Brown, 54 Iowa, 74, 37 Am. Rep. 185; Green v. Talbot, 36 Iowa, 499; Wasson v. Mitchell, 18 Iowa, 153; Hughes v. McCoy, 11 Colo. 591; Irion v. Lewis, 56 Ala. 190; Heard v. Harris, 68 Ala. 43; Evans v. Foster, 1 N. H. 377; Barhyte v. Shepherd, 35 N. Y. 242; Steele v. Dunham, 26 Wis. 396; Little v. Moore, 4 N. J. L. 74, 7 Am. Dec. 574.

[69] Garnett v. Ferrand, 6 B. & C. 611; Butler v. Potter, 17 Johns. (N. Y.) 145; Pratt v. Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; Carter v. Dow, 16 Wis. 298; Wall v. Trumbull, 16 Mich. 228; Coleman v. Roberts, 113 Ala. 323, 59 Am. St. Rep. 111, 36 L. R. A. 84; State ex rel. Egan v. Wolener, 127 Ind. 306; Waldron v. Berry, 51 N. H. 136; Mills v. Brooklyn, 32 N. Y. 489; Johnston v. Moorman, 80 Va. 131; Irion v. Lewis, 56 Ala. 190; Rains v. Simpson, 50 Tex. 495, 32 Am. Rep. 609.

[70] There are, in some of the cases, *dicta* to the effect that inferior judicial official officers and magistrates may be held liable for the judicial acts, even though acting within their jurisdiction, if they were actuated by corrupt or malicious motives, but they are not sustained by the authorities. As is said in Irion v. Lewis, 56 Ala. 190, 196, "In support of such action, even when the judicial error

the officer who exercises judicial functions although not as part of a regularly established court, and to whom, therefore, the name *quasi*-judicial officer has been applied. It is well settled that the *quasi*-judicial officer can not be called upon to respond in damages to the private individual for the honest exercise of his judgment within his jurisdiction however erroneous or misguided his judgment may be.[71]

§ 1498. Illustrations.—This principle extends, for example, to arbitrators in their decision upon the controversy submitted to them;[72] jurors in their deliberations and verdicts;[73] assessors in the valuation of property for taxation;[74] commissioners appointed to determine and award damages for property taken by virtue of the right of eminent domain;[75] officers authorized to lay out, alter or discontinue highways;[76] highway officers in deciding upon exemption from highway taxes;[77] members of municipal boards in deciding upon the allowance of claims;[78] collectors of customs in the sale of perishable property;[79]

complained of is corrupt or malicious, few authorities can be found."

See also, Johnston v. Moorman, 80 Va. 131; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131; Curnam v. Kessler, 110 Mich. 10.

The subject is also ably and fully discussed in Mangold v. Thorpe, 33 N. J. L. 134.

[71] See cases cited in following section.

[72] Jones v. Brown, 54 Iowa, 74, 37 Am. Rep. 185; Pappa v. Rose, L. R. 7 C. P. 32, 1 Eng. Rep. 87, s. c. on appeal L. R. 7 C. P. 525, 3 Eng. Rep. 375.

[73] Hunter v. Mathis, 40 Ind. 356; Turpen v. Booth, 56 Cal. 65, 38 Am. Rep. 48.

[74] Wall v. Trumbull, 16 Mich. 228; Dillingham v. Snow, 5 Mass. 547; Easton v. Calendar, 11 Wend. (N. Y.) 90; Weaver v. Devendorf, 3 Den. (N. Y.) 117; Vail v. Owen, 19 Barb. (N. Y.) 22; Brown v. Smith, 24 Id. 419; People v. Reddy, 43 Id. 539; Vose v. Willard, 47 Id. 320; Bell v. Pierce, 40 Id. 51, Barhyte v. Shepherd, 35 N. Y. 238; Western R. R. Co. v. Nolan, 48 Id. 513; Pentland v. Stewart, 4 Dev. & Bat. (N. C.) 386; Steam Navigation Co. v. Wasco County, 2 Ore. 209; Macklot v. Davenport, 17 Iowa, 379; Muscatine, etc., R. R. Co. v. Horton, 38 Id. 33; Walker v. Hallock, 32 Ind. 239; Lilienthal v. Campbell, 22 La. Ann. 600; Williams v. Weaver, 75 N. Y. 30; Buffalo, etc., R. R. Co. v. Supervisors, 48 N. Y. 93; McDaniel v. Tebbetts, 60 N. H. 497; Wilson v. Marsh, 34 Vt. 352; San Jose Gas Co. v. January, 57 Cal. 614.

[75] Van Steenbergh v. Bigelow, 3 Wend. (N. Y.) 42.

[76] Sage v. Laurain, 19 Mich. 137.

[77] Harrington v. Commissioners, etc., 2 McCord (S. C.), 400.

[78] Wall v. Trumbull, 16 Mich. 228.

[79] Gould v. Hammond, 1 McAllister (U. S. C. C.), 285.

[80] Gordon v. Farrar, 2 Doug. (Mich.) 411; Jenkins v. Waldron, 11 Johns. (N. Y.) 114, 6 Am. Dec. 359; Miller v. Rucker, 1 Bush. (Ky.) 135; Carter v. Harrison, 5 Blackf. (Ind.) 138; Rail v. Potts, 8 Humph. (Tenn.) 225; Peavey v. Robbins, 3 Jones (N. C.), L. 339; Caulfield v. Bullock, 18 B. Mon. (Ky.) 494; Elbin v. Wilson, 33 Md. 135; Friend v. Hamill, 34 Md. 298; Weckerly v. Geyer, 11 S. & R. (Pa.) 35; Chrisman v. Bruce, 62 Ky. 63, 85 Am. Dec.

inspectors of elections [80] and board of registration [81] in deciding upon the existence of the necessary qualifications of a voter; school officers in deciding upon the removal of a teacher; [82] aldermen in deciding upon the letting of contracts; [83] a board of county commissioners in deciding upon an application for a permit to sell intoxicating liquors; [84] boards of supervisors in determining upon the sufficiency of a bond of an officer, and whether by failing to file a new bond required by them, he has forfeited his office; [85] pilot officers in deciding that a pilot was no longer authorized to act as such and therefore revoking his license; [86] and a great variety of other officers exercising similar functions.

§ 1499. Liability not affected by motive.—An attempt has been made in some cases to make a distinction between those officers whose duties lie outside the domain of courts,—the so-called *quasi*-judicial officers,—and the judges of courts, to the effect that while the latter are exempt, the former may be made liable if their motives were corrupt or malicious. This distinction, however, is believed to be not well founded. If the action is really judicial, the immunity which adheres to judicial action should be applied whether the officer sits upon the bench of a regularly established court or not. The weight of authority is clearly with this view.[87]

4. Legislative Officers.

§ 1500. Same immunity extends to legislative action.—The same immunity from private action extends to legislative officers while acting within the limits assigned to them. While their duties are not strictly judicial in their nature, they are called upon to exercise discre-

603; Wheeler v. Patterson, 1 N. H. 88, 8 Am. Dec. 41; State v. McDonald, 4 Harr. (Del.) 555; Patterson v. D'Auterive, 6 La. Ann. 467, 54 Am. Dec. 564; Keenan v. Cook, 12 R. I. 52; Blake v. Brothers, 79 Conn. 676, 11 L. R. A. (N. S.) 501; Ashby v. White, 2 Ld. Raym. 938.

A different rule prevails in Massachusetts and Ohio, although the officers have acted in good faith. Lincoln v. Hapgood, 11 Mass. 350, 355; Blanchard v. Stearns, 5 Metc. (46 Mass.) 298; Larned v. Wheeler, 140 Mass. 390, 54 Am. Rep. 483; Jeffries v. Ankeny, 11 Ohio, 372; Monroe v. Collins, 17 Ohio St. 665.

See also, Osgood v. Bradley, 7 Me. 411; Murphy v. Ramsey, 114 U. S. 15, 29 L. Ed. 47.

[81] Fausler v. Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

[82] Burton v. Fulton, 49 Penn. St. 151. See also, Chamberlain v. Clayton, 56 Iowa, 331, 41 Am. Rep. 101.

[83] East River Gas L. Co. v. Donnelly, 25 Hun (N. Y.), 614, s. c. 93 N. Y. 557.

[84] State v. Commissioners, 45 Ind. 501.

[85] People v. Supervisors, 10 Cal. 344, 346.

[86] Downer v. Lent, 6 Cal. 94, 65 Am. Dec. 489.

[87] See Jones v. Brown, 54 Iowa, 74, 37 Am. Rep. 185; Turpen v. Booth, 56

tion, judgment and foresight. They are chosen to make such provisions, within their jurisdiction, as to them seem for the best interests of their constituents, and they cannot be called upon to defend their action at the suit of private individuals, even though it be alleged that they acted corruptly or maliciously.[88]

This exemption is not confined to the state or national legislatures, but it applies also to inferior legislative bodies such as boards of supervisors, county commissioners, city councils, and other bodies of a like nature.[89]

5. Ministerial Officers.

§ 1501. In general—Liable to party specially injured.—Some consideration has already been given to the question of when the duties to be performed are so particular to the individual as to give him a right of action for an injury sustained by him in consequence of the failure to perform such duties.[90]

In accordance with the principles there laid down, it may be said that wherever the law imposes upon a public officer the performance of ministerial duties, in which a private individual has a special and direct interest, the public officer is liable to such individual for any injury which he may sustain in consequence of the failure or neglect of the officer either to perform them at all, or to perform them properly. In such a case the officer is liable as well for non-feasance as for misfeasance or malfeasance.[91]

Cal. 65, 38 Am. Rep. 48; Bradley v. Fisher, 13 Wall. (80 U. S.) 335, 20 L. Ed. 646; Downer v. Lent, 6 Cal. 94, 65 Am. Dec. 489; East River Gas Light Co. v. Donnelly, 93 N. Y. 557, affirming 25 Hun, 914; Fausler v. Parsons, 6 W. Va. 486, 20 Am. Rep. 431; Steele v. Dunham, 26 Wis. 393; Amperse v. Winslow, 75 Mich. 234.

[88] See Cooley on Torts, 376; Mechem on Public Officers, Book IV, Chap. V.

[89] Jones v. Loving, 55 Miss. 109, 30 Am. Rep. 508; County Commissioners v. Duckett, 20 Md. 469; Borough of Freeport v. Marks, 59 Penn. St. 253; Baker v. State, 27 Ind. 485. See City of Pontiac v. Carter, 32 Mich. 164.

[90] *Ante*, § 1491.

[91] Rowning v. Goodchild, 2 W. Bl. 906; Ashby v. White, 2 Ld. Raym. 938; Lane v. Cotton, 1 Salk. 17; Amy v. Supervisors, 11 Wall. (U. S.) 136, 20 L. Ed. 101; Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Bassett v. Fish, 12 Hun (N. Y.), 209; Piercy v. Averill, 37 Id. 360; Bennett v. Whitney, 94 N. Y. 302; Jenner v. Joliffe, 9 Johns. N. Y. 381; Adsit v. Brady, 4 Hill (N. Y.), 630, 40 Am. Dec. 305; Rounds v. Mansfield, 38 Me. 586; Bailey v. Mayor, 3 Hill (N. Y.), 531, 38 Am. Dec. 669; Maxwell v. Pike, 2 Me. 8; McCarty v. Bauer, 8 Kan. 237; Wilson v. Mayor, 1 Den. (N. Y.) 595, 43 Am. Dec. 719; Robinson v. Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Raynsford v. Phelps, 43 Mich. 342, 38 Am. Rep. 189; Clark v. Miller, 54 N. Y. 528, 534; Keith v.

It is no defense to such an officer upon whom the law has imposed the positive duty of performance, that he was mistaken as to the nature or extent of his obligation, or that he acted in entire good faith and with an honest intention to do his duty.[92]

So it is immaterial that the duty is one primarily imposed upon public grounds, and therefore a duty owing primarily to the public; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance, against which it was in part the purpose of the law to protect him.[93] It is also immaterial that the failure in performance is made by law a penal offense.[94]

III.

LIABILITY FOR THE TORTS OF THEIR OFFICIAL SUBORDINATES.

§ 1502. Public officer of government not liable for acts of his official subordinate.—Public officers of the government, in the performance of their public functions, are not liable to third persons for the misconduct, negligence or omissions of their official subordinates.[95] This immunity rests upon motives of public policy, the necessities of the public service, and the perplexities and embarrassments of a contrary doctrine.[96]

These official subordinates are themselves public officers, though of an inferior grade, and are directly liable, in those cases in which any public officer is liable, for their own defaults. Such subordinate officers are not infrequently appointed directly by the governmental power and removable only at its pleasure, but even in those cases in which they are appointed and removed by their immediate official superior, the latter is not liable,[97] unless he has himself been negligent

Howard, 24 Pick. (Mass.) 292; Hover v. Barkhoof, 44 N. Y. 113; St. Joseph F. & M. Ins. Co. v. Leland, 90 Mo. 177, 59 Am Rep. 9; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65.

[92] Amy v. Supervisors, 11 Wall. (78 U. S.) 136, 20 L. Ed. 101.

[93] Raynsford v. Phelps, 43 Mich. 342, 38 Am. Rep. 189.

[94] Raynsford v. Phelps, *supra;* Hayes v. Porter, 22 Me. 371.

[95] Robertson v. Sichel, 127 U. S. 507, 515, 32 L. Ed. 203; City of Richmond v. Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461; Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504; Schroyer v. Lynch, 8 Watts (Pa.), 453; Wiggins v. Hathaway, 6 Barb. (N. Y.) 632; Ely v. Parsons, 55 Conn. 83; Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Dunlop v. Munroe, 7 Cranch (U. S.), 242, 3 L. Ed. 329; Tracy v. Cloyd, 10 W. Va. 19; Lane v. Cotton, 1 Ld. Raym. 646; Whitfield v. Lord Le Despencer, 2 Cowp. 754.

[96] City of Richmond v. Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461.

[97] Keenan v. Southworth, 110 Mass. 474, 14 Am. Rep. 613.

either in their selection or retention,[98] or in the manner of their appointment or qualification,[99] or in superintending the discharge of the duties in his office,[1] or unless he has himself directed, authorized or co-operated in the wrong.[2]

§ 1503. To what officers this rule applies—Post officers.—This rule has frequently been applied to the officials of the post office department, and the law is well settled both in England and America, that the postmaster general, the local postmasters, and their assistants and clerks appointed and sworn as required by law, are public officers, each of whom is responsible for his own defaults only, and not for those of any of the others, although selected by him, and subject to his orders,[3] unless he has negligently or wilfully appointed or retained unfit or improper persons;[4] or has failed to require of them conformity to the prescribed regulations;[5] or has so carelessly conducted the affairs of his office as to furnish opportunity for such default;[6] or unless he has co-operated in, or authorized the wrong.[7]

Whether the employees of contractors for carrying the mail are public governmental officers within the meaning of this rule, so as to exempt the contractor from liability for the defaults of the subordinates, is a question upon which there is a conflict of authority, but the better opinion is that they are not.[8]

[98] Wiggins v. Hathaway, 6 Barb. (N. Y.) 632; Schroyer v. Lynch, 8 Watts (Penn.), 453.

[99] Bishop v. Williamson, 11 Me. 495.

[1] Dunlop v. Munroe, 7 Cranch (U. S.), 242, 3 L. Ed. 329; Schroyer v. Lynch, *supra;* Ford v. Parker, 4 Ohio St. 576.

[2] Ely v. Parsons, 55 Conn. 83; Tracy v. Cloyd, 10 W. Va. 19.

[3] Keenan v. Southworth, 110 Mass. 474, 14 Am. Rep. 613; Lane v. Cotton, 1 Ld. Raym. 646; Whitfield v. Lord Le Despencer, 2 Cowp. 754; Dunlop v. Munroe, 7 Cranch (U. S.), 242, 3 L. Ed. 329; Schroyer v. Lynch, 8 Watts (Penn.), 453; Bishop v. Williamson, 11 Me. 495; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 249; Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504; Bates v. Horner, 65 Vt. 471.

[4] Wiggins v. Hathaway, 6 Barb. (N. Y.) 632.

[5] Bishop v. Williamson, 11 Me. 495. In this case the postmaster was held liable for the default of an assistant whom he had not required to take the oath prescribed by law. To same effect: Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Bolan v. Williamson, 1 Brev. (S. C.) 181.

[6] Dunlop v. Munroe, 7 Cranch (U. S.), 242, 3 L. Ed. 329; Ford v. Parker, 4 Ohio St. 576.

[7] Tracy v. Cloyd, 10 W. Va. 19.

[8] Cent. R. & B. Co. v. Lampley, 76 Ala. 357; Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445. *Contra*, Conwell v. Voorhees, 13 Ohio, 523, 42 Am. Dec. 206; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 248; Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504.

That the railroad company, carrying the mail while it is in the possession of government officials, owes no duty to individuals, is held in Boston Ins. Co. v. Chicago, etc., Ry. Co., 118 Iowa, 423.

So it has been held that the captain of a ship of war, whose subordinate officers are appointed by the government, is not liable for an injury caused by the negligence of his lieutenant.[9]

And a confederate district commissary in Virginia during the late war, was held not responsible for the misfeasances and wrongdoings of his subordinates unless he co-operated in or authorized the wrong.[10] So a collector of customs is not personally liable for a tort committed by his subordinates, there being no evidence to connect the collector personally with the wrong, or that the subordinates were not competent, or were not properly selected for their positions.[11]

§ 1504. ——— Public trustees and commissioners.—The same rule of immunity has also been extended to public trustees and commissioners, having control of public works and enterprises and usually acting gratuitously, to exempt them from liability for the negligence of the servants, agents and contractors necessarily employed by them in the prosecution of the work, and in whose employment and supervision they were personally free from negligence.[12]

§ 1505. ——— Not to ministerial officers.—But in the case of the ordinary ministerial or administrative officers, like sheriffs, recorders, clerks of courts, and the like, a different rule is ordinarily applied. These officers are usually made liable by law for the acts and defaults of their deputies and subordinates in the course of the performance of their duties,[13] even though such deputies are authorized by law and may to some extent be regarded as themselves public officers.[14]

IV.

LIABILITY FOR TORTS OF THEIR PRIVATE SERVANTS OR AGENTS.

§ 1506. Liable for torts of private servant or agent.—A public officer of whatever grade is subject to the same liability for the negligence or other defaults of his private servant or agent as adheres to

[9] Nicholson v. Mounsey, 15 East, 384.

[10] Tracy v. Cloyd, *supra*.

[11] Robertson v. Sichel, 127 U. S. 507, 32 L. Ed. 203; Brissac v. Lawrence, 2 Blatchf. (U. S. C. C.) 121.

[12] See Donovan v. McAlpin, 85 N. Y. 185, 39 Am. Rep. 649; Walsh v. Trustees, 96 N. Y. 427; County Commissioners v. Duvall, 54 Md. 350, 39 Am. Rep. 393; Donovan v. Board of Education, 85 N. Y. 117.

[13] Harrington v. Fuller, 18 Me. 277, 36 Am. Dec. 719; Norton v. Nye, 56 Me. 211; State v. Moore, 19 Mo. 369, 61 Am. Dec. 563; Prosser v. Coots, 50 Mich. 262; Rider v. Chick, 59 N. H. 50; Ross v. Campbell, 19 Hun (N. Y.), 615.

[14] Campbell v. Phelps, 1 Pick. (Mass.) 62, 11 Am. Dec. 139; Draper v. Arnold, 12 Mass. 449.

any other principal. Hence when the subordinate, whose acts are the subject of the inquiry, "holds not an office known to the law, but his appointment is private and discretionary with the officer, the principal is responsible for his acts." [15]

This distinction was applied in the case of a mail carrier who was held, contrary to some cases previously referred to,[16] to be not a public officer but the mere private servant or agent of the of the contractor, who was therefore liable for the carrier's negligence or default in the performance of his duties.[17]

It has also been applied to the case of a laborer employed by a selectman to cut brush and trees in order to make a highway passable, and who, while so engaged, through mistaken judgment but not maliciously or wantonly, cut down some trees upon the land of an adjoining proprietor, the removal of which was not necessary. The selectman was held liable.[18]

[15] Note to 1 Am. Lead. Cases (Wilson v. Peverly), p. 785, quoted in Ely v. Parsons, 55 Conn. 83.

[16] See *ante*, § 1503.

[17] Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Cent. R. & B. Co. v. Lampley, 76 Ala. 357.

[18] Ely v. Parsons, 55 Conn. 83.

CHAPTER IV.

THE DUTIES AND LIABILITIES OF THE PRINCIPAL TO THE AGENT

§ 1507. In general — Employment — Payment of Compensation — Reimbursement — Indemnity—Lien.

I. THE AGENT'S RIGHT TO EMPLOYMENT.

1508. What here included.
1509. The right to be received into the employment.
1510. Right to be given work to do.
1511. Compensation dependent upon work done.

II. THE AGENT'S RIGHT TO PAYMENT OF COMPENSATION.

1512. What here included.

1. The Agent's Right to Compensation.

1513. Agreement to pay compensation—Express—Implied.
1514. Express agreement conclusive.
1515. When agreement must be express.
1516, 1517. When agreement to pay will not be implied.
1518–1520. When promise to pay will be implied.
1521. Unauthorized agent entitled to compensation if acts are ratified.
1522. When agent can recover for extra services.
1523. Agent cannot recover compensation if agency was unlawful.

2. The Amount of the Compensation.

1524. Express contract governs.
1525. May be left for principal to determine.
1526. In the absence of express agreement — How amount determined — Market — Usage—Reasonable value.
1527. What elements may be considered.
1528, 1529. What evidence as to value is admissible.
1530. Agent continuing after expiration of term presumed to be at prior compensation.

3. When Compensation is Considered to be Earned.

1531. In general.
1532. Compensation earned when undertaking fully completed.
1533, 1534. When full performance a condition precedent.
1535–1537. Agent's right not defeated by principal's default.
1538. Same subject — No defense that principal realized no profit.

4. Effect of Termination of Agency.

1. Termination by the act of the principal.

1539, 1540. When agent is entitled to compensation if agency is terminated before performance.

a. Agency Rightfully Terminated.

1541. When agency may be terminated without liability.
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1701. When principal liable for his compensation.
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§ 1507. In general—Employment—Payment of compensation—Reimbursement—Indemnity—Lien.—Attention may next be given to the question of the rights of the agent against the principal, and of the correlative duties and obligations of the principal to the agent. It is obvious that the most important claims which the agent has upon the principal are: I. Employment in accordance with the contract. II. The payment of his compensation. III. Reimbursement for his expenses. IV. Indemnity against loss and liability incurred in the performance of his duties. V. Protection against physical injury in the performance of the undertaking. Incidental to certain of these, and to secure their recognition and observance are, VI. The agent's right of lien; and VII. The agent's right of stoppage in transit. These may be considered in their order.

I.

THE AGENT'S RIGHT TO EMPLOYMENT.

§ 1508. What here included.—The first and most important right of the agent against his principal is, perhaps, that of employment in accordance with the contract. It is obviously wholly a matter of contract. No man is under any natural obligation to employ another, or to make a contract to employ him. But if he does make a contract with him to employ him, the latter acquires at once the general right to have the contract performed according to its terms, subject to the qualifications and exceptions which apply to other contracts. The chief essentials of this right will be, (1) the right to be received into the employment, (2) the right to be kept in according to the terms, or the right not to be wrongfully discharged, and, (3) perhaps, a right to be employed, or to be given work of the sort contemplated during the contract period.

The *second* of these has been considered under the head of Termination in a previous chapter, and is more fully considered from the standpoint of compensation in the following subdivision. It seems unnecessary therefore to say anything further concerning it in this place. The *first* and the *third,* however, must be briefly considered.

§ 1509. The right to be received into the employment.—The claim to be received into the service depends, as has been stated, wholly upon the contract, and the rights and remedies are wholly contractual. If the principal, having contracted to give an agent employment as such, fails or refuses to do so, the remedy of the agent must ordinarily be an action at law to recover damages for the breach of con-

tract. As has been already seen in an earlier chapter, contracts of this sort are capable of specific performance in equity only in the rarest and most exceptional cases. Considered from the standpoint of an action at law to recover damages, the rules governing the matter are not substantially different from those which apply where the agent has been wrongfully discharged; and as the whole question is fully considered under that head in the following subdivision, it will not be taken up here.

§ 1510. Right to be given work to do.—But has the agent not only a right to have his contract of employment recognized and performed, but has he also a right to be given work to do? In many cases the question will be of little importance to the agent. If, being engaged for a definite time, he is paid his stipulated compensation, he will often have no ground for complaint if he is not kept at work. But suppose a person be engaged in a calling in which the employment of his faculties is essential to his business,—suppose he is an actor but is not called upon or permitted to appear upon the stage, or is a commercial traveler who can not keep his clientele unless he is allowed to visit his patrons regularly and keep in touch with their condition and needs, but he is not permitted to do so,—has he a legal ground for complaint, in the absence of an express provision, where he is paid his compensation regularly?

It must be conceded in any case that any *implied* obligation would be more or less elastic and adapted to the exigencies of business, but is there an implied term that the agent shall be employed a reasonable or any other portion of the time?

In the case of the commercial traveler, the English court has held that a contract "to engage and employ" for a definite time,—in this case four years,—did not imply a term that he should not only be paid his salary but should also be given work to do.[1]

In the case of the actor, the same courts have held,—although there were some exceptional facts,—that if the actor were not given an opportunity to appear within a reasonable time, he might make an engagement with some one else.[2]

[1] Turner v. Sawdon, [1901] 2 K. B. 653, 2 Br. Rul. Cas. 751; Lagerwall v. Wilkinson, 80 L. T. (N. S.) 55.

A contract to "retain and employ" an attorney for a given term does not imply a term that actual business shall be furnished him to do during that term. Emmens v. Elderton, 4 H. L. Cas. 624. Compare Kelly v. Carthage Wheel Co., 62 Ohio St. 598.

[2] Fechter v. Montgomery, 33 Beavan, 22 (though here the actor said to the employer before the contract was closed "Remember I came to you not to be idle, but to act" to which the latter assented). See also, Bunning

In the United States, such few courts as have passed upon the subject have given a rather more liberal interpretation to the employee's rights. Thus where the plaintiff was employed as a designer and cutter in a tailoring establishment "at a salary comparatively large," and who "in order to command this salary or a higher one must continue to be skillful and to enjoy a reputation for skill," it was held by the appellate division in New York, to be "one of the implied covenants of plaintiff's contract that he should be permitted to labor in the manner specified" even though he was paid his salary regularly.[3]

§ 1511. ——— **Compensation dependent upon work done.**—Where an agent is employed by a definite contract for a fixed term, but his compensation, instead of being fixed, is dependent upon the amount he accomplishes, as where he is to be paid by the piece or by the number of sales or the time spent, and the like, there is held to be, at least as against any other cause than termination by *vis major*, an implied term that he shall be given a reasonable opportunity to perform under the contract.[4] Where, however, the only effect of the contract is that he shall be paid for such work as he may do during a period named, there is no implied term that he shall be given any work to do.[5]

v. Lyric Theater, 71 L. T. (N. S.) 396. Compare Pollack v. Shubert, referred to in a following note.

[3] Sigmon v. Goldstone, 116 App. Div. 490.

[4] See Turner v. Goldsmith, [1891] 1 Q. B. 544. (Here the employee was engaged for a definite term (five years), and agreed to do his utmost to obtain orders for and to sell the various goods manufactured by the employer "as should from time to time be forwarded or submitted by sample or pattern" to the employee. After about two years the employer's factory was destroyed by fire and he did not resume business. *Held* that the employee was entitled to have a reasonable amount of samples to enable him to earn his commission during the term and that the destruction of the factory was no excuse. Kay, L. J., said: "If it had been shown that not only the manufactory but the business of the defendant had been destroyed by *vis major*, without any fault of the defendant, I think that the plaintiff could not recover.") Devonald v. Rosser, [1906] 2 K. B. 728, 2 Br. Rul. Cas. 780, 6 Ann. Cas. 230. (Here the employee for a period terminable only by notice was to be paid by the piece. Employers discontinued work because they could not do it at a profit. *Held* that there was an implied term to give a reasonable amount of work as long as the contract continued.)

[5] Thus where a manager agreed with an actor that the latter should be engaged to appear in musical plays during a certain season and agreed to pay him a certain sum per week for each and every week that the actor publicly appeared and performed, and after a time the manager put on no more musical plays during the season, it was held that the manager was not liable to the actor, since there was no term implied that the manager would permit the actor to appear for any specified time. Pollack v. Shubert, 146 App. Div. 628.

II.

THE AGENT'S RIGHT TO PAYMENT OF COMPENSATION.

§ 1512. What here included.—The subject of the agent's compensation for his services to his principal involves a variety of considerations. The most important are doubtless the question of his *right* to any compensation; the *amount* to be paid him; when it is *due;* the effect upon the rights and liabilities of the parties of a *discharge* of the agent by the principal, or the *abandonment* of his undertaking by the agent; the effect upon the agent's right to compensation of his own *disloyalty* or *misconduct;* and the principal's right of *recoupment* against the agent's claim.

These questions will be considered in their order.

1. The Agent's Right to Compensation.

§ 1513. Agreement to pay compensation—Express—Implied.—It is entirely competent for the parties to agree expressly not only that the agent shall be compensated for his services, but that his compensation shall be a certain sum, or shall be paid in a certain way, or shall be ascertained in a particular manner. It is also competent for them to agree that he shall be compensated only in a certain event, or that he shall receive no compensation at all.

In practice, however, it is frequently if not commonly found that the parties have not made any express agreement at all, or that if they have attempted to do so, the agreement does not provide for all of the details or contingencies, so that the questions are constantly arising, when will the law imply a promise to pay compensation, and how shall the amount to be paid be ascertained.

§ 1514. Express agreement conclusive.—Wherever the parties have expressly agreed upon the fact that compensation shall or shall not be paid, or shall be paid only in a certain event, that agreement, in the absence of fraud or mistake of fact, is conclusive. If the principal has expressly agreed to pay a compensation, the fact that the service was, through no fault of the agent, of no value to him furnishes no excuse for not paying. So if the agent has expressly agreed to serve without compensation, he will have no claim for wages however beneficial his services may have proved to the principal. And so if compensation is to be paid only in a certain event, or upon the happening

of a given contingency, no claim can arise except upon the happening of the event or contingency agreed upon.[6]

§ 1515. When agreement must be express.—There are certain cases where the promise to pay compensation must have been express. Thus where services are rendered for each other by near relatives or others constituting members of the same family, the law presumes that they are inspired by motives of affection, or gratitude, or are based on other considerations than those of pecuniary recompense, as, for example, that services are off-set by support furnished, and in order to rebut this presumption, there must be clear and unequivocal evidence of a promise or agreement to pay for the services rendered. There must be shown to have been something more than a mere *intention* to pay, based upon gratitude or friendship. There must have been an *agreement* to pay.[7] This rule is most frequently applied to cases where the relation sustained is rather that of master and servant

[6] Gilbert v. Judson, 85 Cal. 105; Morehouse v. Remson, 59 Conn. 392; Zerrahn v. Ditson, 117 Mass. 553; Beatty v. Russell, 41 Neb. 321; Ames v. Lamont, 107 Wis. 531; Lockwood v. Levick, 8 C. B. (N. S.) 603.

[7] Magarrell v. Magarrell, 74 Iowa, 378; Wilson v. Wilson, 52 Iowa, 44; Scully v. Scully, 28 Iowa, 548; Keegan v. Malone, 62 Iowa, 208; Resso v. Lehan, 96 Iowa, 45; Collar v. Patterson, 137 Ill. 403; Faloon v. McIntyre, 118 Ill. 292; Guffin v. First Nat. Bank, 74 Ill. 259; Reeves Estate v. Moore, 4 Ind. App. 492; Nelson v. Masterson, 2 Ind. App. 524; King v. Kelly, 28 Ind. 89; Ayres v. Hull, 5 Kan. 419; Allen v. Allen, 60 Mich. 635; Thorp v. Bateman, 37 Mich. 68, 26 Am. Rep. 497; Coe v. Wager, 42 Mich. 49; Callahan v. Riggins, 43 Mo. App. 130; Morris v. Barnes, 35 Mo. 412; Hall v. Hall, 44 N. H. 293; Petty v. Young, 43 N. J. Eq. 654; Disbrow v. Durand, 54 N. J. Law, 343, 33 Am. St. Rep. 678; Collyer v. Collyer, 113 N. Y. 442 (not services but board); *In re* Shubart's Estate, 154 Pa. 230; *In re* Young's Estate, 148 Pa. 573; Houck v. Houck, 99 Pa. 552; Curry v. Curry, 114 Pa. 367; Duffey v. Duffey, 44 Pa. 399; Briggs v. Briggs, 46 Vt. 571; Sawyer v. Hebard, 58 Vt. 375; Hall v. Finch, 29 Wis. 278, 9 Am. Rep. 559; Kaye v. Crawford, 22 Wis. 320.

It is to be observed in these cases that it is not the fact of relationship alone which raises the presumption, but the fact that the parties are members of the same family group, living together under circumstances which naturally rebut any inference of an agreement to pay. See Shubart's Estate, 154 Pa. St. 230, *supra;* Killpatrick v. Helston, 25 Ill. App. 127.

And even though the parties are living together, still if the person performing the services is not regarded as a member of the family,—is not treated as other members of the family, does not get the rights and advantages which a member of the family would ordinarily receive, but on the other hand is regarded as a mere servant, the presumption above referred to, that the value of the services is to be offset by the family advantages received, would not arise. See for example, Doremus v. Lott, 49 Hun (N. Y.), 284; McMillan v. Page, 71 Wis. 655; Lockwood v. Robbins, 125 Ind. 398, more fully stated in note to § 1518.

than that of principal and agent, but the underlying principle is the same.[8]

So, it is said to be a general rule that "if one of two or more parties having an interest in the same subject-matter, acts for the benefit of all, he is, in the absence of an agreement to pay compensation, ordinarily held not to be entitled to receive any."[9]

So where the person rendering the service is already in the employment of the other party to render similar service, at a fixed salary or wage, a request to render services will ordinarily be presumed to have been made in contemplation of the existing employment, and compensation for them on the theory that they were extra services or services rendered over time, cannot, as will be seen hereafter,[10] ordinarily be had, in the absence of an express agreement to pay for them.[11]

§ 1516. When agreement to pay will not be implied.—The mere fact that services have been rendered by the agent for the principal is not, of itself, sufficient to raise a promise to pay therefor, but they must have been rendered under circumstances from which a promise to pay can be inferred.[12] No recovery can be had for services, however valuable, or however necessary, which have been rendered without the express or implied request of the principal. A man can not, by mere obtrusion of services, create an obligation to pay for them.[13]

[8] See the discussion in Wood's Master and Servant, sec. 72. See also 26 Cent. L. Jour. 51.

[9] Eberhart v. Camp, 55 Ill. App. 248.

[10] See *post*, § 1594.

[11] Ross v. Hardin, 79 N. Y. 84.

[12] Cincinnati, etc., R. R. Co. v. Lee, 37 Ohio St. 479; Lange v. Kaiser, 34 Mich. 318; Burrows v. Ward, 15 R. I. 346; Busenbark v. Saul, 184 Ill. 343; Viley v. Pettit, 96 Ky. 576.

[13] This rule is tersely expressed by Bell, J., as follows: "It is settled that no man can do another an unsolicited kindness, and make it a matter of claim against him; and it makes no difference whether the act was done from mere good will or in the expectation of compensation. Unless the party benefited has done some act from which his assent to pay for the service may be fairly inferred, he is not bound to pay." In Chadwick v. Knox, 31 N. H. 226, 64 Am. Dec. 329; [citing Reason v. Wirdman, 1 Car. & P. 434; Pelly v. Rawlins, Peak's Ad. Cas. 226; Alexander v. Bane, 1 Mees. & Wels. 511; Parker v. Crane, 6 Wend. (N. Y.) 647; 1 Sel. N. P. 48; 2 Greenl. Ev. 83.] See also, Palmer v. Haverhill, 98 Mass. 487; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237. In this case the plaintiff had voluntarily removed defendant's wheat from a burning field to save it from destruction. Platt, J., said: "The plaintiff performed the service without the privity or request of the defendant, and there was, in fact, no promise express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous, and it therefore forms no ground of action." See also, Seals v. Edmondson, 73 Ala. 295, 49 Am. Rep.

So no recovery can be had for services, although requested, if they were rendered as a spontaneous act of kindness or in hope of receiving compensation, but without an express or implied promise to pay it. *A fortiori* can no recovery be had for services volunteered upon the chances of obtaining future employment. Such services are mere gratuities.[14]

Illustrations of this are found where one undertakes to do some act for another out of kindness or friendship merely, or with a hope and, perhaps, an expectation that the other will recognize the value of the services and compensate him accordingly. So architects, engineers, authors, artists and others who undertake to furnish a satisfactory plan, design, machine, story or other thing in competing for a prize,

51; Allen v. Bryson, 67 Iowa, 591, 56 Am. Rep. 358.

This rule has frequently been applied where a real estate broker was seeking to recover commissions for the sale of the defendant's property. Thus in a case often cited, [Pierce v. Thomas, 4 E. D. Smith (N. Y.), 354] it was said: "To entitle a broker to recover commissions for effecting a sale of real estate, it is indispensable to show that he was employed by the owner (or on his behalf), to make the sale. A ratification of his act, where original employment is wanting, may, in some circumstances be equivalent to an original retainer, but only where there is a plain intent to ratify. An owner cannot be enticed into a liability for commissions against his will. A mere volunteer without authority is not entitled to commissions, merely because he has inquired the price which an owner asks for his property, and has then sent a person to him who consents to take it. A broker has no better claim to recover for volunteer service, rendered without employment, and not received and acted upon by the owner as rendered in his behalf, than any other volunteer."

To same effect: McVickar v. Roche, 74 App. Div. (N. Y.) 397; Campbell Printing Press & Mfg. Co. v. Yorkston, 11 Misc. (N. Y.) 340; Johnson v. Whalen, 13 Okla. 320; Stewart v. Pickering, 73 Iowa, 652; Welch v. Collenbaugh, 150 Iowa, 695; Seevers v. Cleveland Coal Co., —— Iowa, ——, 138 N. W. 793; Samuels v. Luckenbach, 205 Pa. 428; Castner v. Richardson, 18 Colo. 496.

Of course the plaintiff must also show that his employment was by the defendant, and that his performance was within the conditions of the employment.

See Crosby v. St. Paul Lake Ice Co., 74 Minn. 82; Fairchild v. Cunningham, 84 Minn. 521; Dartt v. Sonnesyn, 86 Minn. 55; Hale v. Knapp, 134 Mich. 622; Comm. Nat. Bank v. Hawkins, 35 Ill. App. 463; Callaway v. Equitable Trust Co., 67 N. J. L. 44.

[14] Osborne v. Governors, 2 Strange, 728; Scott v. Maier, 56 Mich. 554, s. c. *sub nom.*, Scott v. Martin, 56 Am. Rep. 402; Wood v. Ayres, 39 Mich. 345, 33 Am. Rep. 396; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; James v. O'Driscoll, 2 Bay (S. C.), 101, 1 Am. Dec. 632; St. Jude's Church v. VanDenberg, 31 Mich. 287; Livingston v. Ackeston, 5 Cow. (N. Y.) 531; Otis v. Jones, 21 Wend. (N. Y.) 394; Ehle v. Judson, 24 Wend. (N. Y.) 97; Eastwood v. Kenyon, 11 Ad. & El. 438; Hertzog v. Hertzog, 29 Pa. 465; Seals v. Edmondson, 73 Ala. 295, 49 Am. Rep. 51.

contract or reward, but without success, can have no claim for compensation in the absence of an express agreement to pay it, although they may have been requested to compete.[15]

§ 1517. ——— No contract for payment will be implied in the face of an express refusal to pay, or where the implication would be repugnant to an express promise, or where the circumstances rebut all the grounds upon which a promise to pay could be inferred.[16] So where the circumstances account for the transaction on some ground more probable than that of a promise of recompense, no promise will be implied.[17]

All contracts for services, it is said, must be good or bad at their inception, and a party will not be permitted on account of subsequent events, to recover for services which when rendered were intended to be gratuitous.[18]

Neither will purely gratuitous services furnish a good consideration for a subsequent promise to pay for them,[19] but when beneficial services, not intended to be gratuitous, have been rendered under such circumstances that no legal claim exists therefor, a subsequent promise to pay in consideration of the benefit received is binding.[20]

§ 1518. **When promise to pay will be implied.**—But whenever services are rendered by one person at the express request of another, the law will, except in the case of near relatives or others who are members of the same family, presume that the person for whom they were rendered intended to pay for them.[21] If the latter alleges that

[15] Scott v. Maier, 56 Mich. 554, 56 Am. Rep. 396; Palmer v. Haverhill, 98 Mass. 487.

[16] Watson v. Steever, 25 Mich. 386; Coe v. Wager, 42 Mich. 49; St. Jude's Church v. VanDenberg, 31 Mich. 287.

[17] Wood v. Ayres, 39 Mich. 345, 33 Am. Rep. 396.

[18] James v. O'Driscoll, 2 Bay (S. Car.), 101, 1 Am. Dec. 632.

[19] Allen v. Bryson, 67 Iowa, 591, 56 Am. Rep. 358, [citing Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Williams v. Hathaway, 19 Pick. (Mass.) 387; Dawson v. Dawson, 12 Iowa, 512; McCarthy v. Hampton, 61 Iowa, 282.

[20] Forbis v. Inman, 23 Ore. 68; Viley v. Pettit, 96 Ky. 576. See also, Snyder v. Castor, 4 Yeates (Pa.), 353; Davison v. Davison, 18 N. J. Eq. 246; Lee v. Lee, 6 G. & J. (Md.) 316; Little v. Dawson, 4 Dall. (Pa.) 111.

[21] Linn v. Linderoth, 40 Ill. App. 320; Mugnier v. Dendlinger, 104 La. 767; Simonson v. Simonson, 53 Hun (N. Y.), 634; McEwen v. Loucheim, 115 N. C. 348; Prince v. McRae, 84 N. C. 674; Harrel v. Zimpleman, 66 Tex. 292; Bard v. Banigan, 39 Fed. 13; Martin v. Roberts, 36 Fed. 217; Forbis v. Inman, 23 Ore. 68.

In Louisiana, see Stewart v. Soubral, 119 La. 211; Succession of Krekeler, 44 La. Ann. 726.

Persons not deemed members of the family within the rule.—A young girl was hired by defendant to work at his home upon a farm for a summer for certain wages. At the expiration of that time she remained, as she contended, on defendant's

they were to be gratuitous, the burden of proof is upon him to establish it.[22] This is particularly true where the services rendered are in the line of the agent's business or profession, or of a kind that are usually paid for. Thus if one employs an attorney to try his case in court, or a physician to attend his child in illness, or an auctioneer to sell his goods at an auction, or a broker to effect insurance upon his ship, or an architect to superintend the building of his house, but says nothing about paying, the law will presume that the person so employed was to be paid for his services, and if the other party alleges that the services were to be rendered without charge, he must prove it.[23]

§ 1519. ——— So though there be no express request, a promise to pay may be implied from the circumstances of the case. Thus if beneficial services are rendered for a person under such circumstances as to show that the agent expects to be paid for them as a matter of

promise "to pay her well when she got through;" as defendant contended, for her keep and clothes. For six years she did heavy out-door farm work, receiving only the most cheap and meager clothing, and about $15 in money. *Held* that she was not a member of the family within the rule, and could recover the reasonable value of her services, even though she might not be able to prove an express contract to pay. McMillan v. Page, 71 Wis. 655.

So where an orphan boy went to work for decedent, "not being taken into decedent's family and cared for and treated as a member thereof;" *Held*, to be entitled to the fair value of his services, after deducting the value of his keep, even though no express contract to pay was shown. Lockwood, Adm'r v. Robbins, 125 Ind. 398. To same effect: Doremus v. Lott, 49 Hun (N. Y.), 284.

So where an ignorant colored girl, born and reared as a slave, was kept in ignorance of her emancipation, by her former owner, and for twenty-four years thereafter worked for defendant as though she were still his slave; *held*, that she could recover for the whole period, the fraud of defendant preventing the operation of the statute of limitations. Hickam v. Hickam, 46 Mo. App. 496. See also, *In re* Oldfield's Estate, — Iowa, —, 138 N. W. 846.

[22] Linn v. Linderoth, 40 Ill. App. 320; Dougherty v. Whitehead, 31 Mo. 255; Lewis v. Trickey, 20 Barb. (N. Y.) 387.

In Thomas v. Thomasville Shooting Club, 121 N. C. 238, plaintiff upon request of defendant rendered services in obtaining leases of property which defendant desired. He did not at the time expect to make any charge because he hoped and expected that he would be employed by defendant as steward. Defendant did not know that he did not expect to make any charge. Plaintiff was not employed as steward because of some "falling out" with defendant. *Held*, he could recover the reasonable value of his services.

[23] In Prince v. McRae, 84 N. C. 674, it was held that a physician who had rendered professional services in the usual way upon request was entitled to reasonable compensation, even though he had in fact made no charge, and had not intended to present a bill. The character of the service, said the court, is not controlled by the unexpressed and revocable intention of the plaintiff.

right, and the person for whom they are rendered does nothing to disabuse him of this expectation, but permits him to render the services, the law will imply a promise to pay for them.[24] This is but the ordinary rule of good faith. As has been seen, services are not to be obtruded upon another against his will, but one who stands by and permits another to render him valuable services under such circumstances as to convince any reasonable man that they were being done, though mistakenly, with the expectation of being paid for them as a matter of legal right and not as a matter of hope or expectancy, and says or does nothing to prevent it, can not be permitted to avail himself of the benefits of the services but refuse to pay for them, upon the ground that they were rendered without his request or order.[25]

§ 1520. ——— In accordance with these principles it was held that where an attorney who had undertaken to defend a certain action and pay for such counsel as he desired, employed as counsel a firm of attorneys who were not informed of this arrangement, and the counsel performed valuable services for the defendants with their knowledge and co-operation, the defendants were liable for the value of the services so rendered. The court said that if the defendants did not intend that the consulting attorneys should look to them for payment for the services they were rendering, they should have objected or informed them of the special contract, but that by their silence with full knowledge of what was being done, and by receiving and enjoying the benefit of the services rendered, a promise to pay therefor would be implied. It would have been otherwise if the consulting attorneys had been informed of the special arrangement, or had the circumstances been such as to raise a presumption that they had such information.[26]

[24] Wood v. Brewer, 66 Ala. 570; McCrary v. Ruddick, 33 Iowa, 521; Muscott v. Stubbs, 24 Kan. 520; Garrey v. Stadler, 67 Wis. 512, 58 Am. Rep. 877; Shelton v. Johnson, 40 Iowa, 84; Waterman v. Gilson, 5 La. Ann. 672; Weston v. Davis, 24 Me. 374; Dougherty v. Whitehead, 31 Mo. 255; Lewis v. Trickey, 20 Barb. (N. Y.) 387; Kinder v. Pope, 106 Mo. App. 536; Lucas v. Godwin, 3 Bing. (N. C.) 737; Phillips v. Jones, 1 Ad. & Ell. 333.

[25] The principle here involved is said by Brewer, J., to be "not merely that one party has done work which benefits the other, because it was never the law that one party could force a contract upon the other, but also that such other party, knowing that the services are being performed for his benefit and on his account, makes no objection, but permits the party to continue doing the work and performing the services." Muscott v. Stubbs, 24 Kan. 520.

[26] McCrary v. Ruddick, 33 Iowa, 521. See case where the same principle was recognized, but where the court held that the facts did not warrant the application. Muscott v. Stubbs, 24 Kan. 520.

§ 1521. Unauthorized agent entitled to compensation if acts are ratified.—As has been seen, the effect of the ratification of the unauthorized act of an agent is retroactive and gives validity to the act from the beginning.[27] If therefore one acts as agent without authority but his acts are subsequently ratified by the principal, he is entitled to the same compensation and the same remedies as if the acts had been originally duly authorized.[28]

§ 1522. When agent can recover for extra services.—Where an agent undertakes to render services for a fixed salary or at a fixed rate, it will be presumed, in the absence of anything to show a contrary intention, that the amount so fixed is to cover his compensation for all services connected with that undertaking. If, therefore, the principal enlarges his powers or imposes additional duties upon him, but without stipulating for an increased compensation, the rate fixed will be deemed to be full compensation for all the services rendered, and no extra compensation can be recovered for the performance of the added duties. To warrant such a recovery there must be an express or implied promise to pay for them,[28a] or a legal custom to that effect.[28b]

[27] Wilson v. Dame, 58 N. H. 392; Lawson v. Thompson, 10 Utah, 462. Although a principal, who had employed an agent to effect a sale of land, terminates the contract with him, he will be liable if he still permits the agent to go on and make the sale. Dayton v. American Steel Barge Co., 36 N. Y. Misc. 223.

No ratification where the alleged principal did not know the agent was working in his behalf. Downing v. Buck, 135 Mich. 636; Thomas v. Merrifield, 7 Kan. App. 669; Copeland v. Stoneham Tannery Co., 142 Pa. 446.

No ratification of an unauthorized sale, unless the principal knew the terms and conditions of the sale. Maze v. Gordon, 96 Cal. 61.

Defendant offered plaintiffs some goods for sale on commission on certain terms and in the letter containing the offer enclosed an order on the warehouse for the goods. Plaintiffs rejected that offer, but made a counter offer, which the defendant refused, and demanded the return of the warehouse order. Plaintiffs failed to comply with this demand but obtained the goods and sold them. The defendant accepted the payment for the goods. *Held* that he thereby only condoned the conversion, and did not render himself liable for the commission named in his first offer to plaintiffs. Rapp v. Livingstone, 14 Daly (N. Y.), 402.

[28] See *ante*, § 500.

[28a] Moreau v. Dumagene, 20 La. Ann. 230; City of Decatur v. Vermillion, 77 Ill. 315; Marshall v. Parsons, 9 C. & P. 656; Guthrie v. Merrill, 4 Kan. 187; Fraser v. United States, 16 Ct. of Cl. 507; Collins v. United States, 24 Ct. of Cl. 340; Carr v. Chartiers Coal Co., 25 Pa. 337; Jordan v. Jordan, 65 Ga. 351; Pew v. Gloucester Bank, 130 Mass. 391; Schurr v. Savigny, 85 Mich. 144; Bartlett v. St. Ry. Co., 82 Mich. 658; Lachine v. Manistique Ry. Co., 126 Mich. 519; Muir v. Corset Co., 155

[28b] United States v. Macdaniel, 7 Pet. (U. S.) 1, 8 L. Ed. 587; United States v. Fillebrown, 7 Pet. (U. S.) 28, 8 L. Ed. 596.

This will be true even though the amount of compensation was originally fixed in contemplation of the expectation that the services which the agent was to perform would normally be about a certain amount or consume about a certain time, if the employment was not limited to that, or there was no agreement for extra compensation.[29]

Where the agent has, from time to time, entered into apparent settlements in full, without making any claim for extra compensation, he will ordinarily be estopped from setting up such a claim at a later time.[30]

Of course the service for which extra compensation is claimed may be of a nature so unusual, or so disconnected with those contemplated by the contract of employment, that the presumption that they were covered by the compensation agreed upon could not arise, and in such a case the right to compensation for them would be governed by the same rules that apply in other cases.

Where the contract is in writing, or but one inference can be drawn from the facts, the question whether the services involved were incident to or disconnected with the main contract is usually for the court; otherwise it is a question for the jury.[31]

§ 1523. Agent cannot recover compensation if agency was unlawful.—The law will not lend its aid to the enforcement of an illegal contract. If, therefore, the undertaking of the agent was to perform some act which was forbidden by law, or which was opposed to the public policy, he can recover no compensation for the act though it be fully performed according to the agreement.[32]

Mich. 441; Ross v. Hardin, 79 N. Y. 84; Matheson v. N. Y. Cent. Ry. Co., 72 App. Div. 254; New York Life Ins. Co. v. Goodrich, 74 Mo. App. 355; Steam Dredge No. 1, 87 Fed. 760.

A farm-hand, working by the month cannot recover for ordinary Sunday "chores" unless there was an express agreement to pay. Robinson v. Webb, 73 Ill. App. 569.

There may of course be a recovery where there was a special contract to pay for such extra services. Elwell v. Roper, 72 N. H. 585.

The fact that a statute fixes the number of hours which shall constitute a day's work, but does not require over time to be paid for, does not change the rule. There can be no recovery for extra work, unless there was an agreement to pay for it. Luske v. Hotchkiss, 37 Conn. 219, 9 Am. Rep. 314; McCarthy v. Mayor, 96 N. Y. 1, 48 Am. Rep. 601.

[29] Benjamin v. Public Service Pub. Co., 11 N. Y. Supp. 208.

[30] Bartlett v. Grand Rapids St. Ry. Co., 82 Mich. 658; Lachine v. Manistique Ry. Co., 126 Mich. 519; Forster v. Green, 111 Mich. 264; Levi v. Reid, 91 Ill. App. 430; Carruthers v. Diefendorf, 66 App. Div. 31.

[31] Standard Elevator Co. v. Brumley, 149 Fed. 184.

[32] Trist v. Child, 21 Wall. (U. S.) 441, 22 L. Ed. 623; Marshall v. Baltimore & Ohio R. R. Co., 16 How. (U. S.) 314, 14 L. Ed. 953; Clippinger v. Hepbaugh, 5 W. & S. (Penn.) 315, 40 Am. Dec. 519; Harris v. Roof, 10 Barb. (N. Y.) 489; Rose v. Truax, 21 Barb. 361; Gray v. Hook, 4 N. Y. 449; Tool

Full discussion has been given to this question in earlier chapters of this work, and it will not be necessary here to determine what the undertakings are which come within the limits of this rule.[33]

2. *The Amount of the Compensation.*

§ 1524. Express contract governs.—The question of the agent's *right* to receive a compensation having been determined in his favor, the next inquiry is as to the *amount* to be paid to him. If the parties have made an express agreement in reference to this matter, such agreement is conclusive upon all questions arising within its scope.[34] There can not be both an express and an implied agreement in reference to the same matter, and the express agreement, if any, must govern.

This rule, that the express contract governs, applies not only to prevent the agent from recovering more than the amount agreed upon, but also, if the contract was fairly and intelligently made, to prevent the agent's recovery from being reduced below that sum, even though the sum fixed be more than the services were reasonably worth.[35]

§ 1525. May be left for principal to determine.—It is competent for the parties to agree that the compensation shall be such an amount

Co. v. Norris, 2 Wall. (U. S.) 45, 17 L. Ed. 868; Swayze v. Hull, 3 Halst. (N. J.) 54, 14 Am. Dec. 399; Gulich v. Ward, 5 Halst. (N. J.) 87, 18 Am. Dec. 389; McBratney v. Chandler, 22 Kan. 692, 31 Am. Rep. 213; Bixby v. Moor, 51 N. H. 402; Kahn v. Walton, 46 Ohio St. 195; Lehman v. Feld, 37 Fed. 852; Samuels v. Oliver, 130 Ill. 73; Street v. Houston Ice Co. (Tex.), 55 S. W. 516; Fryer v. Harker, 142 Iowa, 708, 23 L. R. A. (N. S.) 477.

A broker is not entitled to a commission for procuring a purchaser, where the purchaser produced can not buy without resorting to unlawful practices to defraud the owner's wife of her dower interest. Zittle v. Schlesinger, 46 Neb. 844.

[33] See *ante*, §§ 79–123.

[34] Ames v. Lamont, 107 Wis. 531; Wallace v. Floyd, 29 Pa. 184, 72 Am. Dec. 620; Hamilton v. Frothingham, 59 Mich. 253; Carruthers v. Towne, 86 Iowa, 318; Prouty v. Perry, 142 Iowa, 294.

Where there is an express contract for a certain sum only, which is paid and received without objection, agent can not later recover more for the same period, although he originally wanted more and there was an indefinite assurance that later the principal could pay more. Seeber v. American Mining Co., 10 N. Y. Supp. 851.

[35] In Smythe v. O'Brien, 198 Pa. 223, the agent was allowed to keep $8,000, which he had saved in buying stocks for an experienced business man under a contract freely and intelligently made. See also, Wells v. Parrott, 43 Ill. App. 656.

Where there is a contract with a traveling salesman for a certain salary and his traveling expenses, the principal may not afterward set an arbitrary limit to the amount to be allowed for such expenses. Walker v. Grant, 40 Ill. App. 359.

as the principal may fix. Thus if the agent agree to serve for such compensation as the principal shall, at the termination of the agency, determine to be right and proper under all the circumstances, the amount so fixed by the principal, if he acts honestly and in good faith, is conclusive, although as a matter of fact it be less than the services were really worth.[36]

Agreements of this sort, however, must be clear, and appear to have been fairly made.[37]

§ 1526. In the absence of express agreement how amount determined — Market — Usage — Reasonable value.—Where, however, there is no express agreement as to the amount, the market rate, if there should be one, might determine; or the usual rate, if there should be a usage;[38] if neither, then the law implies a promise to pay what the services are reasonably worth.[39] The question of reasonable value, in this, as in other cases, is one to be determined from all the facts and circumstances surrounding the case.[40]

§ 1527. What elements may be considered.—In determining the amount of this reasonable compensation, there are many elements to be taken into consideration. All services are not to be estimated by the same standard. In every case the nature of the undertaking, its dangers and responsibilities, the amount involved, the skill, ability and reputation of the agent, the result attained, the previous study, preparation and expense required, as well as the actual time consumed, are to be taken into consideration, and the value of the services is to be estimated accordingly.[41]

[36] Butler v. Winona Mill Co., 28 Minn. 205, 41 Am. Rep. 277.

[37] Millar v. Cuddy, 43 Mich. 273, 38 Am. Rep. 181. This case has been cited as opposed to the preceding one. Upon examination it will be found not to be so. In the former there was no question as to the contract, in the latter the court held that such a contract could be made, but had not been in that case.

[38] Agent may recover the usual rate. Hollis v. Weston, 156 Mass. 357; Potts v. Aechternacht, 93 Pa. 138; Marshall v. Reed, 32 Pa. Super. 60.

[39] Tucker v. Preston, 60 Vt. 473; Carruthers v. Towne, 86 Iowa, 318; Hollis v. Weston, 156 Mass. 357; Bear v. Koch, 2 Misc. (N. Y.) 334; Slater v. Cook's Estate, 93 Wis. 104; Best v. Sinz, 73 Wis. 243; Martin v. Roberts, 36 Fed. 217; Taylor Mfg. Co. v. Key, 86 Ala. 212; McCrary v. Ruddick, 33 Iowa, 520; Shelton v. Johnson, 40 Iowa, 84; Millar v. Cuddy, 43 Mich. 373, 38 Am. Rep. 181; Stockbridge v. Crooker, 34 Me. 349, 56 Am. Dec. 662; Nauman v. Zoerhlaut, 21 Wis. 466; Jones v. School District, 8 Kan. 362.

[40] Ruckman v. Bergholz, 38 N. J. L. 531; Eggleston v. Boardman, 37 Mich. 14. Where an agent was employed to help sell an automobile under an agreement "to protect" him if he made the sale, a finding that he was entitled to receive the amount paid to regularly appointed agents was upheld. Fredrickson v. Locomobile Co., 78 Neb. 775.

[41] Eggleston v. Boardman, 37 Mich. 14; Vilas v. Downer, 21 Vt. 419; Ken-

§ 1528. What evidence as to value is admissible.—In many cases custom may have gone far towards establishing the amount of compensation to be paid for certain services, and where parties either expressly or impliedly deal with reference to such a custom, evidence of the amount so fixed is admissible.[42]

So evidence of what is usually charged for similar services by other persons in the same line of business at the same place is admissible.[43] It is also competent to show by persons acquainted with the value of like services, what is their opinion as to the value of the services in question.[44] This is a well-recognized use of what is ordinarily known as expert testimony. If such a witness knows the value of such services, it is not necessary that he should be shown to be acquainted with the amounts which others are in the habit of charging in like cases,[45] nor is it necessary that he should have personal acquaintance with the agent, or personal knowledge of the services rendered,[46] but he may give his opinion upon a hypothetical question covering the elements in controversy.

§ 1529. ——— Ordinarily the testimony of what such a witness would himself have charged is not admissible,[47] yet if the evidence given in reply to such a question is manifestly based upon the witness's opinion as to its value and not upon any uncertain standard of his own, the form of the question might be disregarded.[48]

So evidence of what was paid to a particular agent in another case is not, ordinarily, admissible; such evidence having no necessary tendency to prove either the *usual* charge or the actual value, inasmuch as there may have been in that case peculiar circumstances or elements which would not exist in another.[49] But upon cross-examination, in

tucky Bank v. Combs, 7 Pa. St. 543; Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983.

[42] Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Masterson v. Masterson, 121 Pa. 605; Thomas v. Brandt (Md.), 26 Atl. 524. On proof of custom, see Calland v. Trapet, 70 Ill. App. 228.

[43] Eggleston v. Boardman, 37 Mich. 14; Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Hollis v. Weston, 156 Mass. 357; Ruckman v. Bergholz, 38 N. J. Law, 531; Thompson v. Boyle, 85 Pa. 477; Vilas v. Downer, 21 Vt. 419; Sayre v. Wilson, 86 Ala. 151; Kennerly v. Somerville, 64 Mo. App. 75.

[44] Bowen v. Bowen, 74 Ind. 470; Johnson v. Thompson, 72 Ind. 167, 37 Am. Rep. 152; Parker v. Parker, 33 Ala. 459.

[45] Commissioners v. Chambers, 75 Ind. 409.

[46] Mish v. Wood, 34 Penn. St. 451; Miller v. Smith, 112 Mass. 470; Whitbeck v. New York, etc., R. R. Co., 36 Barb. (N. Y.) 644.

[47] Fairchild v. Railroad Co., 8 Ill. App. 591.

[48] See Elting v. Sturtevant, 41 Conn. 176.

[49] Eggleston v. Boardman, 37 Mich. 14; Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77.

order to test either the good faith or the qualifications of the witness, it might be proper to inquire of him what he would have performed the same service for,[50] or to ascertain the extent of his knowledge as to the price usually paid by inquiring what had to his knowledge been paid in given cases.[51]

§ 1530. Agent continuing after expiration of term presumed to be at prior compensation.—If an agent, employed at a compensation for a definite term, continues in the principal's service after the expiration of that term, without any new or other arrangement, he will be presumed to be continuing on the old terms, and there can be no recovery on a *quantum meruit*.[52]

3. When Compensation is Considered to be Earned.

§ 1531. In general.—The question when the agent's compensation is to be deemed to be earned, is one depending upon a variety of considerations.

Thus it may appear:—

a. That the agent has fully completed his undertaking.

b. That he has only partially completed his undertaking.

c. That he has done nothing at all.

The fact that he has not completed his undertaking may be attributable to one of the following causes:—

a. That his authority was revoked before he had had time or opportunity to perform fully.

b. That he had abandoned the agency before he had made full performance.

The revocation of his authority may have been:—

a. By act of the principal.

b. By operation of law.

If revoked by the act of the principal, that act may have been:—

a. For sufficient cause.

b. For insufficient cause.

So if the agent abandoned the agency, such abandonment may, under the circumstances have been:—

a. Justifiable, or

b. Unjustifiable.

[50] Gillman v. Gard, 29 Ind. 291.

[51] Lakeman v. Pollard, *supra*.

[52] Ewing v. Janson, 57 Ark. 237; Ingalls v. Allen, 132 Ill. 170; Laubach v. Cedar Rapids Supply Co., 122 Iowa, 643; Lalande v. Aldrich, 41 La. Ann. 307; Travelers' Ins. Co. v. Parker, 92 Md. 22; Thompson v. Detroit Copper Co., 80 Mich. 422; Douglass v. Merchants' Ins. Co., 118 N. Y. 484, 7 L. R. A. 822; Wallace v. Floyd, 29 Pa. St. 184, 72 Am. Dec. 620; Rauck v. Albright, 36 Pa. St. 367; Dickinson v. Norwegian Plow Co., 96 Wis. 376.

Again if the undertaking was performed in part, such part performance may have been:—

a. Of value to the principal, or

b. Of no value to the principal.

Without attempting to follow this classification precisely, the chief questions here suggested will be considered.

§ 1532. Compensation earned when undertaking fully completed. As a general proposition, it must be true that the agent is entitled to his compensation when and only when he has fully completed his undertaking according to its terms.[58] In many cases, there is no difficulty in determining when this time arrives, but in others it is not easy to decide upon the full measure of the agent's undertaking or upon the fact of its performance. Each case rests upon its own peculiar facts and circumstances, and the inquiry in every instance must be: 1. What did the agent undertake to do? 2. Has he done it, and if not, then, 3. To whose act or to what occurrence is the failure to be attributed?

[58] CONSTRUCTION OF CONTRACT—*In General.*

A sewing machine agent was to receive $12 a week, a 15 per cent commission on sales, payable as the installments were paid, and also 5 per cent of the net remittances of his office. There was a proviso that "all his claims therefor shall cease immediately upon the termination of this agreement." This was held not to apply to the 15 per cent selling commissions earned when contract terminated but not yet payable. Singer Manufacturing Co. v. Brewer, 78 Ark. 202.

Agents for the sale of threshing machines were, by the terms of their contract to receive no commissions on second hand goods. Court construed this to mean second hand goods taken in part payment for a new machine, and not to apply to a sale made by the agents at defendant's request of a second hand thresher taken in by other agents of the defendant in another territory. "This transaction was outside the scope of plaintiff's employment as regular agents of defendant, and not controlled by the written contract." Gooch v. Case Threshing Machine Co., 119 Mo. App. 397.

A stipulation that the agent was to receive no commissions on machinery sold by him and "taken back" by his principal, applies to a case where the agent made a sale receiving only a purchase money mortgage which was not paid and which the principal had to foreclose and buy in the worn machinery at the sale. Reeves v. Watkins, 28 Ky. Law Rep. 401, 89 S. W. 266. Compare on this point: Taylor Mfg. Co. v. Key, 86 Ala. 212; Sherman v. Pt. Huron Engine Co., 13 S. Dak. 95; Newell v. Pt. Huron Engine Co., —— Ala. ——, 57 South. 68.

An agent had a contract providing for a commission for the sale of two classes of bonds, his commissions to be paid out of the money collections as the purchase price was paid. He made a sale of some of the $500 bonds, receiving in part payment, with the principal's consent, certain of the $250 bonds previously sold to the buyer by other agents. Nothing being said about commissions, he was held not to be entitled to commissions on these bonds taken back, as they could not properly be deemed to

§ 1533. ——— When full performance a condition precedent.— It is entirely competent for the parties to expressly agree that the full performance of a particular undertaking shall be a condition precedent to the right to recover any compensation, and where such a con-

be money collections. Warwick v. North American Investment Co., 112 Mo. App. 633.

Where an agent is to have a commission upon every machine sold by him, he is entitled to it, in the absence of a contrary stipulation, where he really found the purchaser and made the sale, though the principal closes the matter up in person, or through other agents. Woods v. Case Threshing Mach. Co., — Iowa, —, 135 N. W. 399; Davis v. Huber, 119 Iowa, 56.

Where the contract was interpreted to mean "that commissions should be earned upon all orders accepted and filled by shipment, and not merely upon orders obtained." *Held*, that the agent was not entitled to commissions on orders which were justifiably cancelled by the buyer or rejected by the seller. *In re* Ladue Tate Mfg. Co., 135 Fed. 910.

Where a contract provides for both a salary and commissions on sales and also fixes a certain amount of sales, "which shall be considered the minimum amount of business necessary to constitute the fulfillment of this contract," the agent is not entitled to salary or commission unless his sales reach the minimum. Haas v. Malto-Grapo Co., 148 Mich. 358.

The fact that the agent performs more quickly or more easily than was contemplated does not affect his right if he does fully perform, as where the agent sold in one contract the stipulated quantity although it was evidently expected that a year or so would be required to sell that amount. Redwine v. Realty Co., 107 C. C. A. 175, 184 Fed. 851.

Where an insurance agent is to have commissions on renewals, this *prima facie* is held to mean only on renewals while he continues agent. Spaulding v. New York L. Ins. Co., 61 Me. 329; Phoenix Ins. Co. v. Holloway, 51 Conn. 310, 50 Am. Rep. 21; Jacobson v. Connecticut Mut. L. Ins. Co., 61 Minn. 330; Scott v. Travelers' Ins. Co., 103 Md. 69, 7 Ann. Cas. 1166. And a discharge for cause will terminate his right. Jacobson v. Connecticut Mut. L. Ins. Co., *supra;* Frankel v. Michigan Mut. L. Ins. Co., 158 Ind. 304; Walker v. John Hancock Mut. L. Ins. Co., 80 N. J. L. 342; Ann. Cas., 1912 A. 526.

Custom cannot change a clear contract upon the subject. Gooding v. Northwestern Mut. L. Ins. Co., — Me. —, 85 Atl. 391; Stagg v. Conn. Mut. L. Ins. Co., 10 Wall. (U. S.) 589, 19 L. Ed. 1038; Partridge v. Insurance Co., 15 Wall. (U. S.) 573, 21 L. Ed. 229. But contracts frequently expressly provide for interests after the termination of the agency, upon terms indicated. Gooding v. Northwestern Mut. L. Ins. Co., *supra.*

In New York, see Aldrich v. New York L. Ins. Co., 121 App. Div. 18; Hercules Mut. L. Assur. Co. v. Brinker, 77 N. Y. 435; Hale v. Brooklyn L. Ins. Co., 120 N. Y. 294.

Exclusive agency in certain territory.— Commissions on sales made therein. Contracts giving an agent the exclusive right to sell the principal's goods in a certain territory, may be made: Garfield v. Peerless Motor Car Co., 189 Mass. 395; though such a contract must be established by proof, and will not be inferred merely from the fact that the agent had been allowed for a considerable period to sell goods in that territory and had assumed that he was to have it, though he concedes that nothing had been said upon the subject. Wiley v. California Hosiery Co.

tract is fairly made it will be enforced, and will be conclusive unless it appears that the performance has been waived or prevented by the

(Cal.), 32 Pac. 522. See also, King Powder Co. v. Dillon, 42 Colo. 316; Aultman v. Joplin, 8 Ky. Law Rep. 62; Indiana Road Machine Co. v. Lebanon Carriage Co., 25 Ky. Law Rep. 1763, 78 S. W. 861. In Sutton v. Baker, 91 Minn. 12, a contract for exclusive agency was deduced from the circumstances, though not express. Unless the agency is exclusive, the principal may himself sell goods in the territory without liability to the agent. Aultman v. Joplin, *supra;* Indiana Road Machine Co. v. Lebanon Carriage Co., *supra;* Case Threshing Mach. Co. v. Wright Hardware Co., — Tex. Civ. App. —, 130 S. W. 729; Schroeder v. Fine, 131 N. Y. Supp. 575. Where the agency is exclusive, the principal may still sell in that territory, but if he does so, it is a breach of the contract and he is liable to the agent. Garfield v. Peerless Motor Car Co., *supra* (disapproving Golden Gate Pkg. Co. v. Farmers' Union, 55 Cal. 606); Masters v. Wayne Auto. Co., 198 Mass. 25. The contract may reserve to the principal the right to sell in the territory under certain circumstances, and the agent has no cause of complaint unless he shows that the sales were made under other circumstances than those specified. McCoy Eng. Co. v. Crocker-Wheeler Co., 100 Md. 530. Where sales are made by the principal at a lower rate than those fixed in the agent's contract, the agent is entitled to damages, but, it is held, not to commissions on such sales in the absence of a showing that he would have been able to make the sales himself at the higher rates. La Favorite Rubber Mfg. Co. v. Channon, 113 Ill. App. 491. See also, Roberts v. Minneapolis Thresh. Mach. Co., 8 S. Dak. 579, 59 Am. St. R. 777. But in Schiffman v. Peerless Motor Car Co., 13 Cal. App. 600, where the principal invaded the agent's territory in making sales, and represented at the same time that it had not a supply of motor cars to meet the agent's orders, it was held that the agent could recover commissions on cars so sold, and that the principal was estopped to deny that the agent might have made the sales. And in Sparks v. Reliable Dayton Motor Car Co., 85 Kan. 29, Ann. Cas. 1912, C. 1251, it was held that the measure of the agent's damages was presumptively the commissions on the cars sold by the principal. See also Clairmonte v. Napier, 11 Cal. App. 265.

After the agent leaves the employment, he is not entitled to commissions on goods thereafter sold by the principal, merely because they are sold to his former customers. O'Neill v. Howe, 16 Daly, 181.

An agent having a contract of exclusive agency is not entitled to commissions on goods sold by the principal in other territory merely because they are afterwards brought by the purchaser into the agent's territory. Wycoff v. Bishop, 115 Mich. 414. See also, Wiggin v. Shoe Co., 161 Mass. 597; Haynes Automobile Co. v. Woodill Auto Co., 163 Cal. 102.

In Masters v. Wayne Automobile Co., 198 Mass. 25, an ambiguous contract was construed as giving the agent the right to commissions upon sales made by the principal, if made to a person whom the agent had solicited, even though the principal was ignorant of that fact. Where the principal has agreed to give the agent an exclusive territory, he is not liable to the agent because another agent from a different territory makes a sale in the first agent's territory without the principal's knowledge and consent. Cedar Rapids Auto Co. v. Jeffrey, 139 Iowa, 7. See also, Hilliker v. Northwest Thresher Co., 145 Iowa, 721.

Land cases.—For a discussion of

principal.[54] So, though there may not have been any express agreement, it may be entirely clear, either from the nature of the undertaking, or the words or conduct of the parties, that what the agent was to be paid for was the accomplishment of a certain result, and in such a case the agent will not be entitled to compensation unless that result be accomplished, or its accomplishment be waived or prevented by the principal.[55] The case of the real estate broker, more fully to be considered in a later chapter, furnishes many typical illustrations.

Thus "where there is a special contract, by the terms of which the broker is not to be paid commissions unless he sells the property at a specified price, the sale by him at such a price is a condition precedent to his right to compensation, unless pending the negotiations, and

exclusive agency in land cases see *Real Estate Brokers* in chapter on Brokers, Book V, Chap. III.

Agreement to pay commission if property withdrawn from sale.—A contract to pay commissions for the sale of property, if the sale be made within a specified time, may also provide that the agent shall be entitled to his commissions in case the principal withdraws the property from sale, or sells it himself, during the time specified. Such a contract is valid and the agent's undertaking to devote his time and services to the finding of a purchaser within the period named furnishes a sufficient consideration. Kimmell v. Skelly, 130 Cal. 555; Crane v. McCormick, 92 Cal. 176; Maze v. Gordon, 96 Cal. 61; Rucker v. Hall, 105 Cal. 425.

[54] Thus see Flower v. Davidson, 44 Minn. 46 (payment only if "the sale is actually consummated"); Aultman v. Ritter, 81 Wis. 395 (no commission to be payable unless the property was not only sold but paid for); Walker v. Tirrell, 101 Mass. 257, 3 Am. Rep. 352 (no commission unless principal should "see fit and proper" to sell); Temby v. Brunt Pottery Co., 229 Ill. 540 (no commissions on orders which the principal does not accept); Hilliker v. Northwest Thresher Co., 145 Iowa, 721 (no commissions payable unless certain prices were realized); Taylor Mfg. Co. v. Key, 86 Ala. 212 ("no commissions shall be paid on any article taken back, or on any order taken and not filled, on machinery not settled for or on any sale to irresponsible persons"). See also Sherman v. Pt. Huron Engine Co., 13 S. Dak. 95; Newell v. Pt. Huron Engine Co., — Ala. —, 57 South. 68; Ross v. Portland Coffee Co., 30 Wash. 647.

[55] As is said in Goldstein v. White, 16 N. Y. Supp. 860: "Unless there is a special agreement to the contrary, work, whether measured by the job (Cunningham v. Jones, 20 N. Y. 486; Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442; Lawrence v. Miller, 86 N. Y. 131), or by time (Waters v. Davies, 55 N. Y. Super. Ct. 39), must be finished, in order that there shall be a right to pay for it. In other words, there must be a performance or a waiver of conditions precedent before there can be a right to recovery. Phelan v. Mayor, 119 N. Y. 86; Avery v. Willson, 81 N. Y. 341, 37 Am. Rep. 503."

Thus, though the contract be not so specific as those referred to in the preceding note, yet if the commission is clearly to be paid only in case a sale is effected, no commission can be recovered, though a purchaser be produced, if he fails to buy, unless by the principal's fault. Yeager v. Kelsey, 46 Minn. 402. To same effect: Stewart v. Fowler, 37 Kan. 677;

whilst his agency remains unrevoked, the owner consents to a sale for a sum other than originally agreed upon."[56] For a like reason if the promise is to pay a compensation if the sale is effected within a certain time, proper performance on the part of the agent within that time, unless excused or prevented by the principal, is a condition precedent to the right to compensation.[57] So if payment of all or some portion of the purchase price has been stipulated for, as where, for example, the agent's commissions are to be paid out of the purchase price or out of a certain instalment thereof, the payment of the purchase price or of such instalment, is similarly a condition precedent.[58]

Gruesel v. Dean, 98 Iowa, 405; Kost v. Reilly, 62 Conn. 57; McPhail v. Buell, 87 Cal. 115; Dorrington v. Powell, 52 Neb. 440; Tousey v. Etzel, 9 Utah, 329.

So, where it is a condition that the principal shall receive a certain sum without deduction. Beale v. Bond, 84 Law. T. 313. To same effect: Cremer v. Miller, 56 Minn. 52; Hurd v. Neilson, 100 Iowa, 555; Seattle Land Co. v. Day, 2 Wash. 451; Beatty v. Russell, 41 Neb. 321; Ames v. Lamont, 107 Wis. 531. So where the purchaser produced would not comply with the conditions, *e. g.*, to furnish an abstract of the property, which he was to give in part payment. Marple v. Ives, 111 Iowa, 602.

Where actual sale is stipulated for, a provisional sale is not enough. Candict v. Cowdrey, 139 N. Y. 273. Nor an optional one. Jones v. Eilenfeldt, 28 Wash. 687; Lawrence v. Pederson, 34 Wash. 1. Same where orders taken are subject to cancellation. Wolfsheimer v. Frankel, 130 App. Div. 853. See also, Pape v. Romy, 16 Ind. App. 470.

Moreover the agent, in order to be entitled to his compensation, must produce results. No commission is earned by service, however meritorious, which does not lead to a sale or the production of a purchaser, as the contract may require. If the agent does not bring his customer to definite terms, or if the customer or the agent abandons the matter before a definite conclusion is reached, no commissions are earned. And it will make no difference in such a case if, after the agent has failed or abandoned the endeavor, the principal or some other agent brings about the sale, even to the same purchaser, where this has not been the result of sharp practice on the part of the principal to avoid the payment of commission. Garcelon v. Tibbetts, 84 Me. 148; Fairchild v. Cunningham, 84 Minn. 521; Gleason v. Nelson, 162 Mass. 245; Sawyer v. Bowman, 91 Iowa, 717; Cook v. Forst, 116 Ala. 395; Babcock v. Merritt, 1 Colo. App. 84; Crockett v. Grayson, 98 Va. 354; Baars v. Hyland, 65 Minn. 150; Hale v. Kumler, 85 Fed. 161; Crowley Co. v. Myers, 69 N. J. L. 245; Butler v. Baker, 17 R. I. 582, 33 Am. St. R. 897; Cadigan v. Crabtree, 179 Mass. 474, 88 Am. St. R. 397; Ayres v. Thomas, 116 Cal. 140; Alden v. Earle, 121 N. Y. 688.

[56] Jones v. Adler, 34 Md. 440. See Stewart v. Mather, 32 Wis. 344.

[57] Irby v. Lawshe, 62 Ga. 216; Fulty v. Wimer (Cal.), 9 Pac. 316; Ropes v. Rosenfeld, 145 Cal. 671; Page v. Griffin, 71 Mo. App. 524; Young v. Trainor, 158 Ill. 428; Jacquin v. Boutard, 89 Hun, 437; affirmed in 157 N. Y. 686. To same effect: Greene v. Freund, 150 Fed. 721.

[58] Lindley v. Fay, 119 Cal. 239; Ormsby v. Graham, 123 Iowa, 202; Parker v. Bldg. Ass'n, 55 W. Va. 134; Seattle Land Co. v. Day, 2 Wash. 451; Hale v. Kumler, 29 C. C. A. 67, 85 Fed. 161.

§ 1534. ——— In many cases it has been held that the undertaking of a real estate broker—at least under the circumstances there disclosed—requires not only that he shall find a purchaser but that a binding contract shall be made with him, and where this is the case the broker must accomplish that result, to entitle him to his compensation.[59] Usually, however, as will be more fully seen hereafter,[60] the undertaking of such an agent is construed to be, not that he will close a binding sale, but only that he will find a purchaser to whom the principal may sell. In such a case, the production by the agent of a purchaser, who either actually buys, or is at least ready, able and willing to buy, upon the terms proposed, is likewise a condition precedent.[61]

The production of a purchaser who will not close the transaction unless some change be made in the terms proposed, or who insists upon some privilege or exemption not provided for by the express or the implied basis of the negotiation, will not satisfy the agent's obligation unless the principal sees fit to waive the variance.[62]

§ 1535. **Agent's right not defeated by principal's default.**—If it be found that the agent has done all that he undertook to do, his right to his compensation is complete, and he cannot be deprived of it, because the principal then fails to avail himself of the benefits of the act or refuses to do what he had agreed to do upon performance. Neither can the principal then defeat the agent's claim by revoking his authority or withdrawing the subject-matter from his possession or control.[63]

Thus an agent who is employed to procure a loan for his principal is entitled to his commission when he procures a lender, ready, willing and able to loan the money upon the terms proposed. His right to his commission does not depend upon the contingency of the principal's acceptance of the loan, but upon his performance of his part of the contract, and the principal cannot deprive the agent of his commission by refusing to accept the loan which the agent's efforts have resulted in securing.[64]

[59] See Hyams v. Miller, 71 Ga. 608; Tombs v. Alexander, 101 Mass. 255, 3 Am. Rep. 349; Gilchrist v. Clarke, 86 Tenn. 583; Lunney v. Healey, 56 Neb. 313, 44 L. R. A. 593.

[60] See *post*, chapter on Brokers.

[61] See Stewart v. Smith, 50 Neb. 631.

[62] For example, a purchaser who will not accept the ordinary form of deed. Garcelon v. Tibbetts, 84 Me. 148. Or a lender who insists upon payment of principal and interest in gold. Caston v. Quimby, 178 Mass. 153, 52 L. R. A. 785.

[63] See cases cited in following notes.

[64] Vinton v. Baldwin, 88 Ind. 104, 45 Am. Rep. 447; Squires v. King, 15 Colo. 416; Hanesley v. Bagley, 109 Ga. 346.

But compare Demarest v. Tube Co., 71 N. J. L. 14; Crasto v. White, 52 Hun, 473; Ashfield v. Case, 93 App. Div. 452, cited in preceding section.

Neither is a broker's right to his commissions affected ordinarily by the fact that the principal proves to be unable to make a good title to the property which he offered as security;[65] though it is, of course, true that the terms of the broker's employment may be such that he is not entitled to commissions unless the loan be actually made.

§ 1536. ——— Upon the same principle it is held that an agent who undertakes to negotiate a sale of his principal's property,—a binding contract not being required—has earned his commission when he has procured a purchaser who is able, willing and ready to purchase it upon the terms designated,[66] and the principal cannot defeat the agent's claim by then refusing to sell at all,[67] or only upon different terms,[68] or by ignoring the agent and secretly consummating the sale with the purchaser so produced without the further intervention of

[65] Middleton v. Thompson, 163 Pa. 112; Egan v. Kieferdorf, 16 Misc. 385; Gatling v. Central Spar Verein, 67 App. Div. 50; Fullerton v. Carpenter, 97 Mo. App. 197; Finck v. Bauer, 40 Misc. 218; Green v. Lucas, 33 L. T. R. N. S. 584; Peet v. Sherwood, 43 Minn. 447.

[66] Oullahan v. Baldwin, 100 Cal. 648; Wilson v. Sturgis, 71 Cal. 226; Henry v. Stewart, 185 Ill. 448; Wilson v. Mason, 158 Ill. 304, 49 Am. St. R. 162; Scribner v. Hazeltine, 79 Mich. 370; Gelatt v. Ridge, 117 Mo. 553, 38 Am. St. R. 683; Gibbons v. Sherwin, 28 Neb. 146.

[67] Fiske v. Soule, 87 Cal. 313; Cawker v. Apple, 15 Colo. 141; Spalding v. Salteil, 18 Colo. 86; Monroe v. Snow, 131 Ill. 126; Flood v. Leonard, 44 Ill. App. 113; Bird v. Phillips, 115 Iowa, 703; Felts v. Butcher, 93 Iowa, 414; Niederlander v. Starr, 50 Kan. 770; Harwood v. Diemer, 41 Mo. App. 48; Reeves v. Vette, 62 Mo. App. 440; Greenwood v. Burton, 27 Neb. 808; Jones v. Stevens, 36 Neb. 849; Veeder v. Seaton, 85 App. Div. 196; York v. Nash, 42 Ore. 321.

[68] This is true whether the principal changes the terms by making them more favorable to himself. Buckingham v. Harris, 10 Colo. 455; Bishop v. Averill, 17 Wash. 209, or whether he reduces his terms in some slight particular in order to evade the payment of commissions by making the sale himself. Cook v. Forst, 116 Ala. 395; Corbel v. Beard, 92 Iowa, 360; Ranson v. Weston, 110 Mich. 240; Hubachek v. Hazzard, 83 Minn. 437; Schlegal v. Allerton, 65 Conn. 260; Snyder v. Fearer, 87 Ill. App. 275; Hutten v. Renner, 74 Ill. App. 124; Hafner v. Herron, 165 Ill. 242; Hobbs v. Edgar, 23 Misc. 618.

No objection where all parties contemplated that possibility at time of making contract. Hilliker v. Northwest Thresher Co., 145 Iowa, 721.

In Dildine v. Ford Motor Co., 159 Mo. App. 410, although the contract provided for change of price, court refused to recognize it because being used as a "club" to coerce agent.

In Nosotti v. Auerbach, 79 L. T. R. 413, plaintiff was employed to find a purchaser for defendant's house. The jury found that there was no stipulation respecting the time when defendant would be ready to give possession. On January 26th the plaintiff produced a purchaser who offered to buy, provided possession could be given by March 15th. Defendant refused this offer, saying that he could not give possession as soon as that. The jury having found that from January 26th to March 15th was a reasonable time to allow defendant,

the agent.[69] Neither is such an agent's right to his commissions affected by the fact that his principal's title is defective and the sale fails for that reason;[70] or that the principal has disabled himself from conveying as proposed;[71] or that the sale fails because of the misrepresentation by the principal of some material fact connected with the

it was held that plaintiff was entitled to his commission.

Bruce J. said: "If the plaintiff found a person willing to accept the defendant's terms, and to take possession within a reasonable time, and to wait for possession for a reasonable time, I think he did all he was bound to do to earn his commission."

[69] Cook v. Forst, 116 Ala. 395; Schlegal v. Allerton, 65 Conn. 260; Snyder v. Fearer, 87 Ill. App. 275; Hutten v. Renner, 74 Ill. App. 124; Baker v. Murphy, 105 Ill. App. 151; Hafner v. Herron, 165 Ill. 242; Corbel v. Beard, 92 Iowa, 360; Ranson v. Weston, 110 Mich. 240; Hubachek v. Hazzard, 83 Minn. 437; Hobbs v. Edgar, 23 N. Y. Misc. 618; Dreisback v. Rollins, 39 Kan. 268; Scott v. Clark, 3 S. Dak. 486; Nicholas v. Jones, 23 Neb. 813; Love v. Miller, 53 Ind. 294, 21 Am. Rep. 192; Vinton v. Baldwin, *supra;* Reyman v. Mosher, 71 Ind. 596; Moses v. Bierling, 31 N. Y. 462; Mooney v. Elder, 56 N. Y. 238; Fraser v. Wyckoff, 63 N. Y. 445; Wylie v. Marine Nat. Bank, 61 N. Y. 415; Hinds v. Henry, 36 N. J. L. 328; Hannan v. Moran, 71 Mich. 261. See also, Tombs v. Alexander, 101 Mass. 255, 3 Am. Rep. 349; Walker v. Tirrell, 101 Mass. 257, 3 Am. Rep. 352; Richards v. Jackson, 31 Md. 250, 1 Am. Rep. 49. See this subject fully discussed under the title "Brokers," *post.*

The fact that the principal may have seen fit for some reason of his own to require the purchasers, secured by the agent, to execute new orders for the machines sold by the agent, will not deprive him of his commission. Merriman v. McCormick Harvester Co., 101 Wis. 619, s. c., 96 Wis. 600.

[70] Smith v. Schiele, 93 Cal. 144; Clark v. Thompson Co., 75 Conn. 161; Davis v. Morgan, 96 Ga. 518; Rounds v. Allee, 116 Iowa, 345; Indiana Asphalt Co. v. Robinson, 29 Ind. App. 59; Davis v. Lawrence, 52 Kan. 383; Monk v. Parker, 180 Mass. 246; Fitzpatrick v. Gilson, 176 Mass. 477; Stange v. Gosse, 110 Mich. 153; Gauthier v. West, 45 Minn. 192; Roberts v. Kimmons, 65 Miss. 332; Christensen v. Wooley, 41 Mo. App. 53; Gerhart v. Peck, 42 Mo. App. 644; Strong v. Prentice Brown Stone Co., 6 N. Y. Misc. 57; Gorman v. Hargis, 6 Okla. 360; Kyle v. Rippey, 20 Ore. 446 (citing many cases); Sweeny v. Ten-Mile Oil Gas Co., 130 Pa. 193; McLaughlin v. Wheeler, 1 S. D. 497; Cheatham v. Yarbrough, 90 Tenn. 77; Conklin v. Krakauer, 70 Tex. 735; Wilson v. Clark, 35 Tex. Civ. App. 92; Brackenridge v. Claridge, 91 Tex. 527, 43 L. R. A. 593.

[71] Ford v. Easley, 88 Iowa, 603; Reed v. Union Cent. L. I. Co., 21 Utah, 295; Hix v. Edison Electric Light Co., 10 N. Y. App. Div. 75.

An agent of an insurance company was to receive, as compensation for his services, a per cent of all sums paid to and received by the said company as premiums on insurance secured by the agent. The agent submitted a risk to the defendant and they accepted it, and received as part of first premium notes to the amount of over $4,000. Afterward, deeming the risk undesirable, they compromised with the insured and he surrendered the policy and they returned to him the notes. It was held that the company did not avoid their liability to the agent for commission, by thus voluntarily disposing of their own right to premiums. Reed v. Union Cent. Life Ins. Co., 21 Utah, 295.

transaction [72] or that the contract for sale entered into or ratified by the principal is not specifically enforceable.[73]

So where a binding contract is required, and the agent procures it to be made, he will be entitled to his compensation, although no sale actually takes place because the principal refused to enforce the contract,[74] induced [75] or permitted [76] the buyer to withdraw from it, or consented with the buyer that the contract should be cancelled,[77] or because of any other reason not involving the sufficiency of the agent's performance.[78]

The same general principles apply to undertakings to bring about the exchange of property.[79]

§ 1537. ——— Where the agent contends that he has thus substantially performed his undertaking, notwithstanding the default of the principal, the act of the agent must have been the immediate means of securing the purchaser or lender. In this case it is *causa causans* and not the *causa proxima* that the law looks to.[80]

The cases in which this question has most commonly arisen have been cases involving the sale of real estate or the procuring of loans upon it, but the principles of law herein referred to are by no means peculiar to cases of that sort, and many cases will be found cited in the note, involving similar contracts with reference to other subjects.[81]

In a similar case, where the agent was to receive a rebate on the stock received by the defendant, as compensation for promoting the company, and the defendant afterward surrendered its right to receive the amount of stock stipulated for, the decision was for the agent, the court saying: "The principal may not bargain away his right to receive the fund, and thus deprive the agent of the reward for his services. The latter has not agreed to any such thing as this, and the injustice of it is manifest." Hix v. Edison Electric Light Co., 10 N. Y. App. Div. 75.

[72] Hannan v. Moran, 71 Mich. 261; Cohen v. Farley, 28 N. Y. Misc. 168; Washburn v. Bradley, 169 Mass. 86.

But see apparently *contra*, Hausman v. Herdtfelder, 81 N. Y. App. Div. 46; Curtiss v. Mott, 90 Hun, 439.

[73] Mattes v. Engel, 15 S. D. 330; McLaughlin v. Wheeler, 1 S. D. 497.

[74] Parker v. Walker, 86 Tenn. 566; Millet v. Barth, 18 Colo. 112; Alvord v. Cook, 174 Mass. 120; Witherell v. Murphy, 147 Mass. 417; Ward v. Cobb, 148 Mass. 518, 12 Am. St. Rep. 587; Canfield v. Orange, 13 N. D. 322.

[75] Phelps v. Prusch, 83 Cal. 626.

[76] Foster v. Wynn, 51 Ill. App. 401; Betz v. Williams & White Land & Loan Co., 46 Kan. 45.

[77] Lawrence v. Rhodes, 188 Ill. 96; Granger v. Griffin, 43 Ill. App. 421; Parker v. Walker, 86 Tenn. 566.

[78] Flynn v. Jordal, 124 Iowa, 457; Gibson v. Gray, 17 Tex. Civ. App. 646; Mattes v. Engel, 15 S. D. 330.

[79] Brown v. Wilson, 98 Iowa, 316; Lockwood v. Halsey, 41 Kan. 166; Jenkins v. Hollingsworth, 88 Ill. App. 139; Roche v. Smith, 176 Mass. 595, 79 Am. St. Rep. 345; Kalley v. Baker, 8 N. Y. Supp. 851; Blair v. Slosson, 27 Tex. Civ. App. 403.

[80] Attrill v. Patterson, 58 Md. 226; Ayres v. Thomas, 116 Cal. 140.

[81] See for example Veeder v. Seaton, 86 N. Y. App. Div. 196 (principal re-

§ 1538. No defense that principal realized no profit.—So if the agent has done all that he undertook to do, the fact that the services proved to be of no value to the principal, or that the latter did not realize from them the expected profit, furnishes no ground, upon which to deprive the agent of his compensation.[82] And it is immaterial whether this result be attributable to the act of the principal or of third persons: the principal and not the agent must run the risk of his undertaking's proving profitless.

4. Effect of Termination of Agency.

1. Termination by the Act of Principal.

§ 1539. When agent is entitled to compensation if agency is terminated before performance.—The question of the agent's right to compensation when his authority has been revoked or his employment has been terminated before full performance, depends, as has been seen, upon a variety of considerations. The termination may have

fused to perform parol contract for sale of automobile, not enforceable under the statute of frauds, but one which the buyer was ready and willing to perform); Taylor v. Morgan's Sons Co., 124 N. Y. 184; Jacquin v. Boutard, 89 Hun (N. Y.), 437 (principal without excuse refused to accept orders procured by agent); Madden v. Equitable Life Assur. Soc., 11 N. Y. Misc. 540 (insurance company arbitrarily rejected application procured by agent); Strong v. Prentice Brown Stone Co., 6 N. Y. Misc. 57 (principal did not properly perform contract made for him by agent and the purchasers rejected goods sold by agent because they did not comply with the contract); Taylor Mfg. Co. v. Key, 86 Ala. 212; Bailey v. Carnduff, 14 Colo. App. 169 (principal refused without reason to deliver stock sold by the agent); Owl Canon Gypsum Co. v. Ferguson, 2 Colo. App. 219 (same effect); Bush v. Mattox, 116 Ga. 42; Stauffer v. Linenthal, 29 Ind. App. 305 (principal unjustifiably refused to complete sale of a stock of goods negotiated by agent); Stevenson v. Morris Machine Works, 69 Miss. 232 (principal unreasonably delayed filling orders procured by agent and purchaser therefore refused to accept the goods); Tyler v. Bernard (Tenn. Ch. App.), 57 S. W. 179 (same facts as in preceding case; agent recovered commissions on the sale); Delafield v. Smith, 101 Wis. 664, 70 Am. St. Rep. 938 (where the principal approved of the contracts, but failed to deliver the goods).

So in cases where the principal fails to enforce a binding contract against a recalcitrant buyer. Dougan v. Turner, 51 Minn. 330; Geoghegan v. Kelly, 11 N. Y. Supp. 704; Hallack v. Hinckley, 19 Colo. 38; Aikins v. Thackara Mfg. Co., 15 Pa. Super. 250; Yates v. Appleton, 61 Hun (N. Y.), 228.

[82] Scovell v. Upham, 55 Minn. 267; Stone v. Argersinger, 32 App. Div. 208; Rockwell v. Hurst, 13 N. Y. Supp. 290; Hagar v. Donaldson, 11 Pa. Co. Ct. 252, 1 Pa. Dist. 147; Shute v. McVitie (Tex. Civ. App.), 72 S. W. 433; Lockwood v. Levick, 8 C. B. (N. S.) 603; Hendrickson v. Woods, 77 App. Div. 644 (no opinion), 78 N. Y. Supp. 949.

resulted from the act of the principal or by operation of law; if terminated by the act of the principal, such termination may, as to the agent, have been rightful or wrongful.

It has been seen that, unless the authority of the agent be coupled with an interest, it may be revoked by the principal at any time.[83] It has also been seen that, though there may be a contract of employment between the parties, the principal may usually, in fact, terminate it and discharge the agent at any time. As has been already explained,[84] what is meant by this is, that the relation between the principal and the agent, being a personal one founded upon trust and confidence, the law will not ordinarily undertake to compel the principal to continue to employ an agent against his will,—will not, in other words, enforce specific performance of the contract. But notwithstanding the fact that he possesses this power to revoke or terminate, the principal, as has been seen,[85] may expressly or impliedly agree not to exercise it,—and where there is an employment for a definite term, there *is* an agreement not to wrongfully terminate it,—and where such an agreement is made, the principal will be liable if he violates it, without good cause, in the same manner as for the violation of any other contract.

§ 1540. ——— In the absence, however, of an express or implied agreement that the agency shall continue for a definite time, it will be presumed to be an agency at will merely, terminable at the will of either party at any time.[86] And the same rule applies although the agent may have been employed to do a specific thing, unless there is an express or implied agreement on the part of the principal that he will continue to employ the agent until completion, and on the part of the agent that he will continue to act until full performance—it is still at will merely; no implied agreement to continue the agency until completion necessarily arises from the mere fact of such an employment. If, for example, I employ a broker, in the ordinary way, to sell my house, this does not imply an agreement on my part with him either that I will sell the house or that I will continue to employ him until he sells it; or, on his part with me, that he will sell it or keep at it until he does. I may usually withdraw my property, or he may abandon the effort, without liability.

So, as has been seen,[87] the agent may be under an agreement to act for a certain period with no corresponding obligation on the part of the principal to employ him during that period.

[83] *Ante*, § 563.
[84] *Ante*, § 568.
[85] *Ante*, § 566.
[86] *Ante*, § 592.
[87] *Ante*, §§ 598–605.

a. Agency Rightfully Terminated.

§ 1541. When agency may be terminated without liability.—In using the expressions *rightfully* and *wrongfully* terminated, it will be understood that the question of the principal's *power* to revoke authority is not involved, but whether by express or implied agreement having undertaken not to exercise that power, or having agreed that the relation shall continue for a certain period, he has, nevertheless, revoked the authority or terminated the relation in violation of the agreement.[88]

In this view of the case the principal may rightfully revoke the agent's authority in one of two cases: a. Where the authority was conferred to continue only during the will of the principal; and, b. Where, though the authority was to continue for a definite time, it was subject to revocation upon the happening of a certain event, or upon the breach of an express or implied condition of its continuance, and the event has happened or the breach has occurred. What misconduct on the part of the agent will constitute a breach of the implied conditions of every employment, has previously been considered.[89]

§ 1542. Agency at will of the principal.—Where an agency has been created to endure at the will of the principal and is terminated by him before the agent has done anything in pursuance of it, the agent would ordinarily be entitled to no compensation whatever; if terminated by the principal without fault of the agent, after the agent has entered upon the performance, but before full completion, the agent will ordinarily be entitled to compensation for the reasonable value of the work already done, and to be reimbursed for the costs and expenses which he had fairly and in good faith incurred in the performance of the agency up to that time.[90] This will always be the case where, from the nature of the employment, the principal receives the full value of the agent's services as they are rendered. It will also be true in all other cases except those in which the full performance of the undertaking is expressly or impliedly made a condition precedent to the right to compensation,—a subject already considered.[91]

§ 1543. ——— It is undoubtedly competent for the agent to agree that he shall receive no compensation if his authority is terminated before performance, even though it be so terminated at the mere whim

[88] See *ante*, § 568.
[89] See *ante*, § 607.
[90] United States v. Jarvis, Fed. Cas. No. 15,468, 2 Ware (U. S. D. C.), 278; Chambers v. Seay, 73 Ala. 372.
[91] See *ante*, § 1533.

or caprice of the principal, and where such an agreement is fairly made it will be enforced.[92]

Where the agency is thus at the will of the principal, the agent cannot, if it be revoked, recover damages for this withdrawal of the power to act, or for the commissions or compensation he might have earned had the authority not been revoked.[93] Nor can it make any difference that the principal acted unreasonably, capriciously or maliciously in revoking the authority. No action can ordinarily be maintained in such a case for the doing of what one thus has a legal right to do, even though the act be prompted by malice.[94]

If, on the other hand, though the power of revocation be fully conceded, the agent has substantially performed his undertaking in full before the revocation, he will be entitled to compensation as upon a complete performance.[95]

§ 1544. Agency terminable on contingency.—The same rule would apply where the authority was terminable by the principal upon the happening of a certain contingency. Unless the agent had expressly or impliedly agreed that in the event of such a termination he should have no compensation, he would be entitled to receive the reasonable value of the services already rendered, and to be reimbursed for the expenses and charges which he had fairly and in good faith incurred in the performance of the agency. The agent, however, would not be entitled to recover anything by way of compensation for any damages occasioned by the revocation, as for wages or profits which he might have earned had the revocation not occurred, although the revocation was without reasonable cause if within the contingency agreed upon. The exception referred to in the preceding sections would also apply

[92] See, for example, Walker v. Tirrell, 101 Mass. 257, 3 Am. Rep. 352.

For right to terminate if service is not satisfactory. Tyler v. Ames, 6 Lans. (N. Y.) 280; Adriance v. Rutherford, 57 Mich. 170; Hotchkiss v. Gretna Gin. & Compress Co., 36 La. Ann. 517; Dulaney v. Page Belting Co. (Tenn. Ch.), 59 S. W. 1082.

Compare, Hydecker v. Williams, 18 N. Y. Supp. 586.

[93] North Carolina State L. Ins. Co. v. Williams, 91 N. C. 69, 49 Am. Rep. 637; Jacobs v. Warfield, 23 La. Ann. 395; Kirk v. Hartman, 63 Pa. 97; Coffin v. Landis, 46 Pa. 426.

[94] Crescent, etc., Co. v. Eynon, 95 Va. 151.

If there was in fact good ground for discharging the agent, it is immaterial that the principal did not know it at the time. Odeneal v. Henry, 70 Miss. 172; Boston Deep Sea Fishing Co. v. Ansell (1888), 39 Ch. D. 339; Ridgway v. Hungerford Market Co., 3 Ad. & El. 171; Loveman v. Brown, 138 Ala. 608; Troy Fertilizer Co. v. Logan, 90 Ala. 325. If master asserts one cause, he is not estopped to assert another even though both were known to him at time. Strauss v. Meertief, 64 Ala. 299.

[95] Stamets v. Deniston, 193 Pa. 548.

authority, and to exercise reasonable care and diligence in the performance of his undertaking. The nonperformance of these duties also may defeat the agent's right to compensation.[5] It is not every case of misconduct in this regard, however, even though sufficient to warrant the agent's discharge, which will deprive him of all claim to compensation. If the agent were guilty of such misconduct as amounts to treachery, or if he wholly failed to recognize the duties and responsibilities imposed upon him by his situation, or so conducts himself that his services are of no value, it is entirely just and reasonable that he should receive no compensation whatever, and to this extent the law is well settled.[6]

But if on the other hand, though the agent has been negligent or has not performed according to his undertaking, his services are still of some appreciable and substantial value to the principal, over and above all damages sustained by him by reason of the default, the agent should be entitled to recover that value.[7]

It may also be found that the principal has waived or condoned the agent's default, in which event, of course, it will cease to be of legal consequence; and such waiver or condonation may be implied from circumstances and need not be express.[8]

[5] A servant discharged for wilful and persistent disobedience of reasonable orders cannot recover compensation under an entire contract. Von Heyne v. Tompkins, 89 Minn. 77, 5 L. R. A. (N. S.) 524.

[6] See cases cited in second note preceding. See also Alta Invest. Co. v. Worden, 25 Colo. 215; Quinn v. Le Duc (N. J. Ch.), 51 Atl. 199; Schreiner v. Kissock, 91 N. Y. Supp. 28.

[7] Hildebrand v. American Fine Art Co., 109 Wis. 171, 50 L. R. A. 826; Lawrence v. Gullifer, 38 Me. 532; Kessee v. Mayfield, 14 La. Ann. 90; Massey v. Taylor, 5 Cold. (Tenn.) 447; Carroll v. Welch, 26 Tex. 147; Shute v. McVitie (Tex. Civ. App.), 72 S. W. 433; Cotton v. Rand, 93 Tex. 7; Congregation v. Peres, 2 Cold. (Tenn.) 620; Eaken v. Harrison, 4 McCord (S. C.), 249.

[8] Tickler v. Andrea Mfg. Co., 95 Wis. 352.

It has also been held in many English, and several American cases that where a servant or agent employed for a definite period, is guilty of such misconduct as will justify his discharge, he is not only not entitled to recover damages for the discharge, but he is not entitled to any compensation for what he may have done during the current period. This is upon the theory that the contract for that period, whether it be a week, a month, a quarter or a year, is an entire contract, the complete performance of which is a condition precedent to the servant's or agent's right to recover.

English: Turner v. Robinson, 5 B. & Ad. 789, 6 C. & P. 15; Ridgway v. Market Co., 3 Ad. & El. 171; Lilley v. Elwin, 11 Q. B. 742; Spain v. Arnott, 2 Starkie, 256; Turner v. Mason, 14 M. & W. 112.

American: Beach v. Mullin, 34 N. J. L. 348; Peterson v. Mayer, 46 Minn. 468, 13 L. R. A. 72 (see also Nelichka v. Esterly, 29 Minn. 146).

b. Agency Wrongfully Terminated.

§ 1549. When agent discharged without cause—Breach of implied contract.—But where, by express or implied contract, the agency has been created to endure for a definite period, it may not be terminated by the principal, unless for the agent's default, or by virtue of some agreement to that effect, without liability to the agent. As has been seen [9] where no definite time is agreed upon, the agency is ordinarily held to be one to continue during the will of the principal.[10] But it is not necessary that there should be an express agreement that the agency shall not be thus terminated without liability at the mere will of the principal. It may be implied from facts as in other cases, and such an implied understanding is frequently demanded by the rules of ordinary good faith between parties. It is, of course, always within the power of the agent to protect himself by an express agreement, and in many cases the absence of such an agreement will put the agent at the mercy of the principal's will.

As has already been frequently pointed out, the mere fact that an agent is employed to perform a certain act will not, of itself, amount to an undertaking on the part of the principal that the agent shall be permitted to complete the act, at all events, and the principal may fairly, and in good faith, terminate the agency without liability, at any time before performance. The case of the real estate broker furnishes many typical illustrations of this rule. But where the act is one which is to be paid for only upon completion, and which requires time and labor for its performance, and the agent has, within a reasonable time, brought the act to the very point of completion so that success is certain and immediate, it would be the height of injustice to permit the principal then to withdraw the authority and terminate the agency and appropriate the benefit of it, without being liable to the agent for any of the compensation which he had thus substantially and practically earned.

§ 1550. ——— So where an agent is employed to perform an act (to be paid for on completion) which involves expenditures of labor and money before it is possible to accomplish the desired object, and the agent has in good faith incurred expense and expended time and

But this is not the general rule in the United States. See Hildebrand v. American Fine Art Co. and other cases cited in note preceding this one.

[9] See *ante*, § 592.

[10] No substantial damages for discharge where the employment was only for so long as the services are satisfactory to the employer. Sax v. Detroit, etc., R. Co., 129 Mich. 502.

labor, but has not had a reasonable opportunity to avail himself of the results of this preliminary effort, it could not be permitted that the principal should then terminate the agency and take advantage of the agent's services without rendering any compensation therefor unless that result is required by the plain terms of the contract or the inherent nature of the service.[11]

So, while a broker, as will be more fully seen hereafter, must ordinarily fully perform in order to be entitled to his commissions, still if after such a broker, employed to sell property, had in good faith expended money and labor in advertising for and finding a purchaser, and was in the midst of negotiations which were evidently and plainly approaching success, the seller should revoke the authority with the purpose of availing himself of the broker's efforts and avoiding the payment of his commissions, it could not be claimed that the agent had no remedy.[12] In certain of these cases it might well be said that there was an implied contract on the part of the principal to allow the agent a reasonable time for performance, that full performance was wrongfully prevented by the principal's own acts, and that the agent had earned his commission.[13]

All of these questions, however, will be more fully considered in their appropriate place.

§ 1551. What cases involved.—The cases here involved may be divided into two general classes: *First*, those wherein there is a contract with the agent to do some particular act, but not involving a general employment of him to devote his entire time to the principal's service; and, *Second*, those in which there was a contract to enter the principal's service for a definite time and to give to him during that time the exclusive service of the agent. To state it in different form, the first class includes contracts to do specific acts, and the second includes ordinary contracts of employment. Accurately speaking, the first class only ordinarily involves matters of agency, and the second class questions of master and servant. The first class would be illustrated by the case of the broker or other agent who is employed to

[11] Approved in Glover v. Henderson, 120 Mo. 367, 41 Am. St. Rep. 695. See also, Jaekel v. Caldwell, 156 Pa. 266; Green v. Cole, 127 Mo. 587; Zwolanek v. Baker Mfg. Co., 150 Wis. 517.

[12] See *post*, Book V, Chap. III.

[13] See Gleason v. McKay, 37 Ill. App. 464; Green v. Cole, *supra*; Heaton v. Edwards, 90 Mich. 500; Rees v. Pellow, 38 C. C. A. 94, 97 Fed. 167; Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Wylie v. Marine Nat. Bank, 61 N. Y. 415; Martin v. Holly, 104 N. C. 36; Cloe v. Rogers, 31 Okla. 255, 38 L. R. A. (N. S.) 366.

sell specific property for a commission, but who does not undertake to give his entire time and service to the principal; and the second class by the agent or servant who is employed to work by the week, month or year at a fixed wage or salary.

§ 1552. Breach of contract with agent to do particular acts.—Where an agent has been employed to do some particular act or acts for the doing of which he is to receive a commission or other agreed sum, under such circumstances as to involve a contract that he shall be permitted to perform, and he is wrongfully prevented from performing by the principal, his remedy must ordinarily be an action for damages. He can not have wages, because, by the hypothesis, none were to be paid to him. He cannot ordinarily recover the agreed commission, because this was to be paid only upon performance, and, by the hypothesis, this has been prevented by the wrongful act of the principal. There may, of course, be cases, as already suggested, in which he has so substantially and practically performed before the breach, that he may recover upon that theory. In other cases, however, the agent's recovery must be had upon some different basis. He would, in any event, be entitled to compensation for the work, labor and money properly expended before the wrongful termination;[14] or, in cases in which the damages could be estimated with the necessary certainty, to compensation for the loss of what he would have received had he been permitted to perform his undertaking.[15]

[14] Jaekel v. Caldwell, 156 Pa. 266; Martin v. Holly, 104 N. C. 36.

[15] See Cloe v. Rogers, 31 Okla. 255, 38 L. R. A. (N. S.) 366; Durkee v. Gunn, 41 Kan. 496, 13 Am. St. Rep. 300; Green v. Cole, 127 Mo. 587.

Where the compensation is not a fixed sum, and is not capable of being rendered certain by reference to known *data*, but depends upon uncertain or conjectural events, as where it is to be paid in the form of commissions upon the price of goods which the agent may sell during a certain period, the probable amount of his sales during that period is ordinarily too speculative to be made the basis of a recovery. Brigham v. Carlisle, 78 Ala. 243, 56 Am. Rep. 28; Beck v. West, 87 Ala. 213; Howe Machine Co. v. Bryson, 44 Iowa, 159; Oberfeldes v. Mattingly (Ky.), 120 S. W. 352; Stern v. Rosenheim (Md.), 10 Atl. 221; Isbell v. Anderson Carriage Co., 170 Mich. 304; Lewis v. Atlas Ins. Co., 61 Mo. 534; Kelly v. Carthage Wheel Co., 62 Ohio St. 598.

But there may easily be cases in which the experience of the agent under similar circumstances may furnish sufficient *data* for the determination of his probable sales (Crammer v. Kohn, 7 S. D. 247; Oliver v. Perkins, 92 Mich. 304; Randall v. Peerless Motor Car Co., 212 Mass. 352; Schumaker v. Heinemann, 99 Wis. 251; McDougall v. Van Allen Co., 19 Ont. L. R. 351; Laishley v. Goold Bicycle Co., 6 Ont. L. R. 319); as well as cases wherein the experience of others under circumstances substantially similar may furnish sufficient *data*. See Hitchcock v. Supreme Tent, 100 Mich. 40, 43 Am. St. Rep. 423; Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 54 Am. Rep. 676;

§ 1553. Breach of express contract of employment—Agent's remedies.—Where, however, there has been an employment for a definite period, and the agent is discharged without cause before the expiration of that period, or is not permitted to undertake the performance at all, the principal is liable to the agent for the damages occasioned thereby, as in any other case of the breach of a contract.

There has been, and still is, much uncertainty and confusion in the cases as to the exact remedies which the agent, in such a case, may pursue, and as to the measure and nature of the damages he may recover, but it is believed that the preponderance of authority and reason is in harmony with the following rule:—

An agent thus wrongfully discharged or prevented from performing his undertaking has his choice of three remedies (although the second and third differ only in respect of the time at which the action is brought):—

1. He may elect to consider the contract as rescinded, and at once bring an action to recover the *value* of the services, if any, rendered up to the time of the discharge, less the amount already paid to him; or

2. He may at once bring an action for the breach of the contract, and may recover compensation for the probable losses resulting therefrom; or

3. He may wait until the end of the term, and then bring his action

Mueller v. Spring Co., 88 Mich. 390; Aetna Life Ins. Co. v. Nexsen, 84 Ind. 347, 43 Am. Rep. 91.

In Durkee v. Gunn, 41 Kan. 496, 13 Am. St. R. 300, where an agent who had been employed to sell a subdivision of land, and who was to have no pay for advertising, services, etc., except a share of the profits, was wrongfully discharged before the subdivision was sold, he was allowed to recover such damages "as would be equal in amount to his share of the profits which would have resulted had the lands been sold by him." Followed in Green v. Cole, 127 Mo. 587. But cf. Glover v. Henderson, 120 Mo. 367, 41 Am. St. R. 695. But where an attorney, employed to prosecute a claim for a contingent fee, is discharged or prevented from continuing before judgment has been obtained, it is held that the measure of damages is not the fee, but the reasonable value of the services rendered. French v. Cunningham, 149 Ind. 632. See also, Western Union Tel. Co. v. Semmes, 73 Md. 9; Polsley v. Anderson, 7 W. Va. 202, 23 Am. Rep. 613; Badger v. Mayer, 8 N. Y. Misc. 533.

In Rightmire v. Hirner, 188 Pa. 325, the plaintiff was employed for three years, to sell machines on commission. The defendant was not bound, however, to furnish any machines. *Held*, that the measure of damages for a breach was the value of the contract at that time; but that, in determining its value, the jury should take into account the fact that defendant was not obliged to continue to make machines, the contingencies and depressions of trade, and also what the plaintiff probably could earn in some other employment.

for the breach of the contract and recover compensation for the actual loss he has sustained thereby.[16]

He cannot, however, pursue all of these remedies, and a recovery under one will be a bar to a recovery under the others.[17]

The second and third of these remedies are in addition to his right of action for wages earned but not paid.[18]

§ 1554. ——— Theory of these remedies.—By pursuing the first of these remedies, the agent elects to treat the contract as rescinded. He has, however, rendered valuable services for the principal, and there being now no contract to fix the price, he is entitled to recover

[16] Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; James v. Allen County, 44 Ohio St. 226, 58 Am. Rep. 821; Weed v. Burt, 78 N. Y. 192; Saxonia, etc., Co. v. Cook, 7 Colo. 569; Richardson v. Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; Gardenhire v. Smith, 39 Ark. 280; Goodman v. Pocock, 15 Ad. & Ell. (N. S.) 576; Elderton v. Emmons, 6 Man. G. & S. (C. B.) 160; Smith v. Hayward, 7 Ad. & Ell. 544.

[17] Richardson v. Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; McCargo v. Jergens, 206 N. Y. 363; Litchenstein v. Brooks, 75 Tex. 196; James v. Allen County, 44 Ohio St. 266, 58 Am. Rep. 821.

[18] Richardson v. Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; James v. Allen County, 44 Ohio St. 226, 58 Am. Rep. 821.

Judgment as bar to further recovery.—With respect of wages already earned and due but not paid, the plaintiff has a fixed and vested right, which is entirely independent of a cause of action for any subsequent breach of the contract, and which he may enforce without regard to his remedy for the breach of contract, subject only to such rules respecting the joinder of actions as statutes may prescribe or the court may enforce. This action would be based upon the contract for the recovery of wages at the contract rate, and is not based upon the theory of rescission nor measured *quantum meruit*. This action will only lie for the wages for a completed period, and could be brought only after that period had expired. See Perry v. Dickerson, 85 N. Y. 345, 39 Am. Rep. 663; Levin v. Standard Fashion Co., 4 N. Y. Supp. 867; Uliott v. Miller, 17 N. Y. Supp. 526; Keedy v. Crane, 71 Md. 395. (It is submitted, however, that Keedy v. Crane, in holding that the right to recover for a month's wages earned and due, and the right to recover for a breach of the contract for the residue of the term, involved distinct recoveries for the same cause of action, is wrong.)

If the plaintiff is discharged in the middle of a wage period, his right to recover for so much of that period as has not been paid for seems to be based upon the following considerations: he cannot recover for that period as *wages*, because wages are due upon the completion of the service for that period; he may recover *quantum meruit*, but to do so involves treating the contract as abandoned, and is held to be a bar to any further recovery for a breach of the contract. See James v. Parsons, 70 Kan. 156 (where the plaintiff's recovery, *quantum meruit*, for only three days of a wage period was held to be a bar to his recovery of any damages for a breach of the contract). Keedy v. Long, 71 Md. 385, 5 L. R. A. 759. But cf. Levin v. Standard Fashion Co., 4 N. Y. Supp. 867.

their value upon a *quantum meruit.*[19] In this recovery he is not limited by the contract price, not only because the contract has been rescinded, but because it may be that on account of a fixed employment, or because of an expectation of an increased compensation at a later period in the service, he agreed to render the services in question for less than their actual value. Such a recovery should, of course, be less the actual amount, if any, which has been already paid to him.

The two other remedies proceed upon the theory that the contract still continues in force, though broken by the principal, and the recovery had is for *damages for the breach,* and not for *wages.* A recovery was formerly allowed for wages upon the ground of a constructive service, but the doctrine of constructive service is almost universally repudiated in modern times.[20] It is, however, still recognized in a

To avoid this result, he should sue for breach of contract, and recover in this action apparently from the termination of the last full wage period before his wrongful discharge.

Where he is paid up to the time of his wrongful discharge, he can, except in those states which admit the doctrine of constructive service, recover only for the breach of contract. For this, as has been seen, he can have but one action, whether brought at once or after the expiration of the contract term.

Inasmuch as he has but one action, any recovery based upon any portion of the period since wages as such were last due, even though such recovery was mistakenly based on the notion that wages could be recovered, is a bar to any further recovery. Olmstead v. Bach, 78 Md. 132, 44 Am. St. Rep. 273, 22 L. R. A. 74. Here the plaintiff was employed for a year at a salary of $50 a week payable weekly. He was wrongfully discharged, but his salary was paid to the end of the week in which he was discharged, so that no *wages* were due him at the time of his discharge. After the expiration of the next week he sued for and recovered judgment for $50 as one week's wages. The defendant paid this judgment. Plaintiff then waited five weeks and sued again, claiming to recover $250. It was held that the first recovery was a bar to any further recovery; that even though it purported to be for the recovery of one week's wages, it was in fact an action for the breach of the contract; that but one action for this could be brought, and if the plaintiff illadvisedly failed to recover all the damages he was entitled to, it was his own misfortune. Followed in Doherty v. Schipper, 250 Ill. 128.

[19] Smith on Master and Servant, 96; Beck v. Thompson, 108 Ga. 242; Fulton v. Heffelinger, 23 Ind. App. 104; Welch v. Livingston, 33 Misc. 116; Hartman v. Rogers, 69 Cal. 643; James v. Parsons, 70 Kan. 156; Richardson v. Swartzel, 70 Kan. 773.

See Markham v. Markham, 110 N. C. 356.

[20] Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; James v. Allen County, 44 Ohio St. 226, 58 Am. Rep. 821; Richardson v. Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; Little Butte Consol. Min. Co. v. Girand, — Ariz. —, 123 Pac. 209; Doherty v. Schipper, 250 Ill. 128; Olmstead v. Bach, 78 Md. 132, 44 Am. St. Rep. 273, 22 L. R. A. 74; Archard v. Hornor, 3 C. & P. 349; Smith v. Hayward, 7 Ad. & Ell. 544; Aspdin v. Austin, 5 Ad. & Ell. (N. S.) 671; Fewings v. Tisdal, 1 Exch. 295; Elderton v. Emmons, 6 C. B. 160; Goodman v. Pocock, 15 Ad. & Ell. (N. S.) 582.

few states.[21] Under this theory it was incumbent upon the agent to hold himself in readiness, at all times, to perform the service, and having done so, he was permitted at the end of the term to recover his wages as such, the same as if he had in fact performed the service. If the wages were to be paid in installments, he might under this rule, sue for and recover them as they became due.[22] By holding himself in readiness to perform, but being wrongfully prevented by the principal, he was deemed in law to have constructively performed. This doctrine is, however, as is said by a learned judge,[23] "so opposed to principle, so clearly hostile to the great mass of the authorities, and so wholly irreconcilable to that great and beneficent rule of the law that a person discharged from service must not remain idle but must accept employment elsewhere, if offered, that it cannot be sustained. If a person discharged from service may recover wages or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. He is placed in the predicament of being called upon by one rule of law to accept other employment if offered, and by another rule to remain idle in order to recover full wages. The doctrine is also not only at war with principle, but with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor."

This discussion of course presupposes that the agent has in fact been discharged from the employment. If he has not been discharged, but has simply been prevented from performing the service, different rules would apply.[24]

§ 1555. ——— **A middle ground** has been taken by the court in Minnesota. It is that the agent is not to recover on the ground of constructive service, nor is his action a single one to recover damages

[21] Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8; Davis v. Ayres, 9 Ala. 292; Ramey v. Holcombe, 21 Ala. 567; Fowler v. Armour, 24 Ala. 194; Isaacs v. Davies, 68 Ga. 169; Armfield v. Nash, 31 Miss. 361. See also, Allen v. Colliery Engineers' Co., 196 Pa. 512.

[22] Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8; Davis v. Preston, 6 Ala. 83.

[23] Dwight, C., in Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285.

[24] Thus where the plaintiff, employed for a definite term at a monthly wage *without being discharged*, was prevented by the employer from working, though he was ready and willing to work, it was held that he could recover the monthly wages as they accrued. "It is one thing," said Gray, C., "to prevent a party from laboring, and quite a different thing to discharge him from all further employment." Stone v. Bancroft, 112 Cal. 652, 139 Cal 78.

for the breach of contract. What he is entitled to, in the view of this court, is indemnity for the loss of wages. Having been wrongfully discharged, he is entitled, at the expiration of each wage period fixed by the contract, to be indemnified for what he has lost by not being employed during that period; and he may bring as many actions as there may be periods, during which, through inability to get other employment, he has sustained the loss of wages. "It is our opinion," said the court,[25] "that the servant wrongfully discharged is entitled to indemnity for loss of wages, and for the full measure of this indemnity the master is clearly liable. This liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant without his fault to earn, during the installment period named in the contract, the amount of wages he would have earned if the contract had been performed, and the master is liable for the deficiency. This rule of damages is not consistent with the doctrine of constructive service, but it is the rule which has usually been applied by the courts which adopted that doctrine. Under that doctrine the master should be held liable to the discharged servant for wages as if earned, while in fact he is held only for indemnity for loss of wages. The fiction of constructive service is false and illogical, but the measure of damages given under that fiction is correct and logical. It is simply a case of a wrong reason given for a correct rule. Instead of rejecting the false reason and retaining the correct rule, many courts have rejected both the rule and the reason. In our opinion, this rule of damages should be retained; but the true ground on which it is based is not that of constructive service, but the liability of the master to indemnify the discharged servant, not to pay him wages, and this indemnity accrues by installments. The original breach is not total, but the failure to pay the successive installments constitutes successive breaches."

§ 1556. ——— When action may be brought.—The cause of action, for the breach of contract in these cases, arises when the agent is unequivocally discharged,[26] and the agent may bring his action for damages at once, or, except for the statute of limitations, he may wait until the expiration of the agreed term. If he brings his action before the expiration of the term, but the trial does not take place until after

[25] McMullan v. Dickinson Co., 60 Minn. 156, 51 Am. St. Rep. 511, 27 L. R. A. 409.

[26] Litchenstein v. Brooks, 75 Tex. 196; Sutherland v. Wyer, 67 Me. 64; Alle v. Nadeau, 93 Me. 282, 74 Am. St. Rep. 346; Everson v. Powers, 89 N. Y. 527, 42 Am. Rep. 319; Prichard v. Martin, 27 Miss. 805.

its expiration, no particular question arises.[27] But if, in such case, the trial takes place before the expiration of the term, it is held, in some cases, that the damages can be estimated only down to the time of the trial, upon the ground that the question of his employment and earnings, during the residue of the term, is too uncertain and conjectural to be made the subject of a legal remedy.[28] As has often been pointed out, however, the uncertainty here is no greater than in many other cases in which a recovery is constantly permitted, as for example, in cases of personal injury, where damages are awarded, based upon the expectation of life and future earning power. Moreover, where the agreed term of service was long, it may be necessary to bring the action before the expiration of the term in order to save the bar of the statute of limitations, and it may not be possible to delay the trial until after the expiration of the agreed term. Still further, in the case of employments for life, which are not uncommon, the action must be brought before the expiration of the term if it is to be brought at all. It would be obviously unjust in these cases, to deny the plaintiff the benefit of any recovery for the unexpired term. Although the basis of recovery may be more or less conjectural, it is probably as fair to one party as the other. Even if it should be thought that the scales are likely to turn against the principal, it may still be urged that, inasmuch as the situation was brought about by his confessedly wrongful act, it is not unfair that the doubts, if there be any, should be resolved against him. In any event, the weight of authority is believed to be to the effect that even though the trial occurs before

[27] Inasmuch as all uncertainty as to what may happen during the unexpired term, is removed where, though the action was begun before, the trial does not take place until after the expiration of the term, the same rule as to damages is usually adopted as where the action is begun after the expiration of the term. Everson v. Powers, 89 N. Y. 527, 42 Am. Rep. 319; Howay v. Going-Northrup Co., 24 Wash. 88, 85 Am. St. Rep. 942, 6 L. R. A. (N. S.) 49; Bailey v. McIntire, 71 N. H. 329; Catholic Press Co. v. Ball, 69 Ill. App. 591; Halsey v. Meinrath, 54 Mo. App. 335; Roberts v. Crowley, 81 Ga. 429; O'Neill v. Traynor, 24 N. Y. Misc. 686.

[28] The leading case in this country is probably Gordon v. Brewster, 7 Wis. 355, and this case has been approved and followed in several others. Van Winkle v. Satterfield, 58 Ark. 617, 23 L. R. A. 853; Mt. Hope Cemetery Ass'n v. Weidenmann, 139 Ill. 67; McCormick Harvest Mach. Co. v. Cordsiemon, 101 Ill. App. 140; Bassett v. French, 10 N. Y. Misc. 672; Darst v. Mathieson Alkali Works, 81 Fed. 284.

To same effect: Fowler v. Armour, 24 Ala. 194; Zender v. Seliger Toothill Co., 17 N. Y Misc. 126; Everson v. Powers, 89 N. Y. 527, 42 Am. Rep. 319; Sommer v. Conhaim, 25 N. Y. Misc. 166; Litchenstein v. Brooks, 75 Tex. 196; Louisville, etc., R. Co. v. Offutt, 15 Ky. L. R. 301.

the expiration of the term, the award of damages may cover the probable loss for the unexpired portion.[29]

§ 1557. ——— **The measure of damages.**—If in accordance with the rule above stated, the action is brought at once upon the discharge, and the trial is had before the expiration of the term the measure of damages, according to the weight of authority, is *prima facie* a sum equal to the stipulated compensation for the period following the discharge.[30] This sum, however, the principal may reduce if possible by showing the probability of the agent's being able by the exercise of reasonable diligence to secure other employment before the term would have expired. The burden of this proof is held to be upon the de-

[29] Seymour v. Oelrichs, 156 Cal. 782; Hamilton v. Love, 152 Ind. 641, 71 Am. St. Rep. 384; Pennsylvania R. Co. v. Dolan, 6 Ind. App. 109, 51 Am. St. Rep. 289; Forked Deer Pants Co. v. Shipley, 25 Ky. L. R. 2299, 80 S. W. 476; Sutherland v. Wyer, 67 Me. 64; Cutter v. Gillette, 163 Mass. 95; Estes v. Desnoyers Shoe Co., 155 Mo. 577; Boland v. Glendale Quarry Co., 127 Mo. 520; Lally v. Cantwell, 40 Mo. App. 44; Brighton v. Lake Shore, etc., R. Co., 103 Mich. 420; School District v. McDonald, 68 Neb. 610; Kelly v. Carthage Wheel Co., 62 Ohio St. 598; Wilke v. Harrison, 166 Pa. 202 (semble); Helfferich v. Sherman, — S. D. —, 134 N. W. 815; East Tennessee R. Co. v. Staub, 7 Lea (Tenn.), 397; Pierce v. Tenn. Coal, etc., Co., 173 U. S. 1, 43 L. Ed. 591; Meade v. Doherty, 7 New Bruns. 195 (semble).

Where the contract was for employment for life or during ability to work, a recovery was held proper which allowed the contract price up to the time of the trial, "and the present worth of what he would be able to earn in the future, so long as he would, in the ordinary course of events, be able to perform the service, less any sums which he would be able to earn in other employment." Stearns v. Lake Shore Ry. Co., 112 Mich. 651; Pennsylvania Co. v. Dolan, 6 Ind. App. 109, and Brighton v. Lake Shore, etc., Ry. Co., 103 Mich. 420, were relied upon. See also, Daniell v. Boston & M. R. Co., 184 Mass. 337; Rhoades v. Chesapeake, etc., R. Co., 49 W. Va. 494, 87 Am. St. Rep. 826, 55 L. R. A. 170.

[30] Gates v. School District, 57 Ark. 370, 38 Am. St. Rep. 249; Webster v. Wade, 19 Cal. 291, 79 Am. Dec. 218; Utter v. Chapman, 38 Cal. 659; Alderson v. Houston, 154 Cal. 1; Seymour v. Oelrichs, 156 Cal. 782; Ansley v. Jordan, 61 Ga. 482; Brown v. Board of Education, 29 Ill. App. 572; World's Columbian Exposition v. Richards, 57 Ill. App. 601; School Directors v. Orr, 88 Ill. App. 648; City of Jacksonville v. Allen, 25 Ill. App. 54; Hamilton v. Love, 152 Ind. 641, 71 Am. St. Rep. 384; Gazette Printing Co. v. Morss, 60 Ind. 153; Richardson v. Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; Ricks v. Yates, 5 Ind. 115; Hinchcliffe v. Koontz, 121 Ind. 422, 16 Am. St. Rep. 403; Jaffray v. King, 34 Md. 217; Cumberland, etc., Railroad Co. v. Slack, 45 Md. 161; Baltimore Base Ball Club v. Pickett, 78 Md. 375, 44 Am. St. Rep. 304, 22 L. R. A. 690; McGrath v. Marchant, — Md. —, 83 Atl. 912; Farrell v. School District, 98 Mich. 43; Allen v. Whitlark, 99 Mich. 492; Champlain v. Detroit Stamping Co., 68 Mich. 238; Bennett v. Morton, 46 Minn. 113; Horn v. Western Land Ass'n, 22 Minn. 233; Odeneal v. Henry, 70 Miss. 172; Hunt v. Crane, 33 Miss. 669, 69 Am. Dec. 381; Hansard v. Menderson Clothing

fendant.[81] If this rule seems harsh, it is replied that the principal has brought the action upon himself by his own wrongful act, and it is but just that if there be doubt as to the agent's finding other employment, the burden of it should fall upon him who might have prevented any doubt at all by performing his agreement. The damages for the

Co., 73 Mo. App. 584; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Griffin v. Brooklyn Ball Club, 68 App. Div. 566; O'Neill v. Traynor, 24 Misc. 686; Merrill v. Blanchard, 7 App. Div. 167; affirmed, 158 N. Y. 682; Emery v. Steckel, 126 Pa. 171, 12 Am. St. Rep. 857; Latimer v. York Cotton Mills, 66 S. C. 135; Allen v. Maronne, 93 Tenn. 161; Babcock v. Appleton Mfg. Co., 93 Wis. 124; Winkler v. Racine Carriage Co., 99 Wis. 184.

In the following cases, where the trial was held before the term of employment expired, the same thing was held. Van Winkle v. Satterfield, 58 Ark. 617, 23 L. R. A. 853; Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 51 Am. St. Rep. 289; Hamilton v. Love, 152 Ind. 641, 71 Am. St. Rep. 384.

The rule in New Jersey seems not to be substantially different. Thus in Moore v. Central Foundry Co., 68 N. J. Law, 14, although the court said that the mere fact the servant brought his action to recover damages instead of salary, part of which was not due, did not entitle him to recover the full amount of the compensation which he would have received had he served out the full term of his employment, the court further said that the jury should consider the fact that after his discharge his time became his own, and it was his duty to seek employment elsewhere; that they should deduct from the total amount payable under the contract the sum which the plaintiff might reasonably earn during the time the contract had yet to run. See also, Smith v. Gilbert Lock Co., 4 N. J. Law Jour. 312.

Where the agent was to receive his living expenses in addition to his wages he is entitled to compensation for this also. Estes v. Desnoyers Shoe Co., 155 Mo. 577. Cf. Lagerwall v. Wilkinson, 80 L. T. (N. S.) 55.

[81] Troy Fertilizer Co. v. Logan, 96 Ala. 619; Gates v. School District, 57 Ark. 370, 38 Am. St. Rep. 249; Alderson v. Houston, 154 Cal. 1; Brown v. Board of Education, 29 Ill. App. 572; World's Columbian Exposition v. Richards, 57 Ill. App. 601; School Directors v. Orr, 88 Ill. App. 648; City of Jacksonville v. Allen, 25 Ill. App. 54; Ricks v. Yates, 5 Ind. 115; Baltimore Base Ball Club v. Pickett, 78 Md. 375, 44 Am. St. Rep. 304; Bennett v. Morton, 46 Minn. 113; Odeneal v. Henry, 70 Miss. 172; Farrel v. School District, 98 Mich. 43; Allen v. Whitlark, 99 Mich. 492; Champlain v. Detroit Stamping Co., 68 Mich. 238; Hansard v. Menderson Clothing Co., 73 Mo. App. 584; Squire v. Wright, 1 Mo. App. 172; McDermott v. DeMeridor Co., 80 N. J. L. 67; Wirth v. Calhoun, 64 Neb. 316; Griffin v. Brooklyn Ball Club, 68 App. Div. 566; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; O'Neill v. Traynor, 24 N. Y. Misc. 686; Merrill v. Blanchard, 7 App. Div. 167; affirmed, 158 N. Y. 682; Emery v. Steckel, 126 Pa. 171, 12 Am. St. Rep. 857; Coates v. Allegheny Steel Co., 234 Pa. 199; Babcock v. Appleton Mfg. Co., 93 Wis. 124; Gauf v. Milwaukee Athletic Club, — Wis. —, 139 N. W. 207.

In the preceding cases the trial apparently occurred after the expiration of the term of employment.

In the following cases, the trial occurred before the period had expired. Pennsylvania R. Co. v. Dolan, 6 Ind. App. 109, 51 Am. St. Rep. 289; Hamilton v. Love, 152 Ind. 641, 71 Am. St. Rep. 384; Van Winkle v. Satterfield, 58 Ark. 617, 23 L. R. A.

breach of contract could not exceed the stipulated sum.[82] The agent is entitled to compensation, but not to be placed in a better situation than he would have been if the principal had not made default.

§ 1558. ——— Same subject.—Where the action is not brought until the end of the term, the measure of damages can then be more certainly ascertained. It will then be known how much the agent has been able to earn, or by the exercise of reasonable diligence might have earned, at other employment, and to this extent therefore the

853; Webb v. Depew, 152 Mich. 698, 16 L. R. A. (N. S.) 813; Cutter v. Gillette, 163 Mass. 95.

The burden of proof being on the defendant, it is usually held that it is not necessary for the plaintiff to allege or prove as part of his *prima facie* case that he was not able to secure other employment. See cases cited in preceding note. Wirth v. Calhoun, 64 Neb. 316.

It is held in a few states that it is incumbent on the plaintiff, as part of his case, to show that by the exercise of reasonable diligence, he has not been able to obtain other employment. Lewis Co. v. Scott, 95 Ky. 484, 44 Am. St. Rep. 251; Hunt v. Crane, 33 Miss. 669, 69 Am. Dec. 381; Fowler v. Waller, 25 Tex. 695; Willoughby v. Thomas, 24 Gratt. (Va.) 521.

Damages where contract terminable upon notice.—It is not uncommon, in cases of contracts for a definite term, to provide that one party or either party may terminate it before the expiration of that term, upon giving certain notice, and the like. In such a case, of course, the contract may be terminated in pursuance of its terms without any liability. But even though the defendant may terminate the contract without having given the notice required, the measure of damages is not compensation for the remainder of the prescribed term, but treating the discharge as notice, it is compensation for the period which the notice was to cover. Watson v. Russell, 149 N. Y. 388, reversing Watson v. Russell, 5 N. Y. Misc. 352; Fisher v. Monroe, 2 N. Y. Misc. 326, reversing Fisher v. Monroe, 1 N. Y. Misc. 14; Dallas v. Murry, 37 N. Y. Misc. 599; Derry v. Board of Education, 102 Mich. 631; French v. Brookes, 6 Bing. 354; Hartley v. Harmon, 3 Per. & Dav. 567. (Compare Griffin v. Brooklyn Ball Club, 68 N. Y. App. Div. 566; affirmed without opinion, 174 N. Y. 535, where Watson v. Russell, *supra*, was distinguished and not followed because in the case at bar the defendant had not undertaken to terminate the employment in all respects, but to transfer the plaintiff to another club, and because the provision in the contract permitting termination upon notice was limited to a termination during the playing season, while the discharge in question took place before that season opened.)

The rule of Watson v. Russell has been applied in cases where, instead of a provision in the contract permitting discharge upon notice, the contract was made in the light of a custom to that effect. Briscoe v. Litt, 19 N. Y. Misc. 5.

Exemplary damages.—Exemplary damages are not recoverable for breach of contract in these cases. Richardson v. Wilmington & W. R. Co., 126 N. C. 100; Burnett v. Edling, 19 Tex. Civ. App. 711; or for mental suffering. Addis v. Gramophone Co., [1909] App. Cas. 488, 101 L. T. Rep. 466.

[82] Meade v. Rutledge, 11 Tex. 44.

principal's liability is diminished.[33] The rule in this case, as in the other, is compensation to the agent. *Prima facie* the stipulated sum would be the measure of the damages, and the burden is upon the principal to establish either that the agent has obtained other employment or that he might by the exercise of reasonable diligence have so obtained it.[34]

This action proceeds, as has been said, for the breach of the contract, and the right of action accrues upon the breach. In cases, therefore, of employment for a long term of years, the agent by deferring his action until the end of the term, would be in danger of having the statute of limitations operate against his claim.

If the agent is informed that his authority is revoked or that he will not be permitted to continue its execution, he is justified in accepting this as conclusive. It is not necessary that he should go through the barren form of offering to perform. His readiness may be shown by other evidence.[35]

§ 1559. ——— Duty of agent to seek other employment.—It is in general the duty of the agent wrongfully discharged to exercise rea-

[33] For the purpose of reducing the plaintiff's recovery, what the plaintiff earned, and what he might by reasonable diligence have earned, at other similar employment, stand upon the same footing. Emmens v. Elderton, 13 Com. Bench. 495; Utter v. Chapman, 38 Cal. 659; Williams v. Chicago Coal Co., 60 Ill. 149; Gazette Printing Co. v. Morss, 60 Ind. 153; Hinchcliffe v. Koontz, 121 Ind. 422, 16 Am. St. Rep. 403; Sutherland v. Wyer, 67 Me. 64; Cumberland, etc., Railroad Co. v. Slack, 45 Md. 161; Williams v. Anderson, 9 Minn. 50; Squire v. Wright, 1 Mo. App. 172; King v. Steiren, 44 Pa. 99, 84 Am. Dec. 419; Kirk v. Hartman, 63 Pa. 97; Barker v. Knickerbocker L. Ins. Co., 24 Wis. 630; Leatherberry v. Odell, 7 Fed. 641.

The voluntary surrender of employment actually obtained stands upon the same footing. Sutherland v. Wyer, 67 Me. 64. But this would not be true where the new employment was lost by reason of the agent's illness. Bassett v. French, 10 N. Y. Misc. 672.

Loss of a new employment because of the agent's misconduct would doubtless ordinarily stand upon the same footing as a voluntary surrender of it. But where, though the agent was discharged from the new employment by reason of his own misconduct, he immediately obtained employment at better wages and for a longer time, it was held that the defendant had no ground for complaint. Allen v. Maronne, 93 Tenn. 161.

[34] Ansley v. Jordan, 61 Ga. 482; Horn v. Western Land Ass'n, 22 Minn. 233; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Leatherberry v. Odell, 7 Fed. 641; King v. Steiren, 44 Pa. 99, 84 Am. Dec. 419; Kirk v. Hartman, 63 Pa. 97; Barker v. Knickerbocker Life Ins. Co., 24 Wis. 630.

[35] Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Carpenter v. Holcomb, 105 Mass. 284; Alderson v. Houston, 154 Cal. 1; Wallis v. Warren, 4 Exch. 361; Levy v. Lord Herbert, 7 Taunt. 314.

sonable diligence in seeking and obtaining other employment, and thus to reduce his damages as far as he is able.[36] The non-performance of this duty is, however, as has been seen,[37] generally held to be a matter of defense, and not a part of the plaintiff's *prima facie* case; and the burden of proving its non-performance is upon the defendant.

This rule, moreover, as ordinarily stated, does not impose upon the agent the duty to accept *any* other employment that may be offered. By other employment is meant employment of the same general nature but not that which is of an entirely different or more menial kind.[38] Thus a person employed as a bookkeeper would not be compelled to accept employment as a farm laborer, nor would a person employed as an actor or singer be under obligation to accept employment as a clerk in a store.

Neither, it is said, is the agent ordinarily bound to seek employment

[36] Goodman v. Pocock, 15 Q. B. 574; Beckham v. Drake, 9 M. & W. 79; Emmens v. Elderton, 13 Com. Bench 508; Utter v. Chapman, 38 Cal. 659; Williams v. Chicago Coal Co., 60 Ill. 149; Stone v. Vimont, 7 Mo. App. 277; Chamberlin v. Morgan, 68 Penn. St. 168; Shannon v. Comstock, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262; King v. Steiren, 44 Pa. 99, 84 Am. Dec. 419; Armfield v. Nash, 31 Miss. 361; Ward v. Ames, 9 Johns. (N. Y.) 138.

The obligation of the agent to find other employment is not an absolute one, but only to exercise reasonable diligence to obtain it. That there was other employment in fact, which he might have procured, is not material unless the failure to find it was inconsistent with the exercise of reasonable diligence. The agent wrongfully discharged is not obliged to start instantly upon his search, or to prosecute it with unceasing application, reasonable diligence only being the test. For the same reason he is not obliged to accept the first employment that offers, and even though he should reject offered employment, in a reasonable expectation of finding better, and should fail to find it, he would not necessarily be derelict in the performance of his duty.

[37] See *ante*, § 1557.

[38] Wolf v. Studebaker, 65 Pa. 459; Costigan v. Railroad Co., 2 Denio (N. Y.), 609, 43 Am. Dec. 758; Sheffield v. Page, 1 Sprague (U. S. D. C.), 285, Fed. Cas. No. 12,743; Halloway v. Talbot, 70 Ala. 389; Wilkinson v. Black, 80 Ala. 329; Van Winkle v. Satterfield, 58 Ark. 617, 23 L. R. A. 853; Elbert v. Los Angeles Gas Co., 97 Cal. 244; McKinley v. Goodman, 67 Ill. App. 374; Hinchcliffe v. Koontz, 121 Ind. 422, 16 Am. St. Rep. 403; Farrell v. School District, 98 Mich. 43; Fuchs v. Koerner, 107 N. Y. 529; Briscoe v. Litt, 19 N. Y. Misc. 5; Harger v. Jenkins, 17 Pa. Super. 615.

A base-ball player, employed for a year and wrongfully discharged, held not bound to endeavor to reduce the damages for a longer period than that year, and though he was offered employment by two other clubs at higher salary, yet since these offers were only upon the condition that the club should have an option upon his services for two more years, it was held that he was not obliged to accept such services. Griffin v. Brooklyn Base Ball Club, 68 N. Y. App. Div. 566; affirmed without opinion, 174 N. Y. 535.

in another locality,[39] nor with an objectionable employer.[40] The question of locality, however, is one depending upon the facts and circumstances of each case. What might reasonably be deemed the same locality in the case of one employment might not coincide with a like view of another employment.

§ 1560. ——— New employment offered by defendant.—The question whether employment offered by the defendant should be considered by way of mitigation, depends upon a variety of circumstances. If the new employment "varied the terms of the first engagement or if anything had occurred to render further intercourse or association between the parties offensive or degrading, or if the agent had engaged in other employment incompatible with his returning," he may, it is said, reject the offer with safety. Otherwise the invitation to return should be accepted.[41] It is clear enough that the plaintiff is under no more obligation to accept different employment from the defendant than from any other person. If the defendant's offer be of the same employment, at less wages, or upon more disadvantageous terms, the plaintiff would be under no obligation to accept it as against employment with some other person at better terms. Neither is the plaintiff bound to accept employment offered by the defendant, where his doing so would cause a relinquishment of his cause of action for the breach;[42] but where this is not involved, nor any necessary injury to feelings, and the only alternative is idleness, no satisfactory reason is apparent why the agent should not accept it.

[39] Harrington v. Gies, 45 Mich. 374; Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8; Costigan v. Railroad Co., 2 Denio (N. Y.), 609; Wilkinson v. Black, 80 Ala. 329.

[40] "Any reasonable objection, because of capacity, reputation, mode of dealing and transacting business, or of habits or morals, which could be made to the person from whom employment could be obtained, would afford a justification to the plaintiff for rejecting it when offered, or excuse him from not making exertion to secure it." Brickell, C. J., in Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8.

[41] Birdsong v. Ellis, 62 Miss. 418. To same effect: Levin v. Standard Fashion Co., 4 N. Y. Supp. 867; Beymer v. McBride, 37 Iowa, 114; Squire v. Wright, 1 Mo. App. 172; Bigelow v. Powder Co., 39 Hun (N. Y.), 599; Saunders v. Anderson, 2 Hill (S. C.), 486.

A servant who has been wrongfully dismissed and whose dismissal was accompanied by foul and abusive language is not bound to accept a subsequent offer from the same master to re-employ him. Crawford v. Tommy, [1906] Transv. L. R. S. C. 843.

[42] Chisholm v. Preferred Assur. Co., 112 Mich. 50; People's Co-op. Ass'n, v. Lloyd, 77 Ala. 387; Trawick v. Peoria St. Ry. Co., 68 Ill. App. 156; Howard v. Vaughan-Monnig Shoe Co., 82 Mo. App. 405; Wilson v. Kiari, 18 New Zealand, 807.

If the plaintiff was wrongfully discharged, defendant's subsequent re-

§ 1561. ——— Duty to take service of a different sort.—If, having exercised reasonable diligence to find other employment of the same sort, the agent fails to do so, may he then consider himself exonerated from all obligation to the employer, or would he then be required to seek and accept any other reasonable employment for which he may be fitted? Many of the cases state the rule as though the latter obligation were not imposed upon him.[43] But this obligation seems to be a reasonable one, in harmony with the principles which require effort on his part to refrain from idleness and to exercise reasonable care to minimize his loss, and a number of cases expressly impose it.[44] In any event, if he does accept other employment, his actual earnings in such other employment should be used in mitigation.[45]

§ 1562. ——— Work for himself.—If having made a reasonable effort to find other employment but without success, the agent then does work for himself the question whether the principal is entitled to have the value of it deducted from the agent's claim, is in dispute,[46]

quest to him to return and go on with the employment cannot destroy the effect of the breach of the contract: it can only be considered upon the question of damages. Rottlesberger v. Hanley, — Iowa —, 136 N. W. 776. See also Youngberg v. Lamberton, 91 Minn. 100; Mitchell v. Toale, 25 S. C. 238, 60 Am. Rep. 502.

[43] Fuchs v. Koerner, 107 N. Y. 529; Farrell v. School District, 98 Mich. 43; Holloway v. Talbot, 70 Ala. 389; McKinley v. Goodman, 67 Ill. App. 374; Wilkinson v. Black, 80 Ala. 329; Briscoe v. Litt, 19 N. Y. Misc. 5; Elbert v. Los Angeles Gas Co., 97 Cal. 244; Hinchcliffe v. Koontz, 121 Ind. 422, 16 Am. St. Rep. 403.

[44] Thus in Simon v. Allen, 76 Tex. 398, where the plaintiff had been employed as a clerk, the court said: "Plaintiff had the right to seek, for a reasonable time, the same character of employment that he had when he was discharged. If after a reasonable time it became evident that he could not procure employment as a clerk, it would have become his duty, in so far as it concerned his relations with his late employers, to seek other employment for which he was fitted."

So in Perry v. Simpson Waterproof Mfg. Co., 37 Conn. 520, the court, after referring to the employee's obligation to use ordinary diligence to find other employment, said: "Upon the same principle he has no right to insist upon employment in the same business or at the same price. If that is not to be had, he is bound to engage in other business, and if need be, at a less price."

In Maynard v. Royal Worcester Corset Co., 200 Mass. 1, the court speaks of "other employment reasonably adapted to his abilities."

[45] In Stevens v. Crane, 37 Mo. App. 487, the court held, in regard to this question, that the discharged servant's "duty to *seek* employment is confined to similar employment; his duty to account for compensation actually received extends to all employment."

[46] Harrington v. Gies, 45 Mich. 374, holds that it is not to be deducted. Huntington v. Ogdensburgh, etc., R. Co., 33 Howards Pr. (N. Y.) 416, holds the contrary.

but unless such work is merely casual or incidental, no good reason is obvious why it should not be deducted.[47] If the agent engages in some regular business, on his own account, the fair value of his time under all the circumstances ought certainly to be considered.[48]

It has been suggested in several cases,[49] that the question of deducting earnings in other employment depends upon whether such other employment is consistent with the agent's being in readiness to take up the original employment again if he were called upon to do so. But this does not seem to be a sound distinction where the theory of constructive service does not prevail.

[47] See School Directors v. Birch, 93 Ill. App. 499; Stevens v. Crane, 37 Mo. App. 487.

[48] In Lee v. Hampton, 79 Miss. 321, where the plaintiff, after wrongful discharge, leased and operated a farm on his own account, the court said that "it was his bounden duty to use his best endeavors in its management, and whatever was a reasonable sum for his wages as such superintendent, should be deducted from the damages suffered in consequence of such breach of contract." But in Toplitz v. Ullman, 2 N. Y. Misc. 130, where the plaintiff after failing to find other employment, went into business for himself, and made but a small profit, it was held that, since the plaintiff took all the risk, the defendant was not entitled to the actual value of his services, but only to the amount he actually made.

This was followed in Richardson v. Hartmann, 68 Hun (N. Y.), 9.

But where the plaintiff, in the business of his own, did not make any profits, still the value of the business may have been appreciably increased, and this element the jury may regard in making their award. Kramer v. Wolf Cigar Stores, 99 Tex. 597.

Where a woman teacher wrongfully discharged, being unable after proper effort to find another position, tried to start a school of her own, which proved to be a financial failure and resulted in a loss, although she "used every effort within my power to make it a success," it was held that no deduction was to be made. Worthington v. Park Improvement Co., 100 Iowa, 39.

Where it appeared that after plaintiff's discharge he made his home for a time with his father, who resided upon a farm, and did some work there, it was held competent for him to show, that, though of age, he received no compensation for this work. Gwinn v. King, 107 Iowa, 207.

Earnings made after the expiration of the term are not to be considered. Hughes v. School District, 66 S. C. 259.

And where the plaintiff, by doing harder or different work, working longer hours, contributing capital, or otherwise doing what the original employment did not require, is enabled to earn more than the original contract rate the defendant is not entitled to the benefit of the excess. Evesson v. Ziegfeld, 22 Pa. Super. 79 (here the plaintiff, an actress, by playing about twice as many hours was enabled to earn nearly double the salary promised by defendant); Williams v. Chicago Coal Co., 60 Ill. 149.

[49] Gates v. School District, 57 Ark. 370, 38 Am. St. R. 249; Van Winkle v. Satterfield, 58 Ark. 617, 23 L. R. A. 853.

What the agent may earn in another employment which he had the right to carry on, even if defendant had not broken his contract, is not to be deducted from plaintiff's damages.[50]

§ 1563. ——— **When right of action accrues.**—The right of action, as has been already stated, accrues when the breach of contract occurs. Where the agent is wrongfully discharged after entering upon the performance of his agency, there can be no question, as has been seen, that he has then a cause of action for the breach.[51]

Where, however, before the time arrives for performance to begin and before the agent has entered upon it, the principal repudiates the contract and informs the agent that he will not permit him to undertake the performance of it when the performance is due, some question has arisen whether such repudiation may be treated as a present breach, or whether the agent must wait until the time for performance arrives and then tender his services. The weight of authority both in England and America, sustains the doctrine of a present breach in case of such repudiation.[52]

§ 1564. ——— The theory of the decisions in this class of cases is, to adopt substantially the language of a learned judge, that there is a breach of the contract when the principal repudiates it and declares he will no longer be bound by it. The agent has an inchoate right to the performance of the bargain which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages the

Where the employee after discharge obtained employment with another company on condition that he buy $5,000 of its stock which proved to be of no value, it was held, in computing damages for breach of his first contract, that this $5,000 was an expense incidental to his effort to seek employment, and that the loss occasioned by the decline of the stock could be reckoned with salary earned in the second employment to arrive at sum by which the plaintiff's *prima facie* damages should be mitigated. Development Co. v. King, 96 C. C. A. 139, 170 Fed. 923.

[50] For example, if an agent has a proper contract to represent two different automobile manufacturers, and one breaks his contract, the damages of the agent are not affected by what he earns under the other contract. Randall v. Peerless Motor Car Co., 212 Mass. 352.

[51] See *ante*, § 1553.

[52] Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Menage v. Rosenthal, 187 Mass. 470; Alderson v. Houston, 154 Cal. 1; Lake Shore, etc., Ry. Co. v. Richards, 152 Ill. 59, 30 L. R. A. 33; Hochster v. De la Tour, 2 E. & B. 678; Danube & Black Sea Ry. Co. v. Xenos, 13 Com. Bench (N. S.), 825.

repudiation of the contract by the principal, and the announcement that it never will be fulfilled, must, of course, deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus,* and that upon it, the agent, if he so elect, may at once treat it as a breach of the entire contract and bring his action accordingly. The contract having been thus broken by the principal, and treated as broken by the agent, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract, and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for the performance may yet be remote. Such a course, it is said, must lead to the convenience of both parties, and though decisions ought not to be founded upon grounds of convenience alone, they yet tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the principal, the agent may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of the performance, a jury will, of course, take into account whatever the agent has done or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.[53]

§ 1565. No damages if agent acquiesces in discharge.—If the agent, though wrongfully discharged acquiesces in, and consents to, the termination of the agency, no damages can be recovered for it.[54] But in order to effect this result the evidence of acquiescence must be clear. The mere fact that the agent did not protest, or that he peaceably and quietly surrendered his trust, would not justify a claim of acquiescence.

2. Termination by Operation of Law.

§ 1566. No damages where agency terminated by death of the principal.—As has been seen, the death of the principal, by operation of law, revokes the authority, if not coupled with an interest.[55] Inasmuch, moreover, as a contract of employment between principal and

[53] Miller, J., in Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509.

[54] Patnote v. Sanders, 41 Vt. 66, 98 Am. Dec. 564; Boyle v. Parker, 46 Vt. 343.

[55] See *ante,* § 652.

agent ordinarily involves personal considerations, and contemplates the continued existence of both principal and agent, the death of the principal will, where such personal considerations are involved, operate to dissolve the contract.[56] The agent in such a case is, of course, entitled to the compensation earned up to the time of the death, but he is afterwards entitled neither to future wages nor to damages for the termination of the agency.[57]

§ 1567. ——— Joint principals—Partnership.—Where there are joint principals, the death of one will not dissolve the contract, unless it involves something that cannot be properly performed by the survivor.[58] Where a partnership is the principal, and one partner dies, the effect of such death upon contracts of employment is not entirely settled. The death of one partner, of course, ordinarily dissolves the partnership, and it has been said in several cases that it also operates to dissolve contracts of employment to which the firm was a party.[59]

[56] See Lacy v. Getman, 119 N. Y. 109, 16 Am. St. R. 806, 6 L. R. A. 728; Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578.

Compare McDaniel v. Parks, 19 Ark. 671; Zinnell v. Bergdoll, 19 Pa. Super. 508; Pugh v. Baker, 127 N. C. 2.

In Lacy v. Getman, *supra*, it was said by Finch, J.: "The relation of master and servant is no longer bounded by its original limits. It has broadened with the advance of civilization until the law recognizes its existence in new areas of social and business life, and yields in many directions to the influence and necessities of its later surroundings. When, therefore, it is said generally, as the commentators mostly agree in saying, that the contract relations of principal and agent, and of master and servant, are dissolved by the death of either party, it is very certain that the statement must be limited to cases in which the relation may be deemed purely personal, and involves neither property rights nor independent action. Beyond that, a further limitation of the doctrine is asserted, which approaches very near to its utter destruction, and is claimed to be the result of modern adjudication. That limitation is that the rule applies only to the contract of the servant, and not to that of the master, and not at all, unless the service employed is that of skilled labor peculiar to the capacity and experience of the servant employed, and not the common possession of men in general; and it is proposed to adopt as a standard or test of the limitation an inquiry in each case whether the contract on the side of the master can be performed after his death by his representatives substantially, and in all its terms or requirements, or cannot be so performed without violence to some of its inherent elements."

See also generally as to the effect of the death of one party upon contracts. Note, 22 Am. St. Rep. 811.

[57] Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578.

[58] See Martin v. Hunt, 1 Allen (Mass.), 418.

[59] Griggs v. Swift, 82 Ga. 392, 5 L. R. A. 405, 14 Am. St. Rep. 176; Greenburg v. Early, 4 N. Y. Misc. 99, 30 Abbott's N. C. 300; Hoey v. MacEwan, 5 Ct. of Sess. 3rd Ser., 814; Mason v. Secor, 76 Hun (N. Y.), 178; Burnet v. Hope, 9 Ont. 10.

See also Tasker v. Shepherd, 6 H. & N. 575.

Compare Brace v. Calder, [1895] 2 Q. B. 253.

But this does not seem to be a necessary result, and it has been held that if, in fact, the firm actually goes on and continues to receive the service, the contract of employment is not dissolved.[60]

§ 1568. Same rule where agency terminated by insanity of the principal.—The same rules would probably be applied in the case of the after-occurring insanity of the principal. Such insanity, as has been seen,[61] will ordinarily terminate or suspend the authority of the agent, and wherever the contract involved personal considerations and clearly contemplated the continued mental ability and business capacity of the principal, no reason is apparent why a known and complete disability of this sort should not ordinarily affect the contract like the principal's death. If the contract did not involve personal considerations, and especially where its performance can be continued by and with the representatives of the insane principal, a different rule would apply.[62]

§ 1569. Rule where agency terminated by bankruptcy of principal.—While, as has been seen,[63] the bankruptcy of the principal ordinarily operates to terminate the authority of a business agent, the fact that the principal becomes bankrupt furnishes usually no defense to an action brought by an agent, employed for a definite time, to recover damages for a refusal or neglect of the principal to employ him after the bankruptcy.[64]

It has been held that where the principal is a corporation, and is prevented from continuing business by the action of the state, which enjoins the further prosecution of the business and causes a receiver to be appointed, no damages can be recovered by an agent employed for an unexpired period, who is thus prevented from continuing his performance.[65] But this doctrine would not apply to the voluntary

[60] Hughes v. Gross, 166 Mass. 61, 55 Am. St. Rep. 375, 32 L. R. A. 620.

See also Fereira v. Sayres, 5 Watts & S. 210, 40 Am. Dec. 496; Bank v. Vanderhorst, 32 N. Y. 553; Johnson v. Judge, 16 Pa. Super. 137.

[61] See *ante*, § 677.

[62] Sands v. Potter, 165 Ill. 397, 56 Am. St. Rep. 253.

[63] See *ante*, § 687.

[64] Lewis v. Atlas Mutual Life Ins. Co., 61 Mo. 534; Vanuxem v. Bostwick (Pa.), 7 Atl. 598; Hassenfus v. Phila. Packing Co., 15 Pa. Co. Ct. 650; *In re* Silverman, 101 Fed. 219.

See also Couturie v. Roensch (Tex. Civ. App.), 134 S. W. 413.

[65] People v. Globe Mut. Life Ins. Co., 91 N. Y. 174. The court said, in this case, that the effect of the injunction was to make it unlawful for either principal or agent to continue performance. It was as much illegal for the agent to perform or tender performance, as for the principal to permit or require him to perform. The agent could not, therefore, properly allege that he had himself been legally ready or able to perform. Approved, followed in Malcomson v. Wappoo Mills, 88 Fed. 630; Griffith v. Blackwater Boom Co., 46 W. Va. 56.

But cf. Rosenbaum v. Credit System Co., 61 N. J. Law, 543, where

dissolution of a corporation which was the principal,[66] nor, doubtless, to a case wherein the corporation was itself culpably responsible for the intervention of the state.[67]

§ 1570. Rule where agency terminated by death of the agent.—Where the agency is terminated before full performance, by the death of the agent, his representatives are entitled to recover the value of his services already rendered. And even in the case of an entire contract for the performance of a given service, the representatives of the deceased agent may recover the value of the services rendered, not exceeding the price named in the contract.[68]

§ 1571. Rule where agency terminated by insanity of the agent.—Where the agency is terminated by the agent's insanity, the question of his rights and liabilities would be determined by the same principles which govern in the case of his sickness or other incapacity,—a subject considered in the following section.

§ 1572. How when agency terminated by agent's sickness or incapacity.—Where the agency is terminated by the sickness or other physical disability of the agent, which incapacitates him from completing the performance of his undertaking, he will not be liable for not performing,[69] and, on the other hand, will be entitled to recover the reasonable value of his services up to the time of his incapacity. And even though the contract be entire to perform a stipulated service for a stipulated price, so that, under other circumstances, full performance would ordinarily be considered a condition precedent to the right to recover compensation, yet if the agent be disabled by sickness or other act of God from accomplishing a full performance, he is entitled to recover the reasonable value of the services actually rendered,

much of the reasoning in People v. Globe Mutual Life Ins. Co., *supra*, was disapproved.

[66] Schleider v. Dielman, 44 La. Ann. 462; Tiffin Glass Co. v. Stoehr, 54 Ohio St. 157; Macgregor v. Union L. Ins. Co., 57 C. C. A. 613, 121 Fed. 493.

Contra, so far as the compensation was to consist of commissions on business which might be done: there is no implied agreement to do business during the period. Pellet v. Manufacturers' Ins. Co., 43 C. C. A. 669, 104 Fed. 502; *In re* English, etc., Ins. Co., 5 Ch. App. 737.

No liability where employment was not for any prescribed time. Moore v. Security, etc., Ins. Co., 93 C. C. A. 652, 168 Fed. 496.

[67] People v. Globe Mutual Life Ins. Co., 91 N. Y. 174; Rosenbaum v. Credit System Co., 61 N. J. Law, 543.

[68] Persons v. McKibben, 5 Ind. 261, 61 Am. Dec. 85; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189.

[69] Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Robinson v. Davison, L. R., 6 Exch. 269; Boast v. Firth, L. R., 4 C. P. 1. In Robinson v. Davison, the employe, a pianist, was held liable for not giving the

not exceeding the contract price.[70] If, however, the sickness was such that it could have been anticipated at the time the service was undertaken, this rule would not apply.[71]

3. Abandonment by Agent.

§ 1573. 1. When abandonment lawful.—Where the agency is created to endure for an indefinite period, it is, as has been seen, ordinarily held to be an agency at will merely and it may be lawfully terminated by either party at his will at any time.[72] Analogous to this is the somewhat common arrangement that the relation shall continue so long as each of the parties or either of the parties, is satisfied. In the event of dissatisfaction, the party having the option may lawfully terminate the agency upon that ground.[73] In cases of this nature there being no agreement to continue the agency for a definite time, no forfeiture can result from its termination by the party having the right. The agent, therefore, would be entitled to recover the stipulated compensation for the services rendered without diminution on the ground of the termination of the agency.

The same result ensues, also, in those cases in which the agency, though primarily for a definite time, may, by the terms of the contract creating it, be terminated upon the happening of a given event, or the arising of a certain contingency. If terminated in the manner and

employer timely notice of the disability so that he might make other arrangements.

[70] Fuller v. Brown, 11 Metc. (Mass.) 440; Ryan v. Dayton, 25 Conn. 188, 65 Am. Dec. 560; Green v. Gilbert, 21 Wis. 395; Hillyard v. Crabtree, 11 Tex. 264, 62 Am. Dec. 475; Fenton v. Clark, 11 Vt. 557; Seaver v. Morse, 20 Vt, 620; Coe v. Smith, 4 Ind. 79, 58 Am. Dec. 618; Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77; Fahy v. North, 19 Barb. (N. Y.) 341.

In Fuller v. Brown, *supra*, a contract to give notice before quitting was held to apply only to voluntary abandonment and not to quitting because of illness.

[71] Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57. (Absence during confinement of a female employe.) Compare Davies v. District Council, 27 T. L. R. 543.

[72] DeBriar v. Minturn, 1 Cal. 458; Franklin Mining Co. v. Harris, 24 Mich. 115; Palmer v. Marquette, etc., Co., 32 Mich. 274; Tatterson v. Suffolk Mfg. Co., 106 Mass. 56; Harper v. Hassard, 113 Mass. 187; Peacock v. Cummings, 46 Pa. 434.

[73] See Beissel v. Vermilion Farmers' Elev. Co., 102 Minn. 229, 12 L. R. A. (N. S.) 403, (with Note); Spring v. Ansonia Clock Co., 24 Hun (N. Y.), 175; Rossiter v. Cooper, 23 Vt. 522.

Where the contract gives the principal the power to terminate it in case, for certain stated reasons, he is dissatisfied, and expressly makes him the sole judge as to the existence of the reasons, this does not give him an arbitrary right of discharge, but only for reasons actually existing or in fact found. Winship v. Base Ball Association, 78 Me. 571.

upon the event specified, the agent may recover full compensation for the services rendered.[74]

So though employed for a definite time, if the conduct of the principal is such as to justify the agent in abandoning the service, the agent will be entitled to recover the value of his services.[75]

§ 1574. 2. When abandonment wrongful.—But where, on the other hand, the agent has agreed that he will continue to act for a definite period; or that he will fully perform a given undertaking; or that he will terminate the relation only upon the happening of a certain event or the arising of a certain contingency; or that he will not terminate it in any case without giving a specified notice; and he does terminate it in violation of this agreement, without good cause, the termination in the sense of which we have spoken, as being a breach of his contract, must be regarded as wrongful.[76] True, as has been seen,[77] he has the *power* to terminate it. The law will not compel him to continue performance in accordance with his agreement. But under his contract, his *right* to terminate is suspended and if he insists upon exercising his power, he must answer for the broken contract.[78]

§ 1575. Entire and severable contracts—Right to compensation.—The question of the right to recover compensation for services rendered in part performance of an undertaking to act for a given period, or to accomplish a given object, but which has been abandoned by the agent before full performance, is one of the most vexatious and difficult ones in the law. It is certain that the parties may expressly agree that no compensation shall be paid unless the undertaking is performed, and in such a case if the agent abandons the undertaking, without fault of the principal, before full performance, he cannot recover. Full performance is here expressly made a condition precedent to the right to compensation.[79]

But the most difficult question arises where the agreement is not thus express and it becomes necessary to determine whether under all the facts and circumstances of a given case full performance was intended by the parties to be a condition precedent. In determining this question it is important to ascertain whether the contract is *entire* or *severable*. As has been well said,[80] no precise rules can be given

[74] Booth v. Ratcliffe, 107 N. C. 6.

[75] Bishop v. Ranney, 59 Vt. 316; Patterson v. Gage, 23 Vt. 558, 56 Am. Dec. 96; Warner v. Smith, 8 Conn. 14.

[76] See *ante*, § 641.

[77] See *ante*, § 641.

[78] Word v. Winder, 16 La. Ann. 111.

[79] See *ante*, § 1532.

[80] Parsons on Contracts, 7th Ed. Vol. 2, p. *517.

See also the discussion in Clark v. West, 137 N. Y. App. Div. 23, affirmed

by which this question in a given case may be settled. Like most other questions of construction it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed or is left to be implied by law, such a contract will generally be held to be severable. And the same rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. But if on the other hand, the consideration to be paid is entire and single, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items.

§ 1576. ——— In accordance with this rule a contract by which A agrees to serve B for an indefinite time at a given sum per month, would be held to be severable.[81] So an agreement by A to serve B for one year at a certain sum per month to be paid at the expiration of each month, though an entire contract, is, by its terms, so far severable that A would have a right of action for the stipulated sum at the expiration of each month.[82] But a contract by A to serve B for one year for a given sum is plainly entire.[83] And so a contract by A to serve B for one year for a given sum per month is held to be entire.[84] In both cases, no time for payment being specified, the law

"without passing upon the question whether the contract was entire or severable;" no opinion. 201 N. Y. 569.

[81] *Idem*, p. *521. A contract at so much per week "for the first year" no definite time being stated, is a weekly and not a yearly hiring. Robertson v. Jenner, 15 L. T. (N. S.) 514.

[82] See Capron v. Strout, 11 Nev. 304; Thayer v. Wadsworth, 19 Pick. (Mass.) 349; Walsh v. New York & Ky. Co., 88 N. Y. App. Div. 477; Mousseau v. Tone, 6 W. L. R. (Regina) 117.

A contract for a year with weekly payments is still a yearly hiring unless rebutted by evidence to the contrary. Noble v. Gunn, 16 Ont. W. R. 504; Davis v. Marshall, 4 L. T. (N. S.) 216.

[83] Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425. (In this case the party agreed to work for one year for $120.) Eldridge v. Rowe, 2 Gilm. (Ill.) 91, 43 Am. Dec. 41; Miller v. Goddard, 34 Me. 102, 56 Am. Dec. 638; Knox v. Munro, 13 Manitoba Rep. 16. But see Parcell v. McComber, 11 Neb. 209, 38 Am. Rep. 366, re-reported in note to 35 Am. Rep. 476.

[84] Thus a contract to work "for eight months for $104, or $13 a month," is entire. Reab v. Moor, 19 Johns. (N. Y.) 337. So a contract to work "seven months at $12 per month," was held to be an entire contract to pay $84, at the end of the seven months and not a contract to pay $12, at the end of each month. Davis v. Maxwell, 12 Metc. (Mass.)

presumes that it was to be paid only when the year's service was performed.[85]

So a contract to perform a given duty for a given sum would be entire,[86] but a contract to perform the same duty for a given sum to be paid in installments as the performance progressed would be severable so far as the right to recover the several installments is concerned.[87]

Where the compensation was thus payable in installments, but is not in fact paid, and the agent subsequently makes default in a later installment period, such default will not affect his right to recover previous installments earned except as the amount may be reduced by proper recoupment or counterclaim of damages for the breach in the last period.[88]

§ 1577. Full performance of entire contract usually required.—Where the contract was thus found to be entire, it was early established as the doctrine of the common law that full performance of it was a condition precedent to the right to recover the stipulated compensation.[89] If the agent should voluntarily fail, though by a single day, to complete the designated term, he could recover nothing upon the contract for all the services previously rendered, because the contract had not been fully performed on his part. Neither could a recovery be had upon the basis of an implied contract to pay for the services

286. See also Nichols v. Coolahan, 10 Metc. (Mass.) 449; Eldridge v. Rowe, *supra;* Rex v. Birdbrooke, 4 T. R. 245; Diefenback v. Stark, 56 Wis. 462, 43 Am. Rep. 719; Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57. A contract with a teacher to teach ten months at a given sum per month is entire. Wilson v. Board of Education, 63 Mo. 137.

In an action for wages a contract to employ and pay "$200 per month for one year" was held to be a contract for a year with wages payable monthly, but not so far entire that performance for a year was a condition precedent to the employee's right to recover anything, Matthews v. Jenkins, 80 Va. 463; while in an action for wrongful discharge a contract for one year with wages payable monthly was held to be an entire contract for a year by the employer. Larkin v. Hecksher, 51 N. J. L. 133, 3 L. R. A. 137. See also Beach v. Mullin, 34 N. J. L. 343.

[85] Davis v. Maxwell, 12 Metc. (Mass.) 286.

[86] Reab v. Moor, 19 Johns. (N. Y.) 337.

A contract to teach nine months for a fixed sum, is entire. Hill v. Balkcom, 79 Ga. 444.

[87] Woods v. Russell, 5 B. & Ald. 942; Clarke v. Spence, 4 A. & E. 448; Laidler v. Burlinson, 2 M. & W. 602; Cunningham v. Morrell, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332.

[88] Walsh v. New York & Ky. Co., 88 N. Y. App. Div. 477.

[89] Spain v. Arnott, 2 Stark. 256; Cutter v. Powell, 6 T. R. 320; Ellis v. Hamlen, 3 Taunt. 51; Sinclair v. Bowles, 9 B. & C. 92; Waddington v. Oliver, 2 B. & P. (N. R.) 61; Knox v. Munro, 13 Manitoba, 16.

actually rendered, because the existence of the express contract left no room for an implied one. *Expressum facit cessare tacitum* was the maxim applied.[90] And this rule has been adopted and still prevails in the majority of the American states.[91]

§ 1578. The more liberal rule—Britton v. Turner.—This rule, however, while perhaps strictly and severely just, as a principle of retributive justice has not met wtih universal approval, and a strong tendency has been manifested in many cases to mitigate its severity by the application of a more liberal and equitable principle, and to allow the agent, though in default, to recover the actual value of his services to the principal.

The principles adopted in such cases are most fully enunicated in the celebrated case of Britton v. Turner,[92] decided by the supreme court of New Hampshire in 1834.

Concisely stated, the doctrine of this case may be said to be that, where a party fails to comply substantially with his agreement, he can not, unless it is apportionable, sue or recover upon the agreement at all. But where anything has been done from which the other party has received substantial benefit and which he has appropriated, a recov-

[90] Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425.

[91] Lantry v. Parks, 8 Cow. (N. Y.) 63; Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442; Olmstead v. Beale, 19 Pick. (Mass.) 528; Thayer v. Wadsworth, Id. 349; Davis v. Maxwell, 12 Metc. (Mass.) 290; Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; Henson v. Hampton, 32 Mo. 408; Posey v. Garth, 7 Mo. 96, 37 Am. Dec. 183; Caldwell v. Dickson, 17 Mo. 575; Schnerr v. Lemp, 19 Mo. 40; Brown v. Fitch, 33 N. J. L. 418; Natalizzio v. Valentino, 71 N. J. L. 500; Bragg v. Bradford, 33 Vt. 35; Patnote v. Sanders, 41 Vt. 66, 98 Am. Dec. 564; Ripley v. Chipman, 13 Vt. 268; Martin v. Schoenberger, 8 W. & S. (Penn.) 367; Alexander v. Hoffman, 5 Id. 382; Dunn v. Moore, 16 Ill. 151; Eldridge v. Rowe, 2 Gilm. (Ill.) 91, 43 Am. Dec. 41; American Pub. House v. Wilson, 63 Ill. App. 413; Hofstetter v. Gash, 104 Ill. App. 455; Mack v. Bragg, 30 Vt. 571; Clark v. School District, 29 Vt. 217; De Camp v. Stevens, 4 Blackf. (Ind.) 24; Hutchinson v. Wetmore, 2 Cal. 310, 56 Am. Dec. 337; Hogan v. Titlow, 14 Cal. 73; Miller v. Goddard, 34 Me. 102, 56 Am. Dec. 638; Green v. Gilbert, 21 Wis. 395; Evans v. Bennett, 7 Wis. 404; Henderson v. Stiles, 14 Ga. 135; Cody v. Raynaud, 1 Col. 272; Givhan v. Dalley, 4 Ala. 336; Whitley v. Murray, 34 Ala. 155; Abernathy v. Black, 2 Cold. (Tenn.) 314; Larkin v. Buck, 11 Ohio St. 561; Halloway v. Lacy, 4 Humph. (Tenn.) 468; Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189; Holmes v. Stummel, 24 Ill. 370; Jewell v. Thompson, 2 Litt. (Ky.) 52; Morford v. Ambrose, 3 J. J. Marsh. (Ky.) 688; Preston v. American Linen Co., 119 Mass. 400; Byrd v. Boyd, 4 McCord (S. C.), 246, 17 Am. Dec. 740; Cox v. Adams, 1 N. & McC. (S. C.) 284; Steamboat Co. v. Wilkins, 8 Vt. 54; Sherman v. Transportation Co., 31 Vt. 162; Dover v. Plemmons, 10 Ired. (N. C.) L. 23; Angle v. Hanna, 22 Ill. 429, 74 Am. Dec. 161.

[92] 6 New Hampshire, 481, 26 Am. Dec. 713.

ery may be had upon a *quantum meruit*, based upon that benefit. The basis of this recovery is not the original contract, but a new implied agreement deducible from the delivery and acceptance of some valuable service or thing. The defaulting plaintiff can in no case recover more than the contract price, and he cannot recover that if his work is not reasonably worth it, or if, by paying it, the rest of the work will cost the defendant more than if the whole had been completed under the contract.

Notwithstanding much opposition, this rule has gradually worked its way into considerable judicial favor and is now adopted and enforced in Indiana,[93] Iowa,[94] Kansas,[95] Kentucky,[96] Michigan,[97] Missouri,[98] Nebraska,[99] North Carolina [1] and Texas.[2] After some leaning in favor of it, it has been finally denied in Mississippi,[3] Oregon [4] and Wisconsin.[5]

§ 1579. Recovery for services under contract unenforceable under Statute of Frauds.—Where services have been rendered under a con-

[93] Coe v. Smith, 4 Ind. 82, 58 Am. Dec. 618; Ricks v. Yates, 5 Ind. 115.

[94] Pixler v. Nichols, 8 Iowa, 106, 74 Am. Dec. 298; McCay v. Hedge, 18 Id. 66; McAfferty v. Hale, 24 Id. 356; Byerlee v. Mendell, 39 Id. 382; Wolf v. Gerr, 43 Id. 339. In McClay v. Hedge. Judge Dillon says: "This question was settled in this State by the case of Pixler v. Nichols, 8 Iowa, 106, which distinctly recognized and expressly followed Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713. That celebrated case has been criticised, doubted, and denied to be sound. It is frequently said to be good equity but bad law; yet its principles are gradually winning their way into professional and judicial favor. It is bottomed on justice and is right upon principle, however it may be upon the technical and more illiberal rules of the common law as found in the older cases."

[95] Duncan v. Baker, 21 Kan. 99; also reported in note to 31 Am. Rep. at p. 102.

[96] Apparently, see Foster v. Watson, 55 Ky. (16 B. Monroe) 377.

[97] Allen v. McKibben, 5 Mich. 449.

[98] Lee v. Ashbrook, 14 Mo. 378, 55 Am. Dec. 110; Downey v. Burke, 23 Mo. 228; Lowe v. Sinklear, 27 Mo. 308. But the application of the rule is confined to building and similar contracts, and does not extend to contracts for personal service. Earp v. Tyler, 73 Mo. 617; Banse v. Tate, 62 Mo. App. 150; Paul v. Minneapolis Thresher Co., 87 Mo. App. 647.

[99] Parcell v. McComber, 11 Neb. 209, 38 Am. Rep. 366; also reported in note to 35 Am. Rep. 476.

[1] Apparently, see Chamblee v. Baker, 95 N. C. 98.

[2] Riggs v. Horde, 25 Tex. Supp. 456, 78 Am. Dec. 584; Carroll v. Welch, 26 Tex. 147.

[3] Timberlake v. Thayer, 71 Miss. 279, 24 L. R. A. 231.

[4] Steeples v. Newton, 7 Ore. 110, 33 Am. Rep. 705.

[5] Diefenback v. Stark, 56 Wis. 462, 43 Am. Rep. 719. But in Hildebrand v. Amer. Fine Art Co., 109 Wis. 171, 53 L. R. A. 826, the servant was allowed to recover for services actually rendered, he being justifiably discharged, the court distinguishing the case of the servant who voluntarily abandons his employment, when he is not allowed to recover, and the case where he gives cause for his discharge, when he may recover.

tract not enforceable under the Statute of Frauds, as, for example, an oral contract not to be performed within one year, no recovery can be had upon the contract, but, where the employer has made default in performance at least, the employee may recover upon an implied contract for the reasonable value of the services so rendered.[6] Whether such a recovery may be had where the employee himself is the one who makes default and abandons performance is not entirely agreed upon by the authorities. It is held in several cases that the employer can base no defence upon the non-performance of a contract which he could not have affirmatively enforced, and that therefore the employee may recover *quantum meruit*, unaffected by the fact that he has not performed the contract under which the service was begun.[7] A few cases hold that the employee who voluntarily fails to perform the contract, though unenforceable, may not recover anything—the oral contract is not *void* and the law will not imply a new contract in the face of the other one.[8]

Where the employee fails to perform the oral contract because of illness, the courts which would not allow a recovery where he voluntarily abandons the service permit a recovery in this event.[9]

§ 1580. Brief absences as abandonment.—The question of what shall be deemed to be an abandonment of the service, is one to be determined by the facts and circumstances of each case. There are un-

[6] In the following cases where the defendant had refused to perform according to the tenor of the contract within the statute of frauds the plaintiff was allowed to recover on *quantum meruit* for services rendered. Sims v. McEwen, 27 Ala. 184; Patten v. Hicks, 43 Cal. 509; Mills v. Joiner, 20 Fla. 479; William Butcher Steel Works v. Atkinson, 68 Ill. 421, 86 Am. Rep. 560; Frazer v. Howe, 106 Ill. 563; Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222; Bonnon v. Urton, 3 Green (Iowa), 228; Wonsettler v. Lee, 40 Kan. 367; Myers v. Korb, 21 Ky. L. R. 163, 50 S. W. 1108; Lapham v. Osborne, 20 Nev. 168; Ham v. Goodrich, 37 N. H. 185; Emery v. Smith, 46 N. H. 151; McElroy v. Ludlum, 32 N. J. E. 828; Buckingham v. Ludlum, 37 N. J. E. 137; Eaton v. Eaton, 35 N. J. L. 290; Jones v. Hay, 52 Barb. (N. Y.) 501; Springer v. Bien, 16 Daly (N. Y.), 275; Burlingame v. Burlingame, 7 Cow. (N. Y.) 92; Rosepaugh v. Vredenburgh, 16 Hun (N. Y.), 60; Carter v. Brown, 3 S. C. 298; Stevens v. Lee, 70 Tex. 279; McCrowell v. Burson, 79 Va. 290; Miller v. Wisener, 45 W. Va. 59; Salb v. Campbell, 65 Wis. 405; Koch v. Williams, 82 Wis. 186.

[7] See Comes v. Lamson, 16 Conn. 246; Clark v. Terry, 25 Conn. 395; Bernier v. Cabot Mfg. Co., 71 Me. 506, 36 Am. Rep. 343; Freeman v. Foss, 145 Mass. 361, 1 Am. St. Rep. 467; Crawford v. Parsons, 18 N. H. 293; Hartwell v. Young, 67 Hun (N. Y.), 472.

[8] See Swanzey v. Moore, 22 Ill. 63, 74 Am. Dec. 134; Kriger v. Leppel, 42 Minn. 6; Mack v. Bragg, 30 Vt. 571; Collins v. Smith, 11 Ont. W. R. 350.

[9] La Du-King Mfg. Co. v. La Du, 36 Minn. 473.

doubtedly cases in which instant and constant attention and care are required, where any absence from the post of duty might occasion serious if not irreparable loss. In such cases a wilful absence of an hour might be deemed to be an abandonment or furnish good cause for the dismissal of the agent. But in other cases an absence for a day or more might result in no loss and ought reasonably to be considered neither ground for dismissal nor an abandonment of the service.[10] The nature of the employment, the necessities of the case, the probability of loss, the reason of the absence, are all to be taken into consideration, and it is for the jury to say, under all of the circumstances, whether there was an abandonment in fact, or whether the principal was justified in treating it as such.[11] Thus where the foreman of a fruit package factory, employed for a year, was absent upon necessary and reasonable business for less than a day, his absence involving no serious loss, it was held that this was neither an abandonment of the service nor a good ground for his dismissal;[12] so in another case, the absence of a school teacher for four days, it not appearing that there was any serious loss occasioned, or that the business of the school had been impeded a single hour thereby, was held to be not a sufficient reason for a discharge.[13] On the other hand, the absence of a plantation overseer for a single day was held to be a sufficient reason for his dismissal, it appearing that the absence was for the purpose of provoking a discharge in order to create a cause of action.[14]

§ 1581. **Condonation of abandonment.**—Even if the agent has been absent without authority, yet if the principal subsequently receive him back and permit him to continue the performance with no notice that a forfeiture has been incurred, or would be insisted upon, a condonation will be presumed. It is certainly equitable and in accordance with well established principles, to hold that where an em-

[10] See cases cited in following notes. See also Wood, Master & Servant, Second Ed., p. 219.

[11] Shaver v. Ingham, 58 Mich. 649, 55 Am. Rep. 712; Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77; Partington v. Wamsutta Mills, 110 Mass. 467; Heber v. United States Flax Mfg. Co., 13 R. I. 303; Nayler v. Fall River Iron Works, 118 Mass. 317. See also McCormack v. Henderson, 100 Mo. App. 647; Fisher v. Monroe, 11 N. Y. Supp. 207.

[12] Shaver v. Ingham, *supra*. In Shoemaker v. Acker, 116 Cal. 239, the manager of a fruit farm who had agreed to "devote his whole time and attent'on" to it, occasionally, when no work was pressing, and no harm resulted, would absent himself from Saturday until Monday. *Held*, no ground for discharging him.

[13] Fillieul v. Armstrong, 7 Ad. & El. 557.

[14] Ford v. Danks, 16 La. Ann. 119. See Edwards v. Levy, 2 Fost. & Fin. 94; Wright v. Gihon, 3 C. & P. 583.

ployee for a fixed period, without any fault of the employer, absents himself for a short time, and then the employer, with knowledge of the facts, receives him back into his service without objection, and retains him until the termination of the contract, he thereby waives the right to declare the contract forfeited as to the services actually rendered.[15]

§ 1582. What will excuse abandonment—Sickness—Epidemic—Physical violence.—Where sickness or other physical incapacity which could not be foreseen, renders the temporary or permanent cessation from service imperative, the agent cannot be deemed to have voluntarily abandoned the service.[16] Such misfortunes are classed among other acts of God for which the individual cannot be held responsible. So an agent is under no obligation to imperil his life by remaining at his post in the vicinity of a prevailing epidemic so dangerous in its character as to justify a man of ordinary care and prudence in refusing to remain, nor does it make any difference that subsequent developments demonstrate that he was actually in no danger.[17] And the same thing is doubtless true of a threatened physical

[15] Bast v. Byrne, 51 Wis. 531, 37 Am. Rep. 841; Ridgway v. Hungerford Market Co., 3 Ad. & El. 171; Prentiss v. Ledyard, 28 Wis. 131; McGrath v. Bell, 33 N. Y. Super. 195. In Bast v. Byrne the agent agreed to work a year for a fixed price. He worked up to the end of the year but was absent at different times, nine days and a half in all, but he was held entitled to full pay.

Where an employee hired for a year, in November, quit in the following June, and about a week later wrote to his employer demanding payment for work done, and the employer replied that he "would not pay him any more until the year of the hiring had expired" he was held to have assented to the plaintiff's leaving and must pay him wages for the time he worked. "An offer to pay for services performed at the contract price, in case the laborer has left the employer's service, is a waiver of the forfeiture of the wages, if there was one." Merrill v. Fish, 68 Vt. 475.

To voluntarily keep in the service an employee, after he had been so intoxicated that he might have been properly discharged, was held to be a condonation of that act where he was subsequently discharged for another reason. Dunkell v. Simons, 5 N. Y. Supp. 417.

See also, Daniell v. Boston, etc., R. R., 184 Mass. 337; Tickler v. Andrae Mfg. Co., 95 Wis. 352; Nichols & Shepard Co. v. Bachant, 45 Ill. App. 497.

[16] Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77; Jennings v. Lyons, 39 Wis. 557, 20 Am. Rep. 57; Ryan v. Dayton, 25 Conn. 188, 65 Am. Dec. 560; Greene v. Linton, 7 Port. (Ala.) 133, 31 Am. Dec. 707; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Dickey v. Linscott, 20 Me. 453, 37 Am. Dec. 66; Leopold v. Salkey, 89 Ill. 412, 31 Am. Rep. 93; Harrington v. Fall River Iron Works, 119 Mass. 82; Callahan v. Shotwell, 60 Mo. 398; Hubbard v. Belden, 27 Vt. 645; Smith v. Hill, 13 Ark. 173; Hunter v. Waldron, 7 Ala. 753; Moulton v. Trask, 9 Metc. (Mass.) 577; Parker v. Macomber, 17 R. I. 674, 16 L. R. A. 858; McClellan v. Harris, 7 S. Dak. 447.

[17] Lakeman v. Pollard, *supra.*

injury.[18] The propriety of his conduct is for the jury to determine from the facts as they were presented to him.

§ 1583. ——— **Recovery for services actually rendered.**—An agent therefore who is thus compelled by a *vis major* to suspend or discontinue the service, although undertaken for a definite time by an entire contract, may recover upon a *quantum meruit* for the value of the services actually performed.[19]

§ 1584. ——— **Recovery of wages during illness.**—Where, though the agent employed in a general or continuing service is unable, on account of sickness, to render the agreed service, for a temporary interval during a stated period, he does not abandon the service and the principal does not terminate it, the question of his right to compensation for the period of his illness is not free from doubt. As is said in one case, "There is a singular dearth of clear authority respecting the effect of the disability of an employee arising from illness upon the right to wages;" but while the English and some American cases seem in general to uphold his right to compensation,[20] the tendency of the American cases seems to be to deny it.

[18] Walsh v. Fisher, 102 Wis. 172, 72 Am. St. Rep. 865, 43 L. R. A. 810.

[19] Lakeman v. Pollard, *supra;* Ryan v. Dayton, *supra;* Greene v. Linton, *supra;* Wolfe v. Howes, *supra;* Walsh v. Fisher, *supra.*

[20] K—— v. Raschen, 38 L. T. Rep. N. S. 38; Patten v. Wood, 51 J. P. 549; Carr v. Hadrill, 39 J. P. 246; Cuckson v. Stones, 1 E. & E. 248; Mott v. Baxter, 13 Colo. App. 63; Reiter v. Standard Scale Co., 141 Ill. App. 427, aff'd, 237 Ill. 374 (though here he performed some service while ill at home); Miller v. Gidiere, 36 La. Ann. 201.

In K—— v. Raschen, *supra*, this was held to be true even though the disease was one attributable to his own imprudence. Same: McDougal v. Van Allen Co., 19 Ont. L. R. 351.

But *contra*, see Adlets v. Progressive Shoe Co., 84 Mo. App. 288, where a salesman employed at so much per week was confined to a hospital for about four months. Myers v. Sieradzki, [1910] Transv. L. R. S. C. 869, where a saleswoman was absent six weeks out of a period of two months.

In MacFarlane v. Allan-Pfeiffer Chem. Co., 59 Wash. 154, Ann. Cas. 1912 A. 1180, 28 L. R. A. (N. S.) 314, where a traveling salesman, employed by the month, lost about ten days out of a month by illness, it was held that he could not recover for lost time. The court, referring to the cases cited, *ante*, § 1583, said, "The same reasoning which protects the servant in permitting him to recover for service actually performed, protects the master in not holding him liable except for services actually performed; and the servant cannot recover for time lost through his own illness or other inability to perform the required service." Most of the cases cited, however, are only negatively in point. Orpin v. Westmacott Gas Furnace Co., (R. I.) 74 Atl. 481, a *per curiam* opinion not reported in the official reports, is to same effect. So Shaw v. Deal (No. 2), 7 Pa. Co. Ct. 379; Hughes v. Toledo, etc., Cash Reg. Co., 112 Mo. App. 91.

Where a servant hired by the week is absent on account of illness for six or seven weeks, he is not entitled to be paid for the time he was so absent. Miller v. Morton, 8 Manitoba, 1.

In Marks v. Dartmouth Ferry Co., 36 Nov. Sco. 158, the court was evenly

§ 1585. ——— Principal's right to terminate employment.—But though brief and temporary absences, on account of illness, do not of themselves constitute an abandonment of the service under a contract for a fixed term, nor justify the employer in regarding it as such,[21] an absence, even though because of sickness, may be of such a nature and go so much to the root of the whole consideration, as to justify the employer in deeming the contract at an end.[22] A continuous illness for seven weeks in the case of a yearly employee was held by the court in Massachusetts to be such a radical and serious failure to perform as would, as matter of law, justify the employer in treating the employment as terminated. In a recent English case,[23] the test was said to be whether the illness was so long continued that it "would put an end, in a business sense, to their business engagement and would frustrate the object of that engagement,"—a rule obviously not very definite but perhaps sufficient to enable the decision of a case as a question of fact.

divided in opinion, but two judges of the four held that a servant who was continuously ill and absent for seven months and until his death was entitled to his wages during that time, the employer having done nothing to indicate that the absence was regarded as other than temporary.

But this case was reversed in 34 Can. Sup. Ct. 366, where the court held that a permanent incapacity of itself terminated the service; and the court found that the employee had assented to a rule that employees should be paid only for services actually rendered.

A servant who leaves his service uncompleted because of illness can get no compensation for the uncompleted part. Patrick v. Putnam, 27 Vt. 759; Hughes v. Toledo, etc., Cash Reg. Co., 112 Mo. App. 91.

[21] See *ante*, § 1580, and cases cited in preceding note.

In McDougal v. Van Allen Co., 19 Ont. L. R. 351, an illness of five weeks in the case of a traveling salesman employed for three years was held not to justify the employer in terminating the contract.

[22] Thus where the *prima donna* of a new opera about to be put upon the stage for an indefinite period, was, a few days before the first performance, taken seriously ill with an illness apparently not temporary (and which in fact continued until the opera had run for five days) and her place could only be supplied by the engagement of another singer (who happened to be available) for a definite time and at a larger salary, it was held that the employer was justified in treating the contract as terminated. Poussard v. Spiers, 1 Q. B. Div. 410.

The same thing was held where an employee under a contract for a year's time, was absent seven weeks on account of illness. No notice to the employee was necessary. Johnson v. Walker, 155 Mass. 253, 31 Am. St. R. 550. Two of the four judges in Marks v. Dartmouth Ferry Co., 36 Nov. Sco. 158, were of like opinion and Johnson v. Walker was cited. Here the absence was seven months and until the employee's death.

Johnson v. Walker was also cited and followed in Myers v. Sieradzki, [1910] Transv. L. R. S. C. 869, where an absence, by reason of illness, for six weeks out of a period of two months was held to justify the employer in refusing to take the employee back upon recovery.

[23] Storey v. Fulham Steel Works Co., 24 T. L. R. (Ct. of Ap.) 89.

§ 1586. Contracts not to terminate without notice—Forfeiture for breach.—It is not uncommon to provide that the agency, though otherwise at will, shall not be terminated by one or either party without notice to the other, either fixed or reasonable. Such agreements are valid, and, if violated, will furnish ground for an action for the damages sustained. They will not, however, work a forfeiture of wages, unless it is expressly so stipulated.[24] The law abhors forfeitures, and will not lightly imply them.

It is, therefore, common to provide that, if the agent terminates the relation without giving the specified notice, he shall forfeit to the principal either all, or a certain portion, of the compensation then earned but unpaid. Such stipulations, when fairly made and not unreasonable or oppressive in their effects, will be enforced by the law.[25] It would not be reasonable, however, to make the forfeiture cover a very long period,[26] or be entirely out of proportion to the principal's loss.[27]

It is not necessary that the stipulation should take the form of a written contract between the parties. If the agent has notice of such a regulation at the time he enters upon performance, and accepts the agency under it; or if he has notice at any subsequent time during the

Here the occasional absence, (because of illness, of an employee under a five year contract), in a period extending from August to the following January, and his complete absence from January 5 to the middle of May when he offered to return, was held not sufficient to justify the employer in giving notice of termination in April.

[24] Hunt v. Otis, 4 Metc. (Mass.) 463.

[25] Richardson v. Woehler, 26 Mich. 90; Harmon v. Salmon Falls Mfg. Co., 35 Me. 447, 58 Am. Dec. 718; Walsh v. Walley, L. R. 9 Q. B. 367.

[26] Richardson v. Woehler, *supra*.

[27] Basye v. Ambrose, 28 Mo. 39.

In Schimpf v. Tennessee Mfg. Co., 86 Tenn. 219, 6 Am. St. Rep. 832, it was held that a clause in the contract whereby, if the servant left without giving notice, he agreed to forfeit whatever might be due him from the company at the time of leaving, was void as being unreasonable and oppressive.

But in Tennessee Mfg. Co. v. James, 91 Tenn. 154, 30 Am. St. Rep. 865, 15 L. R. A. 211, the contract was that if a servant quit without giving notice, he was to forfeit a certain amount, graduated in proportion to the wages paid him,—the forfeiture for wages from fifty cents up to one dollar a day being ten dollars,—and it was upheld as reasonable.

A stipulation in a contract between a conductor and a tram-ways company that the manager for the time being may fix the damages occasioned by the employee's breach of duty, and that the manager's certificate shall be conclusive in all courts, etc., will not justify the manager in decreeing a forfeiture of all the wages due, after an action brought by the discharged employee to recover the same, without giving the employee notice and an opportunity to be heard on the question of forfeiture. Armstrong v. South London Tramways Co., 64 L. T. R. (N. S.) 96.

service and continues to serve under it, he will be bound.[28] He cannot be bound, however, by a regulation or usage of which he had no notice,[29] and he may always show that as a matter of fact he had none.

§ 1587. ——— What works a forfeiture.—Here, too, as in other cases, a mere temporary absence will not work a forfeiture, nor will it result from absence on account of sickness, severe bodily injury, or other unforeseen emergency. To work a forfeiture, said a learned judge,[30] "the abandonment of the employer's service must be the direct, voluntary act, or the natural and necessary consequence of some voluntary act, of the person employed, or the result of some act committed by him with a design to terminate the contract or employment, or render the further prosecution impossible. But a forfeiture of wages is not incurred, where the abandonment is immediately caused by acts or occurrences not foreseen or anticipated, over which the person employed had no control, and the natural and necessary consequence of which was not to cause the termination of the employment of a party under a contract for services or labor."

5. Effect of Agent's Disloyalty upon Compensation.

§ 1588. Disloyal agent cannot recover compensation.—As has been already seen, it is often said that the first duty of the agent is to be loyal to his trust, and a number of rules have been already stated whose purpose is to insure the performance of that duty. Certain of these rules have been designed, not merely to give a remedy for actual wrongdoing, but to remove as far as possible all temptation to wrongdoing. This duty of loyalty, as has been seen, imposes upon the agent the obligation to protect the interests of his principal, to see to it that his own interests or the interests of any one else whom he represents, shall not conflict with his principal's interests, to make no profit for himself at his principal's expense, to render true and honest accounts, to disclose all information coming to him and seeming to be necessary for his principal's protection, and, generally, to render to his prin-

[28] Harmon v. Salmon Falls Mfg. Co., *supra;* Bradley v. Salmon Falls Mfg. Co., 30 N. H. 487; Collins v. New England Iron Co., 115 Mass. 23; Pottsville Iron and Steel Co. v. Good, 116 Pa. 385, 2 Am. St. Rep. 614.

[29] Stevens v. Reeves, 9 Pick. (Mass.) 198.

[30] Bigelow, C. J., in Hughes v. Wamsutta Mills, 11 Allen (Mass.), 201, in which case it was held that such an unexpected and unforeseen event as the arrest of the servant, and his conviction and imprisonment for crime, would exonerate the servant from the duty of giving two weeks' notice before leaving the service, under a contract by which he agreed to give such notice or not claim any wages due.

cipal a disinterested and loyal service. Among the other measures designed to secure the performance of this duty is the denial of compensation where the duty has not been observed; it is often said that a loyal performance is a condition precedent to the right to recover compensation, and it has been held in many cases that, where the agent is unfaithful to his trust and abuses the confidence reposed in him, he will not be entitled to any compensation for his services.[31]

[31] Agent sells to himself, or to company in which he is interested, without principal's knowledge and consent. Salomons v. Pender, 3 H. & C. 639. Buys principal's property through a confederate or "dummy." Witte v. Storm, 236 Mo. 470. Falsely reports to principal price at which he buys or sells in order to make secret profit or to accomplish some other illegitimate purpose. Martin v. Bliss, 57 Hun (N. Y.), 157; Vennum v. Gregory, 21 Iowa, 328; Hale v. Kellogg (Tex. Civ. App.), 94 S. W. 389; Collins v. McClurg, 1 Colo. App. 348; Schaeffer v. Blair, 149 U. S. 248, 37 L. Ed. 721; Jeffries v. Robbins, 66 Kan. 427; Jackson v. Pleasanton, 101 Va. 282; Harrison v. Craven, 188 Mo. 590; Hutchinson v. Fleming, 40 Can. Sup. Ct. 134; Lichtenstein v. Mott, 99 N. Y. App Div. 570. Conceals important information, or misrepresents the facts, in order to make profit for himself, etc. Wadsworth v. Adams, 138 U. S. 380, 34 L. Ed. 984; Wilkinson v. McCullough, 196 Pa 205, 79 Am. St. Rep. 702; Jansen v. Williams, 36 Neb. 869, 20 L. R. A. 207; Whaples v. Fahys, 87 N. Y. App. Div. 518; Ringo v. Potts, 36 New Bruns. 42; Price v. Metropolitan, etc., Co., 23 Times L. Rep. 630; Ranney v. Henry, 160 Mich. 597; Pratt v. Patterson, 112 Pa. 475; Young v. Hughes, 32 N. J. Eq. 372; Cleveland, etc., R. Co. v. Pattison, 15 Ind. 70; Quinn v. Le Duc (N. J. Eq.), 51 Atl. 199. But not where the information, *e. g.*, as to the identity of the purchaser, was not material. Veasey v. Carson, 177 Mass. 117, 53 L. R. A. 241. Makes false reports about his expenses, surcharges his accounts, etc. Little v. Phipps, 208 Mass. 331, 34 L. R. A. (N. S.) 1046; Hobson v. Peake, 44 La. 383; Paul v. Minneapolis Thresher Co., 87 Mo. App. 647; Stubbs v. Slater, [1910] 1 Ch. 195; Doss v. Board, 96 Ark. 451. Takes secret commissions on dealings had for his principal. Murray v. Beard, 102 N. Y. 505; Boston Deep Sea Fishing Co. v. Ansell, 39 Ch. Div. 339; Manitoba, etc., Co. v. Davidson, 34 Can. Sup. Ct. 255. Refuses to account, converts proceeds, etc. Brannon v. Strauss, 75 Ill. 234; Meyers v. Walker, 31 Ill. 353. Keeps money paid to him, reporting debt unpaid, etc. Sidway v. American Mtg. Co., 119 Ill. App. 502, 222 Ill. 270. Keeps no proper accounts, mixes part of his principal's money with his own, and converts same to his own use. Quirk v. Quirk, 155 Fed. 199. Undermines his principal, tries to get latter's business for himself, makes no effort to promote latter's interest, etc. Bilz v. Powell, 50 Colo. 482, 38 L. R. A. (N. S.) 847. Secures the cancellation of orders taken by him, in order to place them with another company in which the agent is interested. Gibson v. Bailey Co., 114 Mo. App. 350. Acts in such bad faith and disregard of authority that principal is justified in repudiating his acts. Alta Investment Co. v. Worden, 25 Colo. 215.

See also, Sumner v. Reicheniker, 9 Kan. 320; Porter v. Silvers, 35 Ind. 295; Spain v. Arnott, 2 Starkie, 256; Hall v. Gambrill, 34 C. C. A. 190, 92 Fed. 32; Hafner v. Herron, 165 Ill. 242; Hoffin v. Moss, 14 C. C. A. 459, 67 Fed. 440; Phinney v. Hall, 101 Mich. 451; Schleifenbaum v. Rund-

§ 1589. ——— Good faith does not save—Nor custom—Divisible transactions.—It is not an excuse in these cases that the disloyal agent was not really acting in actual bad faith, or that the principal has not been injured. The rule rests, as has often been pointed out, not upon injury to the principal, but upon the paramount policy of removing the danger of temptation from the pathway of the agent. It may often operate to give to the principal the benefit of the agent's service without any compensation, but the agent has only himself to blame if that result ensues. It may seem at times that the penalty is harsher than the actual offense justifies, but the answer which is given is that the law is not aiming at the particular case but is striking indifferently at the whole class.

Any custom or usage that the agent shall take a secret profit or surcharge his account or conceal information, or otherwise be disloyal to his principal, is, of course, bad, unless the principal's knowledge and assent can be shown.[32]

Where the transaction for which compensation is claimed is one and entire, the whole compensation is forfeited;[33] but where there were separate and distinct transactions commissions as to one have been held not to be forfeited by misconduct as to another.[34]

If forfeitable commissions have been paid in ignorance of the misconduct, they may, upon discovery, be recovered back.[35]

§ 1590. Double agency—Agent cannot recover compensation from either party when double agency unknown.—As has been seen the law will not permit the agent to put himself in such a situation that

baken, 81 Conn. 623; Audubon Bldg. Co. v. Andrews, 111 C. C. A. 92, 187 Fed. 254; Witte v. Storm, 236 Mo. 470.

[32] See Little v. Phipps, 208 Mass. 331, 34 L. R. A. (N. S.) 1046.

[33] Little v. Phipps, *supra* (here because the agent charged the principal with a $50 attorney fee when he had actually paid only $25, the whole interest of the agent in the transaction was held forfeited). Price v. Metropolitan, etc., Co., 23 Times L. Rep. 630 (a case of concealing information). Stubbs v. Slater, [1910] 1 Ch. 195 (a case of secret excessive charging). Braden v. Randles, 128 Iowa, 653 (where sales agent falsely reporting offer received and concealing amount which buyer was ready to pay was held to have forfeited both his fixed commission and a contingent interest).

[34] This distinction was made in Hippisley v. Knee, [1905] 1 K. B. 1, and has been followed in some other cases (though it is questioned in Little v. Phipps, *supra*); *e. g.*, Nitedals Taendstikfabrik v. Bruster, [1906] 2 Ch. 671; Herzfelder v. McArthur, [1908] Transv. L. R. S. C. 332 (where it was held that breach of trust in a few separable matters by an agent employed in a long series of transactions did not defeat his right to commissions in transactions in which he had performed faithfully).

[35] Andrews v. Ramsay, [1903] 2 K. B. 635.

his own interests will conflict with those of the principal. The latter is entitled to the disinterested skill, diligence and zeal of the agent for his own exclusive benefit, and unless the principal knowingly consents to it, the agent cannot divide this duty and give a part to another. Hence it is the rule of the law that, except with the free and intelligent consent of his principal, given after full knowledge of all of the circumstances, the agent cannot in the same transaction, act both for the principal and the adverse party.[36]

If, therefore, without such consent, the agent undertakes to also serve the other party in the same transaction, he commits such a breach of his duty to his own principal, and so violates the rules of sound policy and morality, that he forfeits all right to compensation from the principal who first employed him.[37] And for the same reason, he cannot

[36] See *ante*, §§ 176–180.

[37] Green v. Southern States Lbr. Co., 141 Ala. 680; Berlin v. Farwell (Cal.), 31 Pac. 527; Alta Inv. Co. v. Worden, 25 Colo. 215; Deutsch v. Baxter, 9 Colo. App. 58; Bollman v. Loomis, 41 Conn. 581; Bunn v. Keach, 214 Ill. 259; Kronenberger v. Fricke, 22 Ill. App. 550; Boyd v. Dullaghan, 33 Ill. App. 266; Hampton v. Lackens, 72 Ill. App. 442; Van Vlissingen v. Blum, 92 Ill. App. 145; Lloyd v. Colston, 5 Bush (Ky.), 587; Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66; Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168; Farnsworth v. Hemmer, 1 Allen (Mass.), 494, 79 Am. Dec. 756; Scribner v. Collar, 40 Mich. 375, 29 Am. Rep. 541; Leathers v. Canfield, 117 Mich. 277, 6 L. R. A. 661; McDonald v. Maltz, 94 Mich. 172, 34 Am. St. R. 331; Webb v. Paxton, 36 Minn. 532; De Steiger v. Hollington, 17 Mo. App. 382; Rosenthal v. Drake, 82 Mo. App. 358; Stripling v. Maguire, 108 Mo. App. 594; Harkness v. Briscoe, 47 Mo. App. 196; Campbell v. Baxter, 41 Neb. 729; Strawbridge v. Swan, 43 Neb. 781; Watkins v. Cousall, 1 E. D. Smith (N. Y.), 65; Vanderpoel v. Kearns, 2 E. D. Smith (N. Y.), 170; Carman v. Beach, 63 N. Y. 97; Lamb v. Baxter, 130 N. C. 67; Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Everhart v. Searle, 71 Pa. 256; Lynch v. Fallon, 11 R. I. 311, 23 Am. Rep. 458; Lemon v. Little, 21 S. D. 628; Armstrong v. O'Brien, 83 Tex. 635; Tinsley v. Penniman, 12 Tex. Civ. App. 591; Shepard v. Hill, 6 Wash. 605; Meyer v. Hanchett, 39 Wis. 419, s. c. 43 Wis. 246; Morison v. Thompson, L. R. 9 Q. B. 480; Bartram v. Lloyd, 88 L. T. 286; Andrews v. Ramsay, [1903] 2 K. B. 635.

The "knowledge of the duplicate character should be established, not upon mere inference, but upon a full disclosure or positive proof of knowledge, so that the seller or the buyer, as the case may be, may be advised of the exact relation of the agent to the parties conducting the negotiation." Brady, J., in Frankel v. Wathen, 58 Hun, 543.

The principal may recover back from the agent commissions paid to him before learning of the double agency. Cannell v. Smith, 142 Pa. 25, 12 L. R. A. 395.

An agent who secretly receives a commission from the opposite party in the same transaction, forfeits his right to compensation from his principal. Brierly v. Connelly, 31 N. Y. Misc. 268.

The mere fact that, after the transaction was ended, the other party made a gift to the agent, without any previous agreement to do so, and

recover compensation from the second employer, who was ignorant of the first engagement.[38]

there being no bad faith charged, is held not enough to defeat the right to compensation. Campbell v. Yager, 32 Neb. 266. To same effect: Carr v. Ubsdell, 97 Mo. App. 326.

The mere fact that the agent of the seller rendered some aid to the buyer without compensation and without fraud does not disentitle him to compensation from the seller. Donohue v. Padden, 93 Wis. 20.

Dividing commissions with agent of other party.—A secret and equivocal agreement to divide commissions with the agent of the other party will defeat the right to them. Hobart v. Sherburne, 66 Minn. 171. And a secret agreement between the agents of the respective parties to "pool" their commissions has been held to destroy the right of either to recover. Norman v. Roseman, 59 Mo. App. 682. See also, *Brokers.*

But in Alvord v. Cook, 174 Mass. 120, it was held that the mere fact that the agents were to divide their joint commissions was not enough to defeat the broker's recovery. The court said that while it was easy to conceive that an arrangement between brokers for the division of their commissions might put one of them under a temptation to act adversely to his principal, they would not say this would be necessarily so. But see Quinn v. Burton, 195 Mass. 277.

Dividing commissions with purchaser.—An agent to sell does not lose his right to commissions because he has agreed to divide those commissions with the purchaser he has procured. They are his, and he may do what he pleases with them, said the court. Scott v. Lloyd, 19 Colo. 401; Chase v. Veal, 88 Tex. 333; Lawler v. Armstrong, 53 Nash. 664.

Agent also having option.—An agent to sell land, may also be given an option to buy it; and where such an agent, having produced a purchaser, ready, able and willing to buy on the terms proposed, to whom the owner wrongfully refused to convey, then exercised his option in order to complete the sale to the buyer, he was held to be entitled to his commission. Riemer v. Rice, 88 Wis. 16.

A person who has had an option for the purchase of land, which he has elected not to exercise has no such interest as will disqualify him from becoming the broker of another person to buy the land, nor which he owes any duty to disclose to the latter, and he may recover a commission from such purchaser. Carpenter v. Fisher, 175 Mass. 9.

Agent joining in the purchase.—Where an agent, who has been informed by his principal of the lowest price for land, made a secret agreement with a purchaser to buy the land, with the agent jointly,—the agent to apply his commissions in part payment for his share,—the agent was held not entitled to commissions. Finch v. Conrade, 154 Pa. 326.

Under similar circumstances, where the agent so manipulated that he was enabled to join in the purchase at the lowest price the principal would sell for, the agent falsely representing to the principal that the sale could not be consummated unless he bought an interest, he was not permitted to recover. Smith v.

[38] Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66; Lynch v. Fallon, 11 R. I. 311, 23 Am. Rep. 458; Bollman v. Loomis, 41 Conn. 581; Farnsworth v. Hemmer, 1 Allen (Mass.), 494, 79 Am. Dec. 756; Barr v. Hall, 26 New Zeal. L. R. 222.

And if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of his rights.

It is no answer to say that the second employer, having knowledge of the first employment, should be held liable on his promise because he could not be defrauded in the transaction. The contract itself is void as against public policy and good morals, and both parties thereto being *in pari delicto* the law will leave them as it finds them. *Ex dolo malo non oritur actio* is the maxim of the law. The result in such cases is therefore that the agent can recover from neither party unless his double employment was known and assented to by both.[39]

§ 1591. ——— How when agent mere middleman.—As has been seen in an earlier section,[40] and as will be more fully discussed under the head of Brokers,[41] it is possible that the agent, instead of being one in whom any particular trust and confidence is reposed, or upon whom either party relies for the protection of his interests, may be a

Tripis, 2 Tex. Civ. App. 267. See also, to the effect that where the broker who was employed to sell land for a commission, unites with others to buy it, even with the consent of the principal, no compensation is due him unless there is a new undertaking, after his relation is changed, to pay him. Hammond v. Bookwalter, 12 Ind. App. 177.

Even although the double agency is known to both principals,—even if he be a mere middleman—the agent, while acting for both, must deal fairly by both; and the concealment of material facts from either principal with a view to making profit for himself, will destroy all right to compensation from that principal. "He cannot be allowed to attempt to extort a price from one principal not demanded or required by the other, and then be entitled to a commission as for a service." Phinney v. Hall, 101 Mich. 451. See also, Carpenter v. Fisher, 175 Mass. 9.

[39] Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Farnsworth v. Hemmer, 1 Allen (Mass.), 494, 79 Am. Dec. 756; Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168; Smith v. Townsend, 109 Mass. 500; Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Sullivan v. Tufts, 203 Mass. 155; Bollman v. Loomis, 41 Conn. 581; Everhart v. Searle, 71 Pa. 256; Penn. Ry. Co. v. Flanigan, 112 Pa. 558; Rice v. Davis, 136 Pa. 439, 20 Am. St. Rep. 931.

In a number of cases in the lower courts of New York, it seems to be held that it is enough if the defendant, at the time he employed the agent, knew of the latter's previous employment by the other party, without requiring that it shall appear that the other party consented to the agent's employment by the defendant. See Lansing v. Bliss, 86 Hun (N. Y.), 205; Geery v. Pollock, 16 N. Y. App. Div. 321; Whiting v. Saunders, 22 N. Y. Misc. 539.

But all of these cases expressly go back for authority to Rowe v. Stevens, 53 N. Y. 621, in which it appears that each party had notice that the agent was employed by the other, and with such notice agreed to pay him his compensation. See also, Jarvis v. Schaefer, 105 N. Y. 289.

[40] See *ante*, § 178.

[41] See *post*, Book V, Chap. III.

mere "middleman," whose undertaking it is merely to bring the parties in interest together and then leave them to conduct their own negotiations. In such cases, it is said that inasmuch as neither party relies upon the judgment or fidelity of the agent, he violates no duty in undertaking to perform this service for both [42] and therefore may properly have compensation from both.

§ 1592. ——— May recover when double agency was fully known and assented to.—There is some conflict in the decisions upon the question of the agent's right to recover compensation from both parties, even when the double employment is fully known and assented to. It is said, and with no little reason, that even in this case the contract is opposed to public policy on account of the natural and legitimate tendency of such employments.[43] But while all such transactions are properly viewed with suspicion, the weight of reason and authority is in favor of their validity when fairly made.[44] The agent may not be able to serve each of his principals with all his skill, energy or ability. He may not be able to obtain for a selling principal the highest price which could be obtained, nor for a purchasing principal the lowest price for which the property could have been purchased. But he can render to each a service entirely free from falsehood and fraud; a fair and valuable service in which his best judgment and soundest discretion are fully and freely exercised. And such a service is all that either of his principals contracted for, or had reason to expect.[45]

[42] Green v. Robertson, 64 Cal. 75; Clark v. Allen, 125 Cal. 276; Manders v. Craft, 3 Colo. App. 236; Cox v. Haun, 127 Ind. 325; Montross v. Eddy, 94 Mich. 100, 34 Am. St. Rep. 323; Childs v. Ptomey, 17 Mont. 502; Knauss v. Gottfried Brewing Co., 142 N. Y. 70; Gracie v. Stevens, 56 App. Div. 203; affirmed, 171 N. Y. 658; Norton v. Loan Ass'n, 57 App. Div. 520; Bonwell v. Auld, 9 N. Y. Misc. 65; Southack v. Lane, 32 Misc. 141. Same case, 23 Misc. 515.

In Casady v. Carraher, 119 Iowa, 500, it is said that in order to occupy the position of middleman, it is necessary that the agent "should have limited his exertions to such service. If, in addition thereto, the middleman assists either in effecting a trade, he becomes to that extent a partisan agent, and the obligation immediately devolves upon him to disclose his agency to the other."

[43] See Meyer v. Hanchett, 43 Wis. 246.

[44] Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Adams Mining Co. v. Senter, 26 Mich. 73; Fitzsimmons v. Southern Express Co., 40 Ga. 330, 2 Am. Rep. 577; Alexander v. University, 57 Ind. 466; Joslin v. Cowee, 56 N. Y. 626; Rolling Stock Co. v. Railroad, 34 Ohio St. 450; Atterbury v. Hopkins, 122 Mo. App. 172; Fryer v. Harker, 142 Iowa, 708, 23 L. R. A. (N. S.) 477.

[45] In Adams' Mining Co. v. Senter, 26 Mich. at p. 77, Campbell, J., in speaking of the acts of an agent acting for each of two mining companies, says: "It is claimed that upon the principle that a man cannot contract with himself, and cannot occupy positions involving a conflict of duties, all of his dealings whereby

6. *Effect of Agent's Wilful Disobedience.*

§ 1593. Forfeiture by wilful disobedience.—The same result of forfeiture will, as has been seen, flow from such wilful and persistent disobedience of lawful and reasonable instructions as shows a complete disregard of the fundamental obligations of the relation, and a practical disloyalty to the principal's interests.[46] Less than this, and the agent's negligence, will be ground for damages, or, perhaps, for a discharge, but will not ordinarily work a total forfeiture of the agent's right to compensation.[47]

the property of one company was transferred to, or used for the other, should be held unlawful. There is no validity in such a proposition. The authority of agents may, where no law is violated, be as large as their employers may choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every partnership involves such double relations. Every survey of boundaries, by a surveyor jointly agreed upon, would come within similar difficulties. It is only where the agent has personal interests conflicting with those of his principal, that the law requires peculiar safeguards against his acts. There can be no presumption that the agent of the two parties will deal unfairly with either. And when they both deliberately put him in charge of their separate concerns, and there is any likelihood that he may have to deal with the rights of both in the same transactions, instead of lessening his powers, it may become necessary to enlarge them far enough to dispense with such formalities as one man would use with another, but which could not be possible for a single person to go through alone."

[46] See a striking illustration in Von Heyne v. Tompkins, 89 Minn. 77, 5 L. R. A. (N. S.) 524. See also, Jerome v. Cycle Co., 163 N. Y. 351; Peniston v. Huber Co., 196 Pa. 580; Connell v. Gisborne Times Co., 28 New Zeal. L. R. 299; Howell v. Denton (Tex. Civ. App.), 68 S. W. 1002.

In Macnamara v. Martin, 7 Com. L. R. (Australia) 699, an agent to sell land found a purchaser upon terms proposed by principal. The principal thereupon changed his terms and instructed the agent to go no further. Nevertheless the agent, feeling that the principal was not dealing fairly with the purchaser so produced, undertook to make a written contract with him binding the principal to convey. This contract, however, would not bind the principal. The agent sued for the commission originally agreed upon, which it was agreed he had earned, but which it was urged had been forfeited by his disobedience. *Held*, that the agent's alleged misconduct after producing the purchaser did no harm to the principal and did not defeat the agent's right to commissions.

[47] Thus the mere failure of a workman to obey a rule to "punch" a time clock, will not cause a forfeiture of his wages for time which it is conceded that he worked. Mathews v. Industrial Lumber Co., 91 S. Car. 568.

Where, however, the agent's default amounts to a complete failure to perform the act in consideration of which only the compensation was to be paid, the agent cannot recover because he has not performed.[48]

7. Principal's Right of Recoupment.

§ 1594. Principal may recoup damages.—Instead of resorting to an independent action for the recovery of the damages he may have sustained by reason of the agent's failure to perform his undertaking, the principal may recoup them in an action brought against him by the agent to recover his compensation.[49]

This defense is distinguishable from set-off in three important particulars: 1. The claim sought to be taken advantage of by recoupment must be confined to matters arising out of, and connected with, the transaction or contract upon which the suit is brought. The claims and demands of both parties must spring out of the same contract or transaction, and not out of separate and different transactions. 2. It is immaterial whether the damages sought to be recouped are liquidated or unliquidated, it being well settled that unliquidated damages growing out of the same transaction from which the plaintiff's cause of action arises, may be recouped. 3. The remedy is conferred and regulated by common-law rules and does not depend upon statutory creation, although in many states it is regulated or enlarged by statute.[50]

The occasion for the resort to recoupment may arise under one of two states of fact: *a.* Where the agent sues upon the contract itself; and *b.* where he sues upon a *quantum meruit.* In the first case, the

[48] Thus, for example, if a broker is to be paid for selling goods according to a certain sample, and he makes a sale by substituting a better sample, thereby fastening upon his employer an unprofitable sale, a finding that no commissions were earned is justified "because the sales were not made in conformity with the terms upon which the broker was employed to effect them." Schreiner v. Kissock, 91 N. Y. Supp. 28.

[49] Blodgett v. Berlin Mills Co., 52 N. H. 215; Mobile, etc., R. R. Co. v. Clanton, 59 Ala. 392, 31 Am. Rep. 15; Wilson v. Smith, 111 Ala. 170; Brunson v. Martin, 17 Ark. 270; Lee v. Clements, 48 Ga. 128; Houston v. Young, 7 Ind. 200; Stoddard v. Treadwell, 26 Cal. 294; Still v. Hall, 20 Wend. (N. Y.) 51; Phelps v. Paris, 39 Vt. 511; Cilley v. Tenny, 31 Vt. 401; DeWitt v. Cullings, 32 Wis. 298; Harper v. Ray, 27 Miss. 622; Dunlap v. Hand, 26 Id. 460; Runyan v. Nichols, 11 Johns. (N. Y.) 547; Swift v. Harriman, 30 Vt. 607; Marshall v. Hann, 17 N. J. L. 425; Johnson v. White Mt. Creamery Ass'n, 68 N. H. 437, 73 Am. St. Rep. 610; McEwen v. Kerfoot, 37 Ill. 530; Evans v. Hughey, 76 Ill. 115; Harvey v. Cook, 24 Ill. App. 134.

[50] Ward v. Fellers, 3 Mich. 281; Wheat v. Dotson, 12 Ark. 699; Baltimore & Ohio R. R. Co. v. Jameson, 13 W. Va. 833, 31 Am. Rep. 775; Myers v. Estell, 47 Miss. 4.

agent treats the contract as being substantially performed, and bases his action upon it. It therefore becomes an essential portion of his case to show what the contract was, and that its performance has been such as to entitle him to the stipulated compensation. In the second case, the agent disregards the contract and sues for the value of his services as though no special contract existed. In this case it becomes necessary for the principal to set up the contract and its breach in his defense.

§ 1595. ——— What damages may be recouped.—It is indispensable that the loss for which damages are sought to be recouped should grow out of the same contract or transaction as that upon which the plaintiff's action is based.[51] The principal can not therefore recoup for a wrong or injury done by the agent outside of, and disconnected with, the scope of his employment.[52] But, within this limit, damages for the losses which the principal may have sustained by reason of the agent's inefficiency, negligence, misconduct, or failure to perform the express or implied covenants, agreements or conditions of his undertaking, and which would furnish the basis of an action by the principal against the agent, may be recouped by the principal in the action brought by the agent.[53]

Thus in an action by a railway conductor for his wages, the company may recoup for loss resulting to it from a collision caused by his negligence;[54] so in an action by an agent to recover his wages, the principal may recoup the damages he has sustained by reason of the seduction of his daughter by the agent;[55] so where a mill operative left his employment without having given the previous notice of his intention to leave which the contract required, in consequence of which the work at the mill was hindered and delayed, it was held that the damages thereby occasioned to the mill owner might be recouped against the claim for wages.[56]

[51] Lufburrow v. Henderson, 30 Ga. 482; Mayberry v. Leech, 58 Ala. 339; Desha v. Robinson, 17 Ark. 288; Hart v. Francis, 2 Col. 719; Sanger v. Fincher, 27 Ill. 346; Evans v. Hughey, 76 Ill. 115; Waterman v. Clark, 76 Ill. 428; Fessenden v. Forest Paper Co., 63 Me. 175; Bartlett v. Farrington, 120 Mass. 284; Hulme v. Brown, 3 Heisk. (Tenn.) 679; Ward v. Wilson, 3 Mich. 1; Allen v. McKibbin, 5 Mich. 449; Hill v. Southwick, 9 R. I. 299, 11 Am. Rep. 250; Harris v. Gamble, 6 Ch. Div. 748.

[52] Nashville, etc., R. Co. v. Chumley, 6 Heisk. (Tenn.) 327.

[53] See cases cited in preceding section, note 1.

[54] Mobile, etc., Ry. Co. v. Clanton, 59 Ala. 392, 31 Am. Rep. 15; South Chicago City Ry. Co. v. Workman, 64 Ill. App. 383.

[55] Bixby v. Parsons, 49 Conn. 483, 44 Am. Rep. 246.

[56] Satchwell v. Williams, 40 Conn. 371. Principal may recoup for loss of time by agent. Wilson v. Smith, 111 Ala. 170.

§ 1596. ——— So in such an action, the principal may show in his defense that the agent embezzled or wasted the goods or money committed to his care;[57] that the agent wilfully destroyed the principal's property;[58] that by the agent's negligence the property was lost, destroyed or injured;[59] that the agent failed to furnish certain materials which he had agreed to furnish, whereby the principal was compelled to furnish them;[60] that the agent failed to pay certain damages which he had agreed to pay, by reason of which the principal was obliged to pay them.[61]

So the principal may recoup for the damages which he has incurred to third persons by reason of the agent's misconduct or neglect, or his failure to observe and perform the principal's instructions.[62]

§ 1597. ——— Limit of recovery.—Damages, however, in the absence of a statute enlarging the remedy, can be recouped by way of mitigation only, and can not be made the basis of a recovery of the excess.[63] And having once offered and used them in recoupment, the principal can not afterwards bring an action for the excess.[64] If, therefore, the principal's damages exceed the plaintiff's claim, he should bring an independent action for them in the first instance.

The measure of damages is, also, substantially the same as though an independent action were brought to recover them.[65] The limit of the recoupment must, therefore, be the actual damages which directly and proximately result from the negligence, default or misconduct of the agent, and must not exceed the amount claimed by him.[66] Indirect, remote or speculative damages, except in case of fraud where a more liberal rule prevails, are no more to be recovered by recoupment than by an independent action.[67]

[57] Heck v. Shener, 4 Serg. & R. (Penn.) 249, 8 Am. Dec. 700; Brunson v. Martin, 17 Ark. 270; Allaire Works v. Guion, 10 Barb. (N. Y.) 55.

[58] Allaire Works v. Guion, 10 Barb. (N. Y.) 55. See also, Brigham v. Hawley, 17 Ill. 38; Lee v. Clements, 48 Ga. 128; Fowler v. Payne, 49 Miss. 321; Sanger v. Fincher, 27 Ill. 347; Wilder v. Stanley, 49 Vt. 105.

[59] Allaire Works v. Guion, *supra*.

[60] Newton v. Forster, 12 M. & W. 772.

[61] Barker v. Troy, etc., R. R. Co., 27 Vt. 766.

[62] McEwen v. Kerfoot, 37 Ill. 530; Campbell v. Somerville, 114 Mass. 334.

[63] Ward v. Fellers, 3 Mich. 281; Bennett v. Kupfer, 213 Mass. 218, 100 N. E. 332; Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713: Fowler v. Payne, 52 Miss. 210; Streeter v. Streeter, 43 Ill. 156; Holcraft v. Mellott, 57 Ind. 539; Brunson v. Martin, 17 Ark. 270. But see, Johnson v. White Mt. Creamery Ass'n, 68 N. H. 437, 73 Am. St. Rep. 610.

[64] Ward v. Fellers, 3 Mich. 281.

[65] Meyers v. Estell, 47 Miss. 4; Estell v. Myers, 54 Id. 147.

[66] Satchwell v. Williams, 40 Conn. 371.

[67] Blanchard v. Ely, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; Finney v. Cadwallader, 55 Ga. 75; Pettee v.

§ 1598. ——— Right not cut off by assignment.—The right of recoupment, it is said, attaches to the contract and goes with it into whosesoever hands the right may come to sue upon it.[68] The principal may, therefore, avail himself of this defense against the assignee of the agent, even though he be a *bona fide* transferee.[69]

§ 1599. No recoupment against an infant.—Where, however, the agent is an infant, no recoupment can be had against him, of damages arising from his failure to perform the express or implied duties imposed upon him by the contract of agency.[70] "Recoupment is, in substance and effect, a cross-action, and unless the party whom it is attempted to subject to it could be compelled to respond for the damages by an independent action against him, he cannot be reached by recoupment." [71]

III.

THE AGENT'S RIGHT TO REIMBURSEMENT.

§ 1600. What here included.—In the course of the execution of the agency, the agent may not infrequently pay out his own money, or become liable to pay it, in meeting the expenses which arise in the performance of the agency. The agent may also, in executing the principal's commands, expose himself to legal claims, or incur legal obligations to third persons who are injured by the fact or the manner of the agent's execution of the principal's directions. In either case, the agent may have a claim against his principal by reason of the expense or liability thus incurred. These claims are in substance very much alike, but, for convenience sake, will here be considered under the two heads of Reimbursement for money expended, and Indemnity against liability incurred.[72]

Tennessee Mfg. Co., 1 Sneed (Tenn.), 381.

[68] Bixby v. Parsons, 49 Conn. 483, 44 Am. Rep. 246.

[69] Bixby v. Parsons, *supra*.

[70] Widrig v. Taggart, 51 Mich. 103; Whitmarsh v. Hall, 3 Denio (N. Y.), 375; Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286; Robinson v. Weeks, 56 Me. 102; Vent v. Osgood, 19 Pick. (Mass.) 575; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Meeker v. Hurd, 31 Vt. 642; Dallas v. Hollingsworth, 3 Ind. 537; Meredith v. Crawford, 34 Ind. 399; Ray v. Haines, 52 Ill. 485.

[71] Graves, C. J., in Widrig v. Taggart, *supra*.

[72] *Subrogation.*—There are also cases in which the agent will be entitled to subrogation, or something akin to it. Thus where an agent, acting in good faith, and for the benefit of the principal, but without authority, has made himself liable to third persons upon acts or contracts for the principal, and upon which the principal has received the

§ 1601. Agent must be reimbursed for proper outlays.—The performance of the agency is undertaken for the benefit of the principal. To him belong all the profits and advantages resulting from its execution. He is also entitled to all of the profits and advantages acquired by the agent during the course of the performance. It is eminently just and proper, therefore, that the principal should bear the natural and legitimate burdens of the transaction, and that the agent should not be called upon to suffer loss or injury for his acts done in the proper discharge of his duties. And such is the rule of law.

The agent is entitled to be reimbursed by the principal for all of his advances, expenses and disbursements, made in the course of his agency, on account of or for the benefit of his principal, when such advances, expenses and disbursements have been properly incurred, and reasonably and in good faith paid, without any default on the part of the agent.[73]

benefit, as, for example, where by this means valid debts against the principal have been discharged by the agent, the latter standing in equity in the right of those whose claims have been so paid, may often recover from the principal to the extent that such debts have been so discharged. See McLaughlin v. Daily Telegraph Co., 1 Commonw. L. R. (Australia) 243.

In Chandler v. Green, 101 Ill. App. 409, it is said, "An agent who uses his private means to protect the estate of his principal is entitled to be subrogated to the position and rights of his principal. Curry v. Curry, 87 Ky. 667, 12 Am. St. Rep. 504; Gillett v. Insurance Co. of North America, 39 Ill. App. 284–286; see also, Slack v. Kirk, 67 Penn. St. 380."

For the right of the third person to recover in such a case, see Bannatyne v. MacIver, [1906] 1 K. B. 103, 2 Br. Rul. Cas. 735; McLaughlin v. City Bank, 9 N. S. Wales St. Rep. 319

[73] Clifton v. Ross, 60 Ark. 97; Arnold v. Arnold, 83 Kan. 539 (agent to buy goods must be reimbursed for price properly paid); Blazo v. Gill, 143 N. Y. 232 (an agent to supervise the construction of a house reimbursed for money paid for work and materials); Monnet v. Metz, 127 N. Y. 151 (agent reimbursed for counsel fees incurred in a litigation); Lyon v. Sweeney, 91 Mich. 478 (agent to foreclose mortgage entitled to expenses of advertising and attorney fees); Perin v. Parker, 126 Ill. 201, 9 Am. St. Rep. 571, 2 L. R. A. 336 (broker recovered for advances made in payment of grain bought for his principal); Kelley v. Maguire, 99 Ill. App. 317 (factor reimbursed for money advanced); Ward v. Tucker, 7 Wash. 399 (broker effecting insurance entitled to reimbursement for premiums); Schaefer v. Sherwood, 61 N. Y. Misc. 642 (agent to rent premises may be reimbursed for expenditures on necessary repairs); Gardner v. Kinney, 60 Ore. 292 (a surveyor reimbursed for necessary boat hire); Bayley v. Wilkins, 7 Com. B. 886 (a broker authorized to buy stock reimbursed for a call paid thereon); Ellis v. Pond, [1898] 1 Q. B. D. 426 (broker reimbursed for advances made in purchase of stock); Baker v. Wainwright, 36 Md. 336, 11 Am. Rep. 495 (an agent who has purchased land in his own name at principal's request entitled to reimbursement, although there was no written evidence of the agency to satisfy the Statute

§ 1602. ——— When not entitled.—The agent cannot, however, claim to be reimbursed for expenses or disbursements which have been rendered necessary by his own neglect to use reasonable care and diligence, or which have been incurred in violation of the express or implied conditions of the agency, or in opposition to the instructions of his principal. If such expenses are incurred, the agent must bear them himself.[74] The right to reimbursement extends only to such expenses as are properly incurred by the agent in the honest management of the business, and without default on his part.[75] The right to reimbursement does not extend to expenses which were officiously assumed by the agent,[76] nor, obviously, to those which, by the terms of the contract, were to be borne by the agent himself.[77]

The agent will also not be entitled to reimbursement for expenses incurred in promoting an enterprise which he knows to be unlawful. This question has frequently arisen with reference to the right of brokers and other agents for compensation and reimbursement with reference to dealings in "futures," stock gambling, and other forbidden

of Frauds); Mitchell's Adm'r v. Sproul, 5 J. J. Marsh. (Ky.) 264 (agent authorized to hire an attorney may have reimbursement from his principals although the agent, without sealed authority, made the contract with the attorney under seal, and in other respects inadvertently exceeded his authority); Taylor v. St. Claire, 79 Vt. 536 (an agent entitled to reimbursement for money spent on lunches, may have it, although they were not bought at the restaurant provided by the principals for other employes). To same effect: Ruffner v. Hewitt, 7 W. Va. 585; Warren v. Hewitt, 45 Ga. 501; Maitland v. Martin, 86 Pa. 120; Beach v. Branch, 57 Ga. 362; Searing v. Butler, 69 Ill. 575; Elliott v. Walker, 1 Rawle (Penn.), 126; A. B. Frank Co. v. Waldrup (Tex. Civ. App.), 71 S. W. 298; Western Assur. Co. v. Uhlhorn, 41 La. Ann. 385; Parker v. Moore, 53 C. C. A. 369, 1, 115 Fed. 799; Willingham v. Rushing, 105 Ga. 72; Bush v. Froelich, 14 S. D. 62; Kelly v. Board of Pub. Works, 75 Va. 263; Johnston v. Gerry, 34 Wash. 524; Waters v. Davies, 55 N. Y. Super. 39; Nagle v. Richards, 134 N. Y. App. Div. 29.

Interest may be allowed upon disbursements made. Kimball v. Ranney, 122 Mich. 160, 80 Am. St. Rep. 548, 46 L. R. A. 403; Perin v. Parker, 126 Ill. 201, 2 L. R. A. 336, 9 Am. St. Rep. 571.

[74] Godman v. Meixsel, 65 Ind. 62; Veltum v. Koehler, 85 Minn. 125; Dodge v. Tileston, 12 Pick. (Mass.) 328; Baily v. Burgess, 48 N. J. Eq. 411; Ellis v. Pond, [1898] 1 Q. B. D. 426; *In re* Overweg, [1900] 1 Ch. D. 209.

No reimbursement for the price of goods which, by reason of the agent's misconduct, never reach the principal. Hurst v. Holding, 3 Taunt. 32.

[75] Maitland v. Martin, 86 Pa. 120. No reimbursement for expenses incurred in schemes designed to defraud the principal. Henyan v. Trevino, —— Tex. Civ. App. ——, 137 S. W. 458.

[76] Child v. Morley, 8 T. R. 610.

[77] Champion Machine Co. v. Ervay (Tex. Civ. App.), 16 S. W. 172.

or unlawful transactions.[78] As pointed out in an earlier section,[79] however, it is not enough to defeat the agent's claim that the transaction, so far as the principal is concerned, is an unlawful one; to prevent the agent's recovery, he must have been cognizant of the unlawful purpose and have taken some direct part in its execution.[80]

Obviously no duty to reimburse arises where there exists no foundation of agency.[81]

IV.

THE AGENT'S RIGHT TO INDEMNITY.

§ 1603. Agent must be indemnified against consequences of lawful acts.—The agent has the right to assume that the principal will not call upon him to perform any duty which would render him liable in damages to third persons. Having no personal interest in the act, other than the performance of his duty, the agent should not be required to suffer loss from the doing of an act, apparently lawful in itself, and which he has undertaken to do by the direction, and for the benefit and advantage, of his principal. If in the direct performance of such an act, therefore, the agent invades the rights of third persons and incurs liability to them, the loss should fall rather upon him for whose benefit and by whose direction it was done, than upon him whose only intention was to do his duty to his principal. Wherever, then, the agent is called upon by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, the law implies a promise on the part of the principal to indemnify the agent for such losses as flow directly and immediately from the very execution of the agency.[82]

[78] See Samuels v. Oliver, 130 Ill. 73; Mohr v. Miesen, 47 Minn. 228; Mixon v. Walker, 9 Ga. App. 610; Raymond v. Parker, 84 Conn. 694; Wilson v. Nat. Fowler Bank, 47 Ind. App. 689; Riordan v. Doty, 50 S. C. 537; Wagner v. Hildebrand, 187 Pa. 136; Dows & Co. v. Glaspel, 4 N. D. 251; Bartlett v. Collins, 109 Wis. 477; Barnes v. Smith, 159 Mass. 344; Sprague v. Warren, 26 Neb. 826, 3 L. R. A. 679.

[79] See *ante*, § 121.

[80] Irwin v. Williar, 110 U. S. 499, 28 L. Ed. 225; Bibb v. Allen, 149 U. S. 481, 37 L. Ed. 819; Clews v. Jamieson, 182 U. S. 461, 45 L. Ed. 1183; Parker v. Moore, 53 C. C. A. 369, 115 Fed. 799; Lehman v. Feld, 87 Fed. 852; Ennis v. Edgar, 154 Ill. App. 543; Marengo Co. v. Hooper (Ala.), 56 So. 530; Harvey & Co. v. Doty, 50 S. C. 548, and many other cases cited in § 121, *ante*.

[81] Joseph v. Sulzberger, 136 N. Y. App. Div. 499.

[82] Moore v. Appleton, 26 Ala. 633, s. c. 34 Ala. 147, 73 Am. Dec. 448; Ramsay v. Gardner, 11 Johns. (N. Y.) 439; Stocking v. Sage, 1 Conn. 519; Greene v. Goddard, 9 Metc. (Mass.) 212; Powell v. New-

§ 1604. Liability must be a direct consequence of the execution of the agency.—It is, of course, not enough, to entitle the agent to

burgh, 19 Johns. (N. Y.) 284; Maitland v. Martin, 86 Pa. 120; Beach v. Branch, 57 Ga. 362; Searing v. Butler, 69 Ill. 575; Elliott v. Walker, 1 Rawle (Penn.), 126; Otter Creek Lbr. Co. v. McElwee, 37 Ill. App. 285; Selz v. Guthman, 62 Ill. App. 624; First Nat. Bank v. Tenney, 43 Ill. App. 544; Denney v. Wheelwright, 60 Miss. 733: Castle v. Noyes, 14 N. Y. 329; Brown v. Mechanics Bank, 43 N. Y. App. Div. 173; Guirney v. St. Paul, etc., Ry. Co., 43 Minn. 496, 19 Am. St. Rep. 256; Henderson v. Eckern, 115 Minn. 410, Ann. Cas. 1912 D. 989; Hoggan v. Cahoon, 26 Utah, 444, 99 Am. St. Rep. 837; Dugdale v. Lovering, L. R. 10 C. P. 196.

No indemnity against any but the direct and natural consequences of the act. People v. Town Auditors, 74 N. Y. 310.

In First National Bank v. Tenney, 43 Ill. App. 544, it appeared that Tenney, acting as attorney for the bank, which was creditor of a certain debtor in failing circumstances, at the request of the bank, took a judgment upon the bank's claim in his own name, and proceeded to enforce it by a sale of the debtor's goods which he bought in in his own name for the benefit of the bank. The debtor then brought action against Tenney, the bank and others, charging them with fraudulent collusion to defraud the debtor and other creditors. A judgment was rendered in this action against the defendants, from which the bank declined to appeal. Tenney appealed for his own protection and reversed the judgment. He then brought action against the bank to recover for services and expenses in securing a reversal of the judgment against himself. *Held*, that he was entitled to recover. The court said: "The principal is not bound to appeal from a decree rendered against his agent; he may submit to it, but he is bound to indemnify his agent, and this means something more than that after the agent has paid the judgment, or under it been stripped of his goods by due process of law, that the principal will then afford remuneration. The principal may pay if he will, but he cannot lie supinely by and let his agent suffer the consequences of a decree which he, as principal, is legally and morally bound to pay. Neither is the agent bound to wait indefinitely before he takes measures to protect himself; having notified, if practicable, the principal of the situation, he may proceed to measures for his own and his principal's relief, measures which, in the case of an appeal taken, are necessarily in the interest of the principal and tend to his exoneration. When sued for an act done in pursuance of his employment, he is not obliged to let judgment go against him, but may defend and recover the expenses of a defense *bona fide* made."

In Guirney v. St. Paul, etc., R. Co., 43 Minn. 496, 19 Am. St. Rep. 256, the defendant, its agents and servants, had been enjoined from molesting the Fargo railroad in constructing a crossing over the defendant's roadbed. The plaintiff was foreman of construction for the defendant, and had not heard of the injunction. The defendant directed the plaintiff to prevent the Fargo company from interfering with the defendant's tracks, which order the plaintiff obeyed and thereby unwittingly violated the injunction. He was arrested for contempt of court, and brings this action to recover damages occasioned thereby, and it was held that he could recover.

In a great variety of cases sheriffs, constables, and similar officers, who have, at the specific direction of a party or his attorney, levied upon

indemnity, that the loss or injury happened while he was acting as agent: it must be a direct and natural consequence of the execution of the agency.[83] Thus for an injury caused by the wrongful or negligent act of a third person, for which the execution of the authority gave, perhaps, the opportunity, but of which it was not the legal cause, the principal would not be responsible. If, for example, a broker while going upon his principal's business, should be way-laid by a robber, or if a traveling salesman, going from town to town, should be injured by the negligence of a carrier, the principal would not be liable,[84] any more than he would be if the agent, during the existence of the agency, should contract a contagious disease or be struck by lightning. As has been already stated, the injury for which indemnity is sought, must be the direct and natural consequence of the doing of that which the principal directed to be done.

or seized particular goods pointed out to them,—as distinguished from the mere obedience to a general writ or the ordinary performance of their official duty,—have been held entitled to indemnity if those specific instructions prove unauthorized and involve the officer in liability. See Selz v. Guthman, 62 Ill. App. 624; Grimes v. Taylor, 93 Ill. App. 494; Gower v. Emery, 18 Me. 79; Henderson v. Eckern, 115 Minn. 410, Ann. Cas. 1912 D. 989; Ranlett v. Blodgett, 17 N. H. 298, 43 Am. Dec. 603.

In Denney v. Wheelwright, 60 Miss. 733, Wheelwright, as agent for Denney, bargained for the shipment of lumber, upon consignment, and procured an advance from the consignee and turned the amount over to Denney. The venture resulted in loss, and the consignee sued Wheelwright to recover the advances. Wheelwright notified Denney of the action and gave him an opportunity to defend, but the latter made no defense and judgment was rendered against Wheelwright. Having satisfied this judgment, Wheelwright sued Denney to recover the amount of the judgment with attorney's fees and costs. *Held*, that he was entitled to recover.

The right to indemnity covers attorney's fees necessarily incurred. *In re* Wells, 15 The Rep. 169.

[83] The defendants instructed the plaintiff, an auctioneer in Paris, to advertise for sale a mare which they represented to him to be a thoroughbred, and registered in the English Stud Book under the name of Pentecost. The plaintiff complied. A Frenchman, the owner of a thoroughbred mare also called Pentecost, sued the plaintiff in France, alleging that he had suffered damage through the defendant's mare being advertised for sale under that name, and recovered. Plaintiff then sued defendants for indemnity. It being shown that the representation made by the defendants concerning their mare was true, *Held*, that the defendants were not liable, the damages recovered from the plaintiff not being due to any wrongful act on their part. Halbronn v. International Horse Agency, [1903] 1 K. B. 270; Frixione v. Tagliaferro, 10 Moore P. C. 175, was distinguished.

[84] Unless, of course, the principal had reason to anticipate danger to the agent in the employment and failed to warn him. Baxter v. Roberts, 44 Cal. 187, 13 Am. Rep. 160.

§ 1605. ——— Illustrations.—Within the rule that the principal must protect the agent against the direct and natural consequences of the execution of the agency, an agent is entitled to be indemnified when he is compelled to pay damages for taking personal property by direction of his principal, which, though claimed adversely by another, he had reasonable ground for believing to belong to his principal.[85] So an agent, who, acting under the direction of his principal, cuts timber by mistake partly upon the land of another, which timber is received and used by the principal is entitled to recover of his principal what he has been compelled to pay as damages for the trespass.[86] And an agent, who, having recovered upon a claim due to his principal, and having paid the proceeds to him, is compelled, upon a reversal of the judgment, in accordance with the forms of law and through no fault of his own, to refund the amount previously collected, is entitled to be indemnified by the principal against the consequences of such reversal.[87]

§ 1606. ——— So where a person is employed in the usual course of his business as an auctioneer or warehouseman to sell or deliver goods, by one who claims to have a right to do so, the law will imply a promise from the latter to indemnify him if he be compelled to pay damages to another who establishes a superior right to the goods.[88] And so when a railroad conductor, who had acted under express instructions from the company, was charged in damages to one whom he had ejected from the train for not producing such a ticket as he had been directed, though unlawfully, to insist upon, it was held that he was entitled to be indemnified by the company.[89] So where an agent, who had purchased and shipped property for his principal and which the principal failed to pay for, was sued and arrested for the price and was compelled to pay it, it was held that the principal was bound to reimburse him for the amount paid and for his costs and attorney's fees.[90] In these cases the agent need not wait to be sued by the third

[85] Moore v. Appleton, 26 Ala. 633, s. c. 34 Ala. 147, 73 Am. Dec. 448; Avery v. Halsey, 14 Pick. (Mass.) 174; Hoggan v. Cahoon, 26 Utah, 444, 99 Am. St. Rep. 837.

[86] Drummond v. Humphreys, 39 Me. 347.

[87] D'Arcy v. Lyle, 5 Binney (Pa.), 441, 1st Am. Leading Cases, 856. This case is one of the most remarkable in the books.

Compare Frixione v. Tagliaferro, 10 Moore P. C. 175, where it is said that the question whether the decision was legally right or wrong is immaterial if it be one which the agent is bound to recognize.

[88] Nelson v. Cook, 17 Ill. 443; Adamson v. Jarvis, 4 Bing. 66; Butts v. Gibbons, 2 Ad. & Ell. 57.

[89] Howe v. Buffalo, etc., R. R. Co., 37 N. Y. 297.

[90] Clark v. Jones, 84 Tenn. (16 Lea) 351. This was true, said the court, however wrongful might be the recovery against the agent.

party for damages, but may pay at once and thereupon recover from the principal.[91] Where, however, he thus pays, without the protection of a judgment which will bind the principal, he can recover from the principal only to the extent of the injury actually sustained by the third person, though he may, in fact, have paid him more.[92]

It is immaterial whether the agent be sued alone or jointly with the principal. The right to indemnity exists in either case.[93]

§ 1607. Right to indemnity extends to contractual obligations properly incurred.—The agent's right to indemnity is not confined to cases,—which happen to be those thus far chiefly referred to,—wherein a tort obligation has been incurred to a third person by reason of the agent's acts, but it extends also to contractual obligations properly incurred in the execution of the agency and on the principal's account. Thus where an agent authorized to contract for the use of a vessel of the principal's, and who did so in his own name, was compelled to pay damages because the principal refused to furnish the vessel according to the agreement, it was held that he could recover from the principal.[94] Neither is the right confined to contractual obligations expressly authorized, but will extend to those which may fairly be deemed to have been contemplated when the execution of the authority was directed. Within the operation of this principle would be included obligations imposed by custom, either generally operative or prevailing in the markets or upon the exchanges in which the agent was expected to deal.[95]

§ 1608. No indemnity where loss caused by agent's default.—The agent obviously can have no claim against his principal for indemnity

[91] Saveland v. Green, 36 Wis. 612.

[92] Saveland v. Green, 36 Wis. 612.

[93] Moore v. Appleton, 26 Ala. 633, s. c. 34 Ala. 147, 73 Am. Dec. 448.

[94] Saveland v. Green, 36 Wis. 612. To the same effect, where principal induced his agent to undertake in his own name to sell a certain number of bales of cotton which the principal agreed to furnish to him, but did not. Dozier v. Davison, 138 Ga. 190.

In Haskin v. Haskin, 41 Ill. 197, the plaintiff, agent, while carrying on in his own name, the warehouse business of defendant, issued a warehouse receipt in his own name, which was outstanding when the agency ceased. Defendant refused to honor this receipt, and plaintiff was compelled to protect it. *Held*, that defendant must indemnify the plaintiff. *Held*, also that the fact that the plaintiff had not entered the transaction upon the books, did not defeat his right to recover, if the defendant was not injured thereby.

[95] In Bayliffe v. Butterworth, 1 Exch. 425, a liability incurred by the broker in accordance with the known Liverpool usage, was held to be within the rule. In Whitehead v. Izod, L. R. 2 C. P. 228, a similar liability imposed by the rules of the stock exchange was included. To same effect: Taylor v. Stray, 2 C. B. N. S. 175; Stray v. Russell, 1 E. & E. 888; Ulster Co. Sav. Inst. v. Fourth Nat. Bank, 8 N. Y. Supp. 162.

as to losses caused by the agent's own misconduct or default.[96] And where the principal is not in default in meeting his obligations, it is held that the agent can have no claim for indemnity against losses caused by his financial inability to meet the obligations which he has voluntarily incurred on the principal's account in the execution of the agency. Thus, for example, where brokers who were carrying stocks for their principal became, by reason of a general failure of their clients to meet their obligations to them, unable to meet their own engagements, and by reason of this were declared defaulters by the stock exchange and subjected to certain liabilities according to its rules, it was held that the principal was not obliged to indemnify his brokers against those liabilities. The court agreed, "that where the agent is subjected to loss, not by reason of his having entered into the contracts into which he was authorized to enter by his principal, but by reason of a default of his own, that is to say, as in this case, by reason of his insolvency, brought on by want of means to meet his other primary obligations, it cannot be said that he has suffered loss by reason of his having entered into the contracts made by him on behalf of his principal, and consequently there is no promise which can be implied on the part of his principal to indemnify him." [97]

But it will be otherwise where the agent's failure is caused solely and directly by the principal's failure to meet his obligations to the agent.[98]

§ 1609. No indemnity where obligation incurred in excess of authority.—It is equally obvious that the agent can have no claim for indemnity against obligations, contractual or otherwise, which he incurred in excess of his authority, not justified by any emergency or exigency which might condone it.[99] "In order to entitle an agent to recover from his principal," it is said in a leading case,[1] "he must show, first, that the loss arose from the fact of his agency; secondly, that he was acting within the scope of his authority; and, thirdly, that the loss was not attributable to any default or laches on his part."

But though the act was at the time in excess of his authority, the principal may afterward ratify it as in other cases, and if he does so unconditionally and with full knowledge of the facts, the agent will be entitled to indemnity, as though the act had been originally authorized.[2]

[96] Hurst v. Holding, 3 Taunt. 32.
[97] Duncan v. Hill, L. R. 8 Ex. 242.
[98] Lacey v. Hill, L. R. 18 Eq. 182.
[99] Frixione v. Tagliaferro, 10 Moore P. C. 175; J. I. Case Thresh. Mach. Co. v. Gardner, 24 Ky. Law Rep. 63.
[1] Frixione v. Tagliaferro, *supra*.
[2] Frixione v. Tagliaferro, *supra*.

§ 1610. ——— Unless lack of authority attributable to principal's default.—But where the agent's lack of authority was owing to the principal's default the agent would not be denied indemnity. Where the principal undertakes to direct what he himself has no authority to perform, the case is clear, as has been seen in the foregoing sections. But the agent would also be entitled to indemnity where the principal, having conferred authority, allowed the agent to go on in ignorance that the authority so conferred had been terminated by events within the peculiar knowledge of the principal but not of the agent, or by the revocation by the principal himself of which he had given the agent no notice where notice was due.

Of course, however, there would be no duty to indemnify the agent against the termination of his authority where it was terminable without notice, or where it was terminated by acts or events of which the agent was bound to take notice.

§ 1611. No indemnity where act is unlawful.—The principal cannot, however, require the agent to perform an unlawful act, and if the agent performs an act which he knows to be such, or which he must be presumed to have known was unlawful, he must answer for it like any other wrong doer, and like other wrong doers he is entitled neither to indemnity nor contribution.[3] And in such a case not only does the law not *imply* a promise to indemnify, but it will not enforce even an express promise to that effect.

An express bond, therefore, or other formal written agreement to indemnify the agent against consequences of a proposed act known, or which he must be presumed to have known, to be unlawful, is void, as against the policy of the law. But this rule does not extend to cases wherein parties, in the prosecution of their legal rights, in good faith, have committed an unintentional wrong against another, but is limited to those cases wherein the intention is to commit a trespass; it does not include cases wherein the parties are actuated by honest motives in the assertion of what they believe to be their rights under the law, although it should subsequently transpire that they were not justified in doing the acts contemplated by them when the bond was executed.[4]

[3] Coventry v. Barton, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376.

[4] Coventry v. Barton, *supra*; Allaire v. Ouland, 2 Johns. (N. Y.) Cas. 54; Castle v. Noyes, 14 N. Y. 332; Nelson v. Cook, 17 Ill. 449; Stanton v. McMullen, 7 Ill. App. 326; Moore v. Appleton, 26 Ala. 633; Ives v. Jones, 3 Iredell's (N. Car.) L. 538, 40 Am. Dec. 421; Holman v. Johnson, 1 Cowp. 341; Howe v. Buffalo, etc., R. R., 37 N. Y. 299; Stone v. Hooker, 9 Cow. (N. Y.) 154; Jacobs v. Pollard, 10 Cush. (Mass.)

But where the act, though unlawful, has already been committed, a bond or other agreement based upon sufficient consideration to indemnify the agent against the consequences of it is valid.[5]

§ 1612. ——— But the doctrine of the preceding section was held not applicable where the business in which the principal was employed was not actually illegal, but merely one concerning which no action at law could be maintained. Thus the defendant had employed the plaintiff, who was a turf commission agent, to make bets for him upon horse races, and the bets were made in the plaintiff's name and lost, after which the defendant forbade the plaintiff to pay the debts. The agent however paid them, and brought action for indemnity. It appeared that if such an agent did not pay a debt so made, he was liable to be turned out of the horse exchange, and thereby prevented from going on with his business. It was held that the plaintiff was entitled to recover. Bowen, L. J., said: "I feel the force of the point that the obligation to pay a lost bet relied upon by the plaintiff is not recognized by law; but the plaintiff has placed himself in a position of pecuniary difficulty at the defendant's request, who impliedly contracted, I think, to indemnify him from the consequences which would ensue in the ordinary course of his business from the step which he had taken." [6]

§ 1613. Agent indemnified only against loss, not mere liability.— In accordance with what is probably the general rule, as a matter of legal liability at any rate, although the rule in equity may be different, it is said that the implied obligation of the principal to indemnify, is an obligation to indemnify against loss and not merely against liability.[7] The agent would therefore be compelled to show that he has actually sustained loss, although, as has been already seen,[8] where his liability is fixed, he need not wait until he has been sued by the other party, but may discharge the liability and recover indemnity from the principal.

287, 57 Am. Dec. 105; Shotwell v. Hamblin, 28 Miss. 156, 55 Am. Dec. 83; Forniquet v. Tegarden, 24 Miss. 96; Cumpston v. Lambert, 18 Ohio, 81, 51 Am. Dec. 442; Jameison v. Calhoun, 2 Speer (S. Car.), 19; Kemper v. Kemper, 3 Rand. (Va.) 8; Davis v. Arledge, 3 Hill (S. Car.), L. 170, 30 Am. Dec. 360; Atkins v. Johnson, 43 Vt. 78, 5 Am. Rep. 260; Armstrong v. Clarion Co., 66 Pa. 218, 5 Am. Rep. 368; Arnold v. Clifford, 2 Sumner (U. S. C. C.), 238.

[5] Hacket v. Tilley, 11 Mod. 93; Kneeland v. Rogers, 2 Hall (N. Y. Sup. Ct.), 579; Hall v. Huntoon, 17 Vt. 244, 44 Am. Dec. 332; Knight v. Nelson, 117 Mass. 458; Griffiths v. Hardenbergh, 41 N. Y. 464; Doty v. Wilson, 14 Johns. (N. Y.) 378.

[6] Read v. Anderson, 13 Q. B. Div. 779.

[7] Brown v. Mechanic's Bank, 48 N. Y. App. Div. 173. See also, Otter Creek Lbr. Co. v. McElwee, 87 Ill. App. 285.

[8] See *ante*, § 1606.

V.

THE AGENT'S RIGHT TO PROTECTION FROM INJURY.

§ 1614. In general.—It is not within the scope of this work to enter into a minute discussion of the liability of the employer for injuries happening to his employee in the course of his employment, either through the negligence of the employer or of a fellow-employee. These questions belong more appropriately to treatises on the subjects of Employer's Liability, Master and Servant, Torts, or Negligence. A general statement of the more important rules which govern in these cases is all which is deemed pertinent and will be given. Nothing like a full collection of the cases has been attempted. They are now so numerous as to be wholly beyond the range of a discussion which must be confined to a few pages.

1. Risks Incident to the Business.

§ 1615. General rule—Master not liable.—Every undertaking for the rendition of services is attended with more or less of risk incident to the business itself. Risks of this nature are as much within the knowledge and control of the servant or agent as of the master, and are presumably contemplated and considered by the servant when he accepts the undertaking. They result from no fault or neglect of the master, but arise from the very nature of the thing to be done, or from the circumstances under which it must be done. With reference to these, it is the rule of the law that the master is not responsible to the servant for injuries received in the execution of the undertaking and which result from the natural and ordinary risks and perils which are incident to the performance of such services including, as will be seen, the risk of the negligence of fellow servants.[9]

[9] **Assumption of Risk.** Sweeney v. Central Pac. R. R. Co., 57 Cal. 15; Orman v. Mannix, 17 Cal. 564, 31 Am. St. Rep. 340, 17 L. R. A. 602; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Bell v. Western, etc., R. R. Co., 70 Ga. 566; Prather v. Richmond, etc., R. R. Co., 80 Ga. 427, 12 Am. St. Rep. 263; Minty v. Union Pacific Ry. Co., 2 Idaho, 471, 4 L. R. A. 409; Bryant v. Burlington, etc., Ry. Co., 66 Iowa, 305, 55 Am. Rep. 275; Dowell v. Burlington, etc., Ry. Co., 62 Iowa, 629; Penn. R. R. Co. v. Wachter, 60 Md. 395; Wonder v. Baltimore, etc., R. R. Co., 32 Md. 411, 3 Am. Rep. 143; South Baltimore Car Works v. Schaefer, 96 Md. 88, 94 Am. St. Rep. 560; Consolidated Gas Co. v. Chambers, 112 Md. 324, 26 L. R. A. (N. S.) 509; Farwell v. Boston & Worcester R. R., 4 Metc. (Mass.) 49, 38 Am. Dec. 339; Yeaton v. Boston, etc., R. R. Co., 135 Mass. 418; Moulton v. Gage, 138 Mass. 390; Ft. Wayne, etc., R. R. Co. v. Gildersleeve, 33 Mich. 133; Hathaway v. Michigan Cent. R. R. Co., 51 Mich.

This rule has usually been founded upon two reasons. One is that above mentioned, that the servant knowing that he will be exposed to incidental risks, and having made no provision in the contract that they shall be otherwise borne, must be supposed to have contracted upon the basis that, as between himself and the master, he would assume the responsibility of the result.[10] The other is that this rule best subserves and promotes the public interests. If the servant is to take the risks himself, he will naturally be more careful and prudent than if he could demand indemnity from his master. The result of this care and prudence is, not only that injuries are less liable to occur to the servant himself, but that they are also much less liable to happen to third persons, with the care of whose persons or property the servant may be intrusted.[11]

The real foundation of the rule, however, is not either one of these, but the following: Under the law of life as well as under the law of the land, a loss must rest upon him on whom it falls unless there is some reason and opportunity to shift it to some one else. Under the law of justice, and, notwithstanding some notable exceptions, under the common law, a person can not be held liable for an injury for which he is in no wise at fault. With reference to the risks here concerned, they inhere in the business and are not attributable to the negligence of the master. Not being attributable to the fault of the mas-

253, 47 Am. Rep. 569; Schroeder v. C. & A. Ry. Co., 108 Mo. 322, 18 L. R. A. 827; Coyle v. Griffing Iron Co., 63 N. J. L. 609, 47 L. R. A. 147; Gibson v. Erie Ry. Co., 63 N. Y. 449, 20 Am. Rep. 552; Laning v. N. Y. Cent. R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Sweeney v. Berlin, etc., Co., 101 N. Y. 520, 54 Am. Rep. 722; Lewis v. Seifert, 116 Pa. 628, 2 Am. St. Rep. 631; Watson v. Ry. Co., 58 Tex. 434; Nordstrom v. Spokane, etc., R. Co., 55 Wash. 521, 25 L. R. A. (N. S.) 364; Bormann v. Milwaukee, 93 Wis. 522, 33 L. R. A. 652; Kohn v. McNulta, 147 U. S. 238, 37 L. Ed. 150; Southern Pac. Co. v. Seley, 152 U. S. 145, 38 L. Ed. 391; Texas & Pacific Ry. Co. v. Archibald, 170 U. S. 665, 42 L. Ed. 1188; Clarke v. Holmes, 7 H. & N. 937.

[10] Hutchinson v. Railway Co., 5 Exch. 343; Farwell v. Boston, etc., R. Co., 4 Metc. (Mass.) 49, 38 Am. Dec. 339.

It is, indeed, true that judges often declare that the assumption of the inherent risks is not a matter of express or implied agreement at all but a mere matter of law; and that the only risks to which the doctrine of assumption can apply are the extraordinary ones which arise from the negligence of the master. See Bria v. Westinghouse, 133 N. Y. App. Div. 346; Mansell v. Conrad, 125 N. Y. App. Div. 634. See also, Denver, etc., R. Co. v. Norgate, 72 C. C. A. 365, 141 Fed. 247, 6 L. R. A. (N. S.) 981, and cases cited.

[11] Tuttle v. Milwaukee R. Co., 122 U. S. 189, 30 L. Ed. 1114; Priestley v. Fowler, 3 Mees & Wels. 1; Illinois Central R. R. Co. v. Cox, 21 Ill. 20, 71 Am. Dec. 291; Lawler v. Androscoggin R. R. Co., 62 Me. 463, 16 Am. Rep. 492; Hanrathy v. Northern, etc., R. R. Co., 46 Md. 280.

ter, they can not be shifted upon him under the common law, but only by some statute or by contract. There being, by the hypothesis, no statute and no contract, the loss remains where it fell, upon the servant. It is not strictly accurate to say that he assumed it: he could not escape it. To say that he assumed the risk, however, would not be objectionable if it did not lead to confusion with another situation, hereafter to be considered, wherein there is room to escape, namely, where the master has been negligent, and the question arises whether the servant has assumed the risk of it in such wise as to relieve the master from a liability which would otherwise have fallen upon him.

§ 1616. ——— This "assumption" of the ordinary and inherent risks, by the mere fact of accepting the employment, of course presupposes, in the ordinary case, that the master has not negligently done and will not negligently do anything by which these ordinary and inherent risks will be extended or enlarged; in other words, that the master will perform his ordinary duties for the protection of the servant. There is, by the mere fact of entering upon the employment, no assumption of risks arising from the negligence of the master.

A known and existing conditon, however, contemplated at the time of the employment may also be assumed thereby, under rules hereafter to be considered, although resulting from the negligent manner in which the master carries on his business.

2. Negligence of the Master.

§ 1617. Master responsible for his own negligence.—But although the servant must thus bear the responsibility of the risks which are incident to his employment, he has, as has been stated, a right to expect that the master will not add to or increase these risks or create others by his own personal negligence. It has been seen that the fact of the agency is no excuse to the agent for injuries resulting to others by his own neglect. No man can relieve himself from the responsibilities which rest alike upon all persons by becoming an agent or servant and the same rule applies to the principal or master.

If, therefore, injury results to the servant from the personal negligence of the master, the master is liable in the same manner and to the same extent as though the relation did not exist [12] unless he can

[12] Rhoades v. Varney, 91 Me. 222; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Quincy Mining Co. v. Kitts, 42 Mich. 34; Johnson v. Boston Tow Boat Co., 135 Mass. 215, 46 Am. Rep. 458.

Fellow servant doctrine does not apply to negligence of the master where master is working with servant. Ashworth v. Stanwix, 3 El. & El. 701; Rhoades v. Varney, *supra*.

escape upon the ground of contributory negligence or assumption of the risk. The fact that the negligence of a fellow servant contributed with the master's negligence to cause the injury does not relieve the master.[13]

This negligence of the master may consist in his failure to observe one or more of several duties which he owes to the servant, the more important of which deserve specific mention.

§ 1618. I. For dangerous premises.—The master may incur liability to the servant for injuries received by the latter from the perils or dangers of the master's premises, of which the servant had no knowledge or notice and which he had no reason to expect, but of which the master knew, or by the exercise of reasonable care and diligence might have known. It is the general rule of the law that the owner or occupant of land or other premises is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be there transacted or permitted by him, for an injury there occasioned by the unsafe condition of the land or other premises, or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and of which he has given no notice. And this rule applies for the protection of the servant as well as of a stranger. Where the service is to be performed upon the principal's premises, it is the duty of the principal to exercise reasonable care to provide a reasonably suitable place in which the agent, exercising due care, can perform his duty without exposure to dangers that do not ordinarily come within the scope of such employments as usually carried on, and having provided it, to keep the same in a reasonable state of repair.[14] The principal or master is not a guarantor in

[13] Kennedy v. Swift, 234 Ill. 606, 123 Am. St. Rep. 113.

[14] Louisville, etc., R. R. Co. v. Stutts, 105 Ala. 368, 53 Am. St. Rep. 127; Elledge v. Ry. Co., 100 Cal. 282, 38 Am. St. Rep. 290; Kennedy v. Chase, 119 Cal. 637, 63 Am. St. Rep. 153; Williams v. Sleepy Hollow Min. Co., 37 Colo. 62, 7 L. R. A. (N. S.) 1170, 11 A. & E. Ann. Cas. 111; Burnside v. Peterson, 43 Colo. 382, 17 L. R. A. (N. S.) 76; McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181; Szymanski v. Blumenthal, 4 Penne. (Del.) 511, 103 Am. St. Rep. 132; Super. Coal & Mining Co. v. Kaiser, 229 Ill. 29, 120 Am. St. Rep. 233; Rogers v. Cleveland, etc., Ry. Co., 211 Ill. 126, 103 Am. St. Rep. 185; Western Stone Co. v. Muscial, 196 Ill. 382, 89 Am. St. Rep. 325; Morris & Co. v. Malone, 200 Ill. 132, 93 Am. St. Rep. 180; McKee v. Chicago, etc., R. R. Co., 83 Iowa, 616, 13 L. R. A. 817; Barto v. Iowa Telephone Co., 126 Iowa, 241, 106 Am. St. Rep. 347; Schmalstieg v. Leavenworth Coal Co., 65 Kan. 753, 59 L. R. A. 707; Tradewater Coal Co. v. Johnson, 24 Ky. L. Rep. 1777, 61 L. R. A. 161; Bowden v. Derby, 97 Me. 536, 94 Am. St. Rep. 516, 63 L. R. A. 223;

this respect, nor is it his duty to aim at perfection; reasonable care to provide and maintain a reasonably safe place is the measure of the principal's or master's obligation.[15] Failing in this, he will, subject to the doctrine of assumption of risks hereafter considered, be liable for an injury resulting therefrom.

§ 1619. ——— **Warning.**—Since the servant is presumed to know the usual and ordinary risks incident to the business itself, the master owes the servant no duty to warn him against them. This is true, also, of obvious and open dangers.[16] But, on the other hand, the servant has a reasonable right to expect that if the lands and premises of the master, where it is the express or implied right or duty of the servant to go or to be, in the performance of his undertaking, contain unusual or hidden dangers from which he may suffer injury and which exist to the knowledge of the master, but of which the servant is igno-

Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Flynn v. Prince Collins Co., 198 Mass. 224, 17 L. R. A. (N. S.) 568; Swoboda v. Ward, 40 Mich. 420; Dayharsh v. Hannibal, etc., R. R. Co., 103 Mo. 570, 23 Am. St. Rep. 900; Burdict v. Missouri Pac. R. R. Co., 123 Mo. 221, 45 Am. St. Rep. 528, 26 L. R. A. 384; Saunders v. Eastern Hydraulic, etc., Co., 63 N. J. L. 554, 76 Am. St. Rep. 222; Burns v. Delaware, etc., Tel. Co., 70 N. J. L. 745, 67 L. R. A. 956; Donnegan v. Erhardt, 119 N. Y. 468, 7 L. R. A. 527; Wellston Coal Co. v. Smith, 65 Ohio St. 70, 87 Am. St. Rep. 547, 55 L. R. A. 99; Anderson v. Bennett, 16 Ore. 515, 8 Am. St. Rep. 311; Collins v. Harrison, 25 R. I. 489, 64 L. R. A. 156; Downey v. Gemini Mining Co., 24 Utah, 431, 91 Am. St. Rep. 798; Fisher v. Chesapeake, etc., Ry. Co., 104 Va. 635, 2 L. R. A. (N. S.) 954; McMillan v. North Star Min. Co., 32 Wash. 579, 98 Am. St. Rep. 908; Portance v. Lehigh Valley Co., 101 Wis. 574, 70 Am. St. Rep. 932; McMahon v. Ida Mining Co., 95 Wis. 308, 60 Am. St. Rep. 117; Johnson v. First Nat. Bank, 79 Wis. 414, 24 Am. St. Rep. 722; Armour & Co. v. Russell, 144 Fed. 614, 75 C. C. A. 416, 6 L. R. A. (N. S.) 602.

[15] See Galveston, etc., Ry. Co. v. Gormley, 91 Tex. 393, 66 Am. St. Rep. 894; Little Rock, etc., Ry. Co. v. Eubanks, 48 Ark. 460, 3 Am. St. Rep. 245.

[16] *No duty to warn where obvious.* —Hagins v. Bell Telephone Co., 134 Ga. 641, 137 Am. St. Rep. 270; Haskell v. Przezdziankowski, 170 Ind. 1, 127 Am. St. Rep. 352, 19 L. R. A. (N. S.) 972; Podvin v. Pepperell Mfg. Co., 104 Me. 561, 129 Am. St. Rep. 411; Hardy v. Chicago, R. I., etc., R. Co., 139 Iowa, 314, 19 L. R. A. (N. S.) 997; Cooper v. Cashman, 190 Mass. 75, 3 L. R. A. (N. S.) 209; Anderson v. Columbia Improvement Co., 41 Wash. 83, 2 L. R. A. (N. S.) 840; Bollington v. Louisville, etc., R. Co., 125 Ky. 186, 8 L. R. A. (N. S.) 1045; Ford v. Pulp Co., 172 Mass. 544, 48 L. R. A. 96; Louisville, etc., R. Co. v. Boland, 96 Ala. 626, 18 L. R. A. 260; McLaine v. Head & D. Co., 71 N. H. 294, 93 Am. St. Rep. 522, 58 L. R. A. 462; Rahles v. Thompson, 137 Wis. 506, 23 L. R. A. (N. S.) 296; Nelson-Bethel Co. v. Pitts, 131 Ky. 65, 23 L. R. A. (N. S.) 1013; Nordstrom v. Spokane R. Co., 55 Wash. 521, 25 L. R. A. (N. S.) 364.

No duty to warn even a minor employee of dangers obvious to one of his years and discretion. Cronin v.

rant, he will receive notice of them so as to be upon his guard.[17] This duty of warning would be increased if the servant were, to the knowledge of the master, so young or ignorant or inexperienced as to be less likely to anticipate dangers from the employment than a person of greater age, knowledge or experience.[18]

Columbian Mfg. Co., 75 N. H. 319, 29 L. R. A. (N. S.) 111; Beghold v. Auto Body Co., 149 Mich. 14, 14 L. R. A. (N. S.) 609; Whalen v. Rosnosky, 195 Mass. 545, 122 Am. St. Rep. 271.

[17] Louisville, etc., R. Co. v. Hall, 87 Ala. 708, 13 Am. St. Rep. 84, 4 L. R. A. 710; West. Ry. v. Russell, 144 Ala. 142, 113 Am. St. Rep. 24; Burnside v. Peterson, 43 Colo. 382, 96 Pac. 256, 17 L. R. A. (N. S.) 76; Consolidated Coal Co. v. Wombacher, 134 Ill. 57; Louisville, etc., Ry. Co. v. Wright, 115 Ind. 378, 7 Am. St. Rep. 432; Pittsburg, etc., Ry. Co. v. Adams, 105 Ind. 151; Salem Stone & Lime Co. v. Griffin, 139 Ind. 141; Christopherson v. Chicago, etc., Ry., 135 Iowa, 409, 124 Am. St. Rep. 284; Brice-Nash v. Barton Salt Co., 79 Kan. 110, 131 Am. St. Rep. 284, 19 L. R. A. (N. S.) 749; Myhan v. Louisiana, etc., Co., 41 La. Ann. 964, 17 Am. St. Rep. 436, 7 L. R. A. 172; Faren v. Sellers & Co., 39 La. Ann. 1011, 4 Am. St. Rep. 256; Hume v. Fort Halifax Power Co., 106 Me. 78, 138 Am. St. Rep. 332; Crimmins v. Booth, 202 Mass. 17, 132 Am. St. Rep. 468; Ribich v. Lake Superior Smelting Co., 123 Mich. 401, 81 Am. St. Rep. 215, 48 L. R. A. 649; Parkhurst v. Johnson, 50 Mich. 70, 45 Am. Rep. 28; McDonald v. Chicago, etc., Ry. Co., 41 Minn. 439, 16 Am. St. Rep. 711; Hewett v. Woman's Hospital, 73 N. H. 556, 7 L. R. A. (N. S.) 496; Willis v. Plymouth Telephone Co., 75 N. H. 453, 30 L. R. A. (N. S.) 477; Blaisdale v. Davis Paper Co., 75 N. H. 497, 139 Am. St. Rep. 735; Western Union Tel. Co. v. McMullen, 58 N. J. L. 155, 32 L. R. A. 351; Cetofone v. Camden Coke Co., 78 N. J. L. 662, 27 L. R. A. 1058; Brennan v. Gordon, 118 N. Y. 489, 16 Am. St. Rep. 775, 8 L. R. A. 818; Wagner v. Jayne Chemical Co., 147 Pa. 475, 30 Am. St. Rep. 745; Galveston, etc., Ry. Co. v. Garrett, 73 Tex. 262, 15 Am. St. Rep. 781; Missouri Pacific Ry. Co. v. White, 76 Tex. 102, 18 Am. St. Rep. 33; Michael v. Roanoke Machine Works, 90 Va. 492, 44 Am. St. Rep. 927; Miner v. Franklin County Tel. Co., 83 Vt. 311, 26 L. R. A. (N. S.) 1195; Kliegel v. Aitken, 94 Wis. 432, 35 L. R. A. 249; Cincinnati, etc., R. Co. v. Gray, 41 C. C. A. 535, 101 Fed. 623, 50 L. R. A. 47.

In Dougherty v. Dobson, 214 Pa. 252, 8 L. R. A. (N. S.) 90, it was held that the master, owing such a duty to a minor, could not discharge it by placards, warning employees of the danger, posted around the room, when the foreman expressly directed the doing of the act warned against.

But in Shuster v. Philadelphia, etc., R. Co., 6 Penne. (Del.) 4, 4 L. R. A. (N. S.) 407, it was held that a placard posted on a freight car, notifying employees that it was "crippled" and dangerous, was a sufficient discharge of his duty to warn.

Duty to warn, when it exists, is non-delegable: Brice-Nash v. Barton Salt Co., 79 Kan. 110, 131 Am. St. Rep. 284, 19 L. R. A. (N. S.) 749; Koerner v. St. Louis Car Co., 209 Mo. 141, 17 L. R. A. (N. S.) 292; Anderson v. Pittsburg Coal Co., 108 Minn. 455, 26 L. R. A. (N. S.) 624.

[18] Tedford v. Los Angeles Elec. Co., 134 Cal. 76, 54 L. R. A. 85; Ingerman v. Moore, 90 Cal. 410, 25 Am. St. Rep. 138; May v. Smith, 92 Ga. 95, 44 Am. St. Rep. 84; Hinckley v. Horazdowsky, 133 Ill. 359, 23 Am. St. Rep. 618, 8 L. R. A. 490; Norton

§ 1620. ——— Unsafeness where servant had no business to be.—But this rule respecting a safe place does not apply to dangers in places where the servant has no express or implied right or duty to be. If the agent impelled by mere idle curiosity or some other motive having no relation to the service, goes into a place of danger, into which the master had no reasonable ground to anticipate that he might go, the master would not be liable;[19] but the master must take into his consideration the age, habits and instincts of his servants, and will be liable if he fails to warn them of dangers known to him in places

v. Volzke, 158 Ill. 402, 49 Am. St. Rep. 167; Newbury v. Getchel, etc., Mfg. Co., 100 Iowa, 441, 62 Am. St. Rep 582; Meier v. Way, Johnson Co., 136 Iowa, 302, 125 Am. St. Rep. 254; Taylor v. Wootan, 1 Ind. App. 188, 50 Am. St. Rep. 200; Hill v. Gust, 55 Ind. 45; St. Louis, etc., R. Co. v. Valirius, 56 Ind. 511; Chambers v. Woodbury Mfg. Co., 106 Md. 496, 14 L. R. A. (N. S.) 383; Ciriack v. Merchants' Woolen Co., 151 Mass. 152, 21 Am. St. Rep. 438, 6 L. R. A. 733; Parkhurst v. Johnson, 50 Mich. 70, 45 Am. Rep. 28; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Sullivan v. India, etc., Co., 113 Mass. 396; Anderson v. Morrison, 22 Minn. 274; Adams v. Grand Rapids Refrigerator Co., 160 Mich. 590, 136 Am. St. Rep. 454, 27 L. R. A. (N. S.) 953, 19 Ann. Cas. 1152; Norfolk Beet-Sugar Co. v. Hight, 56 Neb. 162; Omaha Bottling Co. v. Theiler, 59 Neb. 257, 80 Am. St. Rep. 673; Smith v. Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535; Addicks v. Christoph, 62 N. J. L. 786, 72 Am. St. Rep. 687; Brennan v. Gordon, 118 N. Y. 489, 16 Am. St. Rep. 775, 8 L. R. A. 818; Turner v. Goldsboro Lbr. Co., 119 N. C. 387; Cleveland Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 15 Am. St. Rep. 596, 3 L. R. A. 385; Rummel v. Dilworth, Porter & Co., 131 Pa. 509, 17 Am. St. Rep. 827; Ross v. Walker, 139 Pa. 42, 23 Am. St. Rep. 160; Tagg v. McGeorge, 155 Pa. 368, 35 Am. St. Rep. 889; Baker v. Alleghany, etc., R. R. Co., 95 Pa. 211, 40 Am. Rep. 634; Ewing v. Lanark Fuel Co., 65 W. Va. 726, 29 L. R. A. (N. S.) 487; Hightower v. Bamberg Cotton Mills, 48 S. C. 190; Reynolds v. Boston & Maine R. R., 64 Vt. 66, 33 Am. St. Rep. 908; Nadau v. White River Lbr. Co., 76 Wis. 120, 20 Am. St. Rep. 29; Jones v. Florence Mining Co., 66 Wis. 268, 57 Am. Rep. 269; Greenberg v. Whitcomb Lbr. Co., 90 Wis. 225, 48 Am. St. Rep. 911, 28 L. R. A. 439; Union Pacific Railroad Co. v. Fort, 17 Wall. (U. S. Sup. Ct.) 553, 21 L. Ed. 739.

[19] Severy v. Nickerson, 120 Mass. 306, 21 Am. Rep. 514; Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120; Wright v. Rawson, 52 Iowa, 329, 35 Am. Rep. 275; Pittsburgh, etc., R. Co. v. Sentmeyer, 92 Pa. 276, 37 Am. Rep. 684; Doggett v. Illinois Cent. R. Co., 34 Iowa, 284; McCann v. Atlantic Mills, 20 R. I. 566; Olson v. Minneapolis, etc., R. Co., 76 Minn. 149, 48 L. R. A. 796; Kennedy v. Chase, 119 Cal. 637, 63 Am. St. Rep. 153; Stodden v. Anderson Mfg. Co., 138 Iowa, 398, 16 L. R. A. (N. S.) 614; Louisville, etc., R. Co. v. Hocker, 23 Ky. L. Rep. 982, 64 S. W. 638; Ellsworth v. Metheney, 44 C. C. A. 484, 104 Fed. 119, 51 L. R. A. 389; Pioneer Min. & Mfg. Co. v. Talley, 152 Ala. 162, 12 L. R. A. (N. S.) 861. See also, O'Brien v. Western Steel Co., 100 Mo. 182, 18 Am. St. Rep. 536; Sievers v. Peters Box Co., 151 Ind. 642; Wise v. Ackerman, 76 Md. 375; Hoffard v. Illinois Central Ry., 138 Iowa, 543, 16 L. R. A. (N. S.) 797.

where he ought reasonably to have anticipated that their natural instincts or curiosity would lead them.[20]

§ 1621. ——— Unsafeness resulting from doing of the work itself.—The doctrine of the safe place also does not apply for obvious reasons to cases in which the unsafeness arises wholly in and from the ordinary doing of the work itself, as where employees must make their own place to work as they go along and the unsafeness arises from that fact;[21] or where the conditions of the work are necessarily and constantly shifting and changing as the work progresses, as in work of construction, excavation, demolition, and the like, and the unsafeness arises from that fact and not from anything inherent in the place itself;[22] or where the work itself is to correct or remove the unsafeness

[20] Atlanta Cotton Factory Co. v. Speer, 69 Ga. 137, 47 Am. Rep. 750.

Compare Ellsworth v. Metheny, 44 C. C. A. 484, 104 Fed. 119, 51 L. R. A. 389; and Terre Haute, etc., R. Co. v. Fowler, 154 Ind. 682, 48 L. R. A. 531.

[21] See Peschel v. Chicago, etc., R. Co., 62 Wis. 338; Walaszewski v. Schoknecht, 127 Wis. 376; Miller v. Centralia Pulp Co., 134 Wis. 316, 13 L. R. A. (N. S.) 742; Knudson v. La Crosse Stone Co., 145 Wis. 394, 33 L. R. A. (N. S.) 223; Carlson v. Oregon Short Line, 21 Oreg. 450.

Scaffolds, etc. —The decisions respecting scaffolds, staging, and the like are conflicting; but in general if the master undertakes to furnish the scaffold, he is under the same obligation as to this as to any other appliance. See McBeath v. Rawle, 192 Ill. 626, 69 L. R. A. 697; Cheatham v. Hogan, 50 Wash. 465, 22 L. R. A. (N. S.) 951; Blomquist v. Chicago, etc., Ry. Co., 60 Minn. 426.

But where the workmen are to build their own scaffolds and the master furnishes reasonably adequate and suitable material, he is not liable for negligent defects in construction. The servants who build the scaffolds are fellow servants with those who use them. See Channon v. Sanford Co., 70 Conn. 573, 66 Am. St. Rep. 133, 41 L. R. A. 200; Beesley v. Wheeler, 103 Mich. 196, 27 L. R. A. 266; Gombert v. McKay, 201 N. Y. 27, 42 L. R. A. (N. S.) 1234; Kimmer v. Weber, 151 N. Y. 417, 56 Am. St. Rep. 630; Lambert v. Pulp Co., 72 Vt. 278; Haakensen v. Fibre Co., 76 N. H. 448, Ann. Cas. 1913 B. 1122; Ross v. Walker, 139 Pa. 42, 23 Am. St. Rep. 160; Leishman v. Union Iron Works, 148 Cal. 274, 3 L. R. A. (N. S.) 560; Kennedy v. Spring, 160 Mass. 203; Callahan v. Phillips Academy, 180 Mass. 183; Olsen v. Nixon, 61 N. J. L. 671.

Reasonable care in selection of material not exercised. Farrell v. Eastern Mach. Co., 77 Conn. 484, 68 L. R. A. 239; Donahue v. Buck, 197 Mass. 550, 13 L. R. A. (N. S.) 476.

These general conclusions however, are likely to be affected by the "departmental rule." See Sims v. American Steel Barge Co., 56 Minn. 68, 45 Am. St. Rep. 451; Cadden v. American Steel Barge Co., 88 Wis. 409.

By the "association" or "consociation" theory. See Chicago, etc., Ry. Co. v. Maroney, 170 Ill. 520, 62 Am. St. Rep. 396. And by the vice-principal doctrine. See Blomquist v. Chicago, etc., Ry. Co., 60 Minn. 426; McNamara v. MacDonough, 102 Cal. 575.

[22] Maloney v. Florence, etc., Ry., 39 Colo. 384, 121 Am. St. Rep. 180, 12 Ann. Cas. 621, 19 L. R. A. (N. S.) 348; Citrone v. O'Rourke Eng. Co., 188 N. Y. 339, 19 L. R. A. (N. S.)

caused by some unusual occurrence or emergency, and the injury arises from that very condition.[23]

§ 1622. ——— Unsafeness caused by conditions upon adjacent premises.—The master is, of course, not responsible directly for that which takes place upon the premises of others over whom he has no control. He has ordinarily neither the power nor the duty to prevent or abate that which the owners may lawfully do upon adjacent premises.[24] But where what is or has been done upon the adjacent premises directly causes the master's premises to be or to become an unsafe place in which his servants or agents are to perform their duties, the master may owe to his servants or agents a duty to warn, and even to reconstruct or rearrange his own premises so that they shall satisfy the legal requirement of a reasonably safe place in which to work.[25] Dangers of this sort also may be assumed by the servant, so as to release the master from liability, either by entering into or remaining in the employment with knowledge of their existence and without exacting from the master an undertaking to remedy the difficulty.[26] The servant's contributory negligence may also bar recovery as in other cases.[27]

§ 1623. ——— Liability for places and instruments used, but not owned, by the master.—It follows, and for the same reason, that the master should be under the same duty to the servant, to use reason-

340; Russell v. Lehigh Valley R. Co., 188 N. Y. 344, 19 L. R. A. (N. S.) 344; Oleson v. Maple Grove Co., 115 Iowa, 74; Beique v. Hosmer, 169 Mass. 541; Moore v. Penn. R. Co., 167 Pa. 495; McElwaine-Richards Co. v. Wall, 166 Ind. 267; Grayson-McLeod Lumber Co. v. Carter, 76 Ark. 69; Richards v. Riverside Iron Works, 56 W. Va. 510; Christienson v. Rio Grande West. R. Co., 27 Utah, 132, 101 Am. St. Rep. 945; Miller v. Moran Co., 39 Wash. 631, 109 Am. St. Rep. 917, 1 L. R. A. (N. S.) 283; Armour v. Hahn, 111 U. S. 313, 28 L. Ed. 440; Omaha Packing Co. v. Sanduski, 84 C. C. A. 89, 155 Fed. 897, 19 L. R. A. (N. S.) 355; Westinghouse Co. v. Callaghan, 83 C. C. A. 669, 155 Fed. 397, 19 L. R. A. (N. S.) 361.

[23] Maloney v. Florence, etc., R. Co., 39 Colo. 384, 121 Am. St. Rep. 180, 19 L. R. A. (N. S.) 348, 12 A. & E. Ann. Cas. 621; Neagle v. Syracuse, etc., R. Co., 185 N. Y. 270, 25 L. R. A. (N. S.) 321; Vaughn v. Cal. Cent. R. Co., 83 Cal. 18; Martin v. Des Moines El. L. Co., 131 Iowa, 724; Kletschka v. Minneapolis, etc., R. Co., 80 Minn. 238.

[24] Electric Ry. Co. v. Moore, 113 Tenn. 531; Moore v. Electric Ry. Co., 119 Tenn. 710, 16 L. R. A. (N. S.) 978.

[25] South Side Elev. Ry. v. Nesvig, 214 Ill. 463; Helfrich v. Ogden City Ry., 7 Utah, 186; Indianapolis Traction Co. v. Holtsclaw, 41 Ind. App. 520.

[26] Hall v. Wakefield, etc., Ry., 178 Mass. 98; Drake v. Auburn City Ry., 173 N. Y. 466; Indianapolis Traction Co. v. Holtsclaw, 41 Ind. App. 520.

[27] Helfrich v. Ogden City Ry., 7 Utah, 186; Savage v. Rhode Island Co., 28 R. I. 391.

able care in seeing that reasonably safe appliances and a reasonably safe place are furnished the servant for use in his employment, whether the master is the owner of the premises or appliances or is merely a lessee or a licensee.[28] It has accordingly been held that a railroad company must use the same care in maintaining a track leased and used by it as one owned by it;[29] and that it owes the same duty in regard to cars belonging to another company used by it as it does in regard to its own cars.[30] But in Massachusetts the rule has been applied that a company is not liable for the safety of premises or appliances used by it unless it had such control over them as to be able to repair them;[31] and it has been held that under a statute requiring companies to keep their "ways" in proper condition, a railroad could not be held for the unsafe condition of a track used by it as a mere licensee for the purpose of delivering freight.[32]

This question should not be confused with the liability of a master who has hired his servant to another. It has been held, and it would seem properly, that the general master in such a case is not liable for

[28] McGuire v. Bell Telephone Co., 167 N. Y. 208, 52 L. R. A. 437; Miner v. Franklin County Tel. Co., 83 Vt. 311, 26 L. R. A. (N. S.) 1195.

[29] Wisconsin Central R. R. v. Ross, 142 Ill. 9, 34 Am. St. Rep. 49.

[30] Gottlieb v. N. Y., etc., R. R. Co., 100 N. Y. 462; Budge v. Railroad & Steamship Co., 108 La. 349.

But see McMullen v. Carnegie Co., 158 Pa. 518, 23 L. R. A. 448, where the court admitted the doctrine as to railroads but refused to extend it to the steel company which was owner and user of miles of sidetracks, and employed the plaintiff, as brakeman on cars run on such sidetracks, but which belonged to the railroads. For the unsafe condition of these cars the court refused to hold the steel company liable.

And so where a shed built over a railroad track by a third party was allowed to become unsafe. Doyle v. Toledo, etc., R. R. Co., 127 Mich. 94, 89 Am. St. Rep. 456, 54 L. R. A. 461; and where railroad scales on the track of a railroad were in an unsafe condition, the same result was reached, the scales being owned by a coal company. Little Rock, etc., R. R. Co. v. Cagle, 53 Ark. 347.

But a different result was reached where an employee was injured by reason of a third party's carelessness in piling up boxes on a wharf immediately adjacent to the company's tracks. Carolan v. Southern Pac. Co., 84 Fed. 84.

[31] Trask v. Old Colony Railroad, 156 Mass. 298; Dunn v. Boston, etc., St. Ry. Co., 189 Mass. 62, 109 Am. St. Rep. 601.

In Robinson v. St. Johnsbury, etc., R. R. Co., 80 Vt. 129, 9 L. R. A. (N. S.) 1249, 12 Ann. Cas. 1060, it was held that an express company owed no duty to see that the cars furnished by the railroad company for the use of express messengers were in a reasonably safe condition, the express company not being in the possession or control of the cars. Citing Channon v. Sanford Co., referred to in the second note hereafter.

[32] Engel v. N. Y., etc., R. R. Co., 160 Mass. 260, 22 L. R. A. 283.

the lack of care exercised by the one to whom the servant was hired in constructing or maintaining a reasonably safe place for his use.[33]

§ 1624. II. For dangerous appliances, tools and machinery.—The same general rules apply to the appliances, tools and machinery, which the master has expressly or impliedly undertaken to furnish. The master owes a duty to exercise ordinary and reasonable care in view of the nature of the employment to provide and maintain reasonably safe appliances, tools and machinery,[34] but he is under no obligation to provide the newest, latest or best machinery, tools or appliances, or to adopt every new improvement; he may conduct his business with such machinery, tools and appliances as he deems best adapted to his purposes and means, provided he uses reasonable prudence and care in the selection of such as are reasonably safe and proper for use, and keeps them in a reasonable state of repair.[35] The use of any machinery in-

[33] Channon v. Sanford Co., 70 Conn. 573, 66 Am. St. Rep. 133, 41 L. R. A. 200; Hardy v. Shedden Co., 24 C. C. A. 261, 78 Fed. 610, 37 L. R. A. 33.

[34] *Duty as to instrumentalities.*—Louisville, etc., R. R. Co. v. Stutts, 105 Ala. 368, 53 Am. St. Rep. 127; Last Chance M. & M. Co. v. Ames, 23 Colo. 167; Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 98 Am. St. Rep. 281; Hannibal, etc., R. R. Co. v. Kanaley, 39 Kan. 1; Fuller v. Tremont Lbr. Co., 114 La. 266, 108 Am. St. Rep. 348; Cowett v. American Woolen Co., 97 Me. 543; Griffin v. Boston, etc., R. R. Co., 148 Mass. 143, 12 Am. St. Rep. 526, 1 L. R. A. 698; Johnson v. Spear, 76 Mich. 139, 15 Am. St. Rep. 298; McDonald v. Michigan Cent. R. R. Co., 132 Mich. 372, 102 Am. St. Rep. 426; Nutt v. Southern Pacific Ry. Co., 25 Ore. 291; Service v. Shoneman, 196 Pa. 63, 79 Am. St. Rep. 689, 69 L. R. A. 792; Purdy v. Westinghouse, etc., Co., 197 Pa. 257, 80 Am. St. Rep. 816, 51 L. R. A. 881; International, etc., Ry. Co. v. Kernan, 78 Tex. 294, 22 Am. St. Rep. 52, 9 L. R. A. 703; Texas & Pacific Ry. Co. v. Huffman, 83 Tex. 286; Bertha Zinc Co. v. Martin, 93 Va. 791, 70 L. R. A. 999; Richmond, etc., Ry. Co. v. Williams, 86 Va. 165, 19 Am. St. Rep. 876; Sroufe v. Moran Bros. Co., 28 Wash. 381, 92 Am. St. Rep. 847, 58 L. R. A. 313; Texas & Pacific Ry. Co. v. Barrett, 166 U. S. 617, 41 L. Ed. 1136; American Bridge Co. v. Seeds, 75 C. C. A. 407, 144 Fed. 605, 11 L. R. A. (N. S.) 1041.

In Mather v. Rillston, 156 U. S. 391, 39 L. Ed. 464, it is said: "We think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence."

As to materials, the same general rule applies as to tools, machinery, etc. See Drew v. Western Steel Car Co., 616 Ala. 174, 40 L. R. A. (N. S.) 890; Neveu v. Sears, 155 Mass. 303; Mooney v. Beattie, 180 Mass. 451, 70 L. R. A. 831.

[35] Davis v. Augusta Factory, 92 Ga. 712; Western, etc., R. R. Co. v. Bishop, 50 Ga. 465; Chicago, etc., R. Co. v. Driscoll, 176 Ill. 330; Monmouth Mining Co. v. Erling, 148 Ill. 521, 39 Am. St. Rep. 187; Louisville, etc., R. Co. v. Orr, 84 Ind. 50; Lake Shore, etc., Ry. Co. v. McCormick, 74 Ind. 440; Burns v. Chicago, etc., Ry. Co., 69 Iowa, 450, 58 Am. Rep. 227; Brann v. Chicago, etc., R. Co.,

volves more or less of risk, and in many cases the degree of risk is very great. This risk, however, is a risk incident to the business, and

53 Iowa, 595, 36 Am. Rep. 243; Wonder v. Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143; Wormell v. Maine Central Rr. Co., 79 Me. 397, 1 Am. St. Rep. 321; Ross v. Pearson Cordage Co., 164 Mass. 257, 49 Am. St. Rep. 459; Goldthwait v. Haverill, etc., St. Ry. Co., 160 Mass. 554; Thain v. Old Colony R. Co., 161 Mass. 353; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Ford v. Fitchburg R. R. Co., 110 Mass. 240, 14 Am. Rep. 598; Jones v. Granite Mills, 126 Mass. 84, 30 Am. Rep. 661; Shadford v. Ann Arbor St. Ry. Co., 111 Mich. 390; Hewitt v. Flint, etc., R. Co., 67 Mich. 61; Michigan Cent. R. Co. v. Smithson, 45 Mich. 212; Ft. Wayne, etc., R. Co. v. Gildersleeve, 33 Mich. 133; Grattis v. Kansas City, etc., R. Co., 153 Mo. 380, 77 Am. St. Rep. 721, 48 L. R. A. 399; Brands v. St. Louis Car Co., 213 Mo. 698, 18 L. R. A. (N. S.) 701; Vanderpool v. Partridge, 79 Neb. 165, 13 L. R. A. (N. S.) 668; Harley v. Buffalo Car Mfg. Co., 142 N. Y. 31; Sweeney v. Berlin & Jones Envelope Co., 101 N. Y. 520, 54 Am. Rep. 722; Corcoran v. Holbrook, 59 N. Y. 517, 17 Am. Rep. 369; Augerstein v. Jones, 139 Pa. 183, 23 Am. St. Rep. 174; Keenan v. Waters, 181 Pa. 247; Payne v. Reese, 100 Pa. 301; Philadelphia, etc., R. Co. v. Keenan, 103 Pa. 124; McCann v. Atlantic Mills, 20 R. I. 566; Darracott v. Chesapeake, etc., R. Co., 83 Va. 288, 5 Am. St. Rep. 266.

In Alabama, however, it is held to be the duty of the employer to keep "reasonably abreast with improved methods;" that while it was not the duty of the employer to adopt every new invention which might lessen danger, "but it is their duty to discontinue old methods which are insecure, and to adopt such improvements and advancements as are in ordinary use by prudently conducted roads engaged in like business, and surrounded by like circumstances." Richmond, etc., R. R. Co. v. Jones, 92 Ala. 218; Georgia Pac. Ry. Co. v. Propst, 83 Ala. 518; Louisville, etc., Ry. Co. v. Allen, 78 Ala. 494.

The North Carolina court, in holding that failure of a railroad company to equip its cars with a safety coupler was negligence *per se*. adopted practically the same rule. Lloyd v. Hanes, 126 N. C. 359; Troxler v. Southern Ry. Co., 124 N. C. 189, 70 Am. St. Rep. 580, 44 L. R. A. 313; Greenlee v. Southern Ry. Co., 122 N. C. 977, 65 Am. St. Rep. 734, 41 L. R. A. 399. See also, Galveston, etc., Ry. Co. v. Gormley (Tex. Civ. App.), 27 S. W. 1051; Gulf, etc., R. Co. v. Warner (Tex. Civ. App.), 36 S. W. 118; France v. Rome, etc., Co., 88 Hun, 318; Burke v. Witherbee, 98 N. Y. 562.

By what standard the reasonable safeness of appliances is to be determined is more or less in dispute. A majority of the courts apparently consider that "reasonably safe" means in compliance with the ordinary usages and customs which prevail in like businesses. See Titus v. Bradford, etc., Co., 136 Pa. 618, 20 Am. St. Rep. 944; Briggs v. Chicago & N. W. Ry., 60 C. C. A. 513, 125 Fed. 745; Burke v. Witherbee, 98 N. Y. 562; Kehler v. Schwenk, 144 Pa. 348, 27 Am. St. Rep. 633, 13 L. R. A. 374; Roberts v. Port Blakely Mill Co., 30 Wash. 25; Troxler v. So. Ry., 124 N. C. 189, 70 Am. St. Rep. 580, 44 L. R. A. 313; Mississippi Logging Co. v. Schneider, 20 C. C. A. 390, 74 Fed. 195; Ship Bldg. Works v. Nuttall, 119 Pa. 149. Other courts do not make custom conclusive, but admit it as evidence only of what is reasonably safe under all the circumstances of the case. See Geno v. Fall Mountain Paper Co., 68 Vt. 568; Wilta v. Interstate Iron Co., 103 Minn. 303, 16 L. R. A. (N. S.) 128; Croker v. Pusey

if the servant, being of sufficient age and experience to appreciate the dangers accepts the employment,[36] or continues in it,[37] knowing, or having full opportunity to know, of the dangers, he assumes the responsibility of injury.

§ 1625. ——— Warning.—But even in this case, a duty of warning may attach to the master. If there are concealed dangers known to the master, but of which the servant is ignorant, it is the duty of the master to warn the servant of their existence.[38] So if, by reason

Co., 3 Penne. (Del.) 1; Going v. Alabama Steel Co., 141 Ala. 537; Washington etc., Co. v. McDade, 135 U. S. 554, 34 L. Ed. 235; Barclay v. Puget Sound Lumber Co., 48 Wash. 241, 16 L. R. A. (N. S.) 140; McCormick Harvesting Co. v. Burandt, 136 Ill. 170; Wheeler v. Wason Mfg. Co., 135 Mass. 294.

Furnishing better or safer appliances than the law would otherwise require will impose an obligation on the master to maintain them in good condition where the servant has been induced to rely thereon for protection. See Scheurer v. Banner Rubber Co., 227 Mo. 347, 28 L. R. A. (N. S.) 1207.

[36] Dowling v. Allen, 74 Mo. 13, 41 Am. Rep. 298; Smith v. St. Louis, etc., Ry. Co., 69 Mo. 32, 33 Am. Rep. 484; Porter v. Hannibal, etc., R. Co., 71 Mo. 66, 36 Am. Rep. 454; Coombs v. New Bedford Cord. Co., 102 Mass. 572, 3 Am. Rep. 506; Sweeney v. Central Pac. R. Co., 57 Cal. 15; Hayden v. Smithsville Mfg. Co., 29 Conn. 584; Bell v. Western, etc., R. Co., 70 Ga. 566; Dowell v. Burlington, etc., R. Co., 62 Iowa, 629; Yeaton v. Boston, etc., R. Co., 135 Mass. 418; Fort Wayne, etc., R. Co. v. Gildersleeve, 33 Mich. 133; Hathaway v. Michigan Cent. R. Co., 51 Mich. 253, 47 Am. Rep. 569; Richards v. Rough, 53 Mich. 212; Gibson v. Erie Ry. Co., 63 N. Y. 449, 20 Am. Rep. 552; Laning v. New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Watson v. Railway Co., 58 Tex. 434; Wonder v. Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143.

[37] Swoboda v. Ward, 40 Mich, 420; Richards v. Rough, 53 Mich. 212; Pingree v. Leyland, 135 Mass. 398; Huddleston v. Lowell Machine Shop, 106 Mass. 282; Umback v. Lake Shore, etc., Ry. Co., 83 Ind. 191; Bell v. Western, etc., R. Co., 70 Ga. 566; McGlynn v. Brodie, 31 Cal. 376; Sowden v. Idaho Mining Co., 55 Cal. 443; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; Kroy v. Chicago, etc., R. Co., 32 Iowa, 357; Behm v. Armour, 58 Wis. 1; Sullivan v. Louisville Bridge Co., 9 Bush (Ky.), 81; Porter v. Hannibal, etc., R. Co., 71 Mo. 66, 36 Am. Rep. 454.

[38] Many cases involving the duty to warn are collected in the note to the preceding section and the citation will not be repeated here. See also, Polaski v. Pittsburg Coal Co., 134 Wis. 259, 14 L. R. A. (N. S.) 952; Fleming v. Northern Paper Mill, 135 Wis. 157, 15 L. R. A. (N. S.) 701; Dowling v. Allen, 74 Mo. 13, 41 Am. Rep. 298; Nickel v. Columbia Paper Co., 95 Mo. App. 226; Baxter v. Roberts, 44 Cal. 187, 13 Am. Rep. 160; Ford v. Fitchburg R. R. Co., 110 Mass. 240, 14 Am. Rep. 598; Texas, etc., Ry. Co. v. McAtee, 61 Tex. 695; Ryan v. Fowler, 24 N. Y. 410, 82 Am. Dec. 315; Atchison, etc., R. R. Co. v. Holt, 29 Kan. 149; Malone v. Hawley, 46 Cal. 409; Hayden v. Smithville Mfg. Co., 29 Conn. 548.

There is no duty to warn the servant of that which he knew as well as the master possibly could know. Beghold v. Auto Body Co., 149 Mich. 14, 14 L. R. A. (N. S.) 609.

In Smith v. Peninsular Car Works,

of the youth or inexperience of the servant, he is not aware of the dangers involved, it is the duty of the master to inform the servant of them if they are known to him.[39] It is not enough in these cases that the dangerous parts of the machinery should be visible, because the servant, though knowing the fact, may be utterly ignorant of the risks.[40] There can however be no duty to warn against that of which the master himself was ignorant and which he was not bound to know.[41]

§ 1626. ——— Inspection—Maintenance.—The duty of the master, as has been stated, is not merely to exercise reasonable care to furnish, but also to reasonably maintain, renew or repair. This involves the duty of reasonable inspection,[42] where that is necessary to enable the main duty to be performed.[43]

60 Mich. 501, 1 Am. St. Rep. 542, the plaintiff an employee of defendant was engaged in carrying molten iron over a passage-way that was covered with ice. He slipped and the molten iron overturned on the ice, and an explosion followed which injured the plaintiff. The defendant was held liable; the court held it was under a duty to inform plaintiff of unusual or latent dangers; that the plaintiff could not be presumed to have scientific knowledge enough to understand the danger of an explosion under such circumstances; that being so inexperienced, a duty to warn him arose which was not discharged by a general statement to him that the work was dangerous.

But to the effect that a master need not warn a nineteen year old boy of the effect of mixing lime and water, see Bollington v. Louisville, etc., R. Co., 125 Ky. 186, 8 L. R. A. (N. S.) 1045.

[39] Many cases involving the duty to warn inexperienced or ignorant employees are collected in a note to the preceding section. See also, Mather v. Rillston, 156 U. S. 391, 39 L. Ed. 464; Welch v. Bath Iron Works, 98 Me. 361; Smith v. Peninsular Car Works, 60 Mich. 501, 1 Am. St. Rep. 542; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Grizzle v. Frost, 3 Fost. & Fin. 622; Swoboda v. Ward, 40 Mich 420; Hill v. Gust, 55 Ind. 45; Sullivan v. India Mfg. Co., 113 Mass. 396; St. Louis, etc., Ry. Co. v. Valirius, 56 Ind. 511; Dowling v. Allen, 74 Mo. 13, 41 Am. Rep. 298.

But even as to infants there can be no duty to warn of that which the servant already knows and appreciates. Cronin v. Columbian Mfg. Co., 75 N. H. 319, 29 L. R. A. (N. S.) 111.

[40] Chicago, etc., R. R. Co. v. Knapp, 176 Ill. 127; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Kann v. Meyer, 88 Md. 541; Dowling v. Allen, 74 Mo. 13, 41 Am. Rep. 298; Mather v. Rillston, 156 U. S. 391, 39 L. Ed. 464.

[41] As where there is nothing in the history, construction or operation of a machine to suggest such an injury as actually occurred. Conkey Co. v. Larsen, 173 Ind. 585, 29 L. R. A. (N. S.) 116.

[42] Armour v. Brazeau, 191 Ill. 117; Brann v. Chicago, etc., R. Co., 53 Iowa, 595, 36 Am. Rep. 243; Baltimore B. & S. Co. v. Jamar, 93 Md. 404, 86 Am. St. R. 428; Munch v. Great Northern R. Co., 75 Minn. 61; Parker v. Wood Lumber Co., 98 Miss. 750, 40 L. R. A. (N. S.) 832; Comben v. Stone Co., 59 N. J. L. 226; Young v. Mason Stable Co., 193 N. Y. 188, 127 Am. St. Rep. 939, 21 L. R. A. (N. S.) 592; Richmond, etc., R. Co. v. Burnett, 88 Va. 538.

[43] No duty rests upon an employer

§ 1627. ——— Repairing defective tools, etc.—For reasons similar to those referred to in the section respecting places to work, a servant whose undertaking it is to repair, restore or correct defective tools, appliances or machinery can not demand that, as to those particular things, the duty of furnishing safe tools and appliances shall be at the same time performed. There is an inherent inconsistency.[44]

§ 1628. ——— Servants having no business to use—Using for unexpected purposes.—The duty with respect of tools and appliances, like the duty with respect of place, does not extend to tools, appliances, etc., which the servant injured had no business or occasion to use or to come into contact with in the course of his service, and the use of which by the servant injured involved a departure from his service which the master was not obliged to anticipate or guard against.[45] Neither does it apply to injuries received while the servant was voluntarily using or attempting to use the tools, appliances, etc., even though defective, for a purpose for which they were not designed or intended, and for which the master had no reason to suppose the servant would attempt to put them in the course of the service.[46]

§ 1629. ——— Dangers arising from dangerous use of proper appliances, etc.—Obviously a master who has performed his duty

to inspect simple and common tools, such as a ladder or a hammer. Meador v. Lake Shore, etc., Ry. Co., 138 Ind. 290, 46 Am. St. R. 384; Stirling Coal Co. v. Fork, 141 Ky. 40, 40 L. R. A. (N. S.) 837; Koschman v. Ash, 98 Minn. 312, 116 Am. St. R. 373; Wachsmuth v. Shaw Electric Crane Co., 118 Mich. 275; Vanderpool v. Partridge, 79 Neb. 165, 13 L. R. A. (N. S.) 668; Miller v. Erie R. Co., 21 N. Y. App. Div. 45; Marsh v. Chickering, 101 N. Y. 396; Martin v. Highland Park Mfg. Co., 128 N. Car. 264, 83 Am. St. R. 671 [compare Mercer v. Atlantic C. L. R. Co., 154 N. Car. 399, Ann. Cas. 1912 A. 1002]; Sheridan v. Gorham Mfg. Co., 28 R. I. 256, 13 L. R. A. (N. S.) 687; Gulf, etc., Ry. v. Larkin, 98 Tex. 225, 1 L. R. A. (N. S.) 944; O'Brien v. Missouri, K. & T. R. Co., 36 Tex. Civ. App. 528; Williams v. Kimberly & Clark Co., 131 Wis. 303, 120 Am. St. Rep. 1049, 10 L. R. A. (N. S.) 1043, 11 Ann. Cas. 622; Meyer v. Ladewig, 130 Wis. 566, 13 L. R. A. (N. S.) 684; Garnett v. Phoenix Bridge Co., 98 Fed. 192.

[44] "The physician might as well insist on having a well patient to be treated and cured, as the machinist to have sound and safe machinery to be repaired." Dartmouth Spinning Co. v. Achord, 84 Ga. 14, 6 L. R. A. 190. Same effect: Green v. Babcock Lumber Co., 130 Ga. 469; Martineau v. National, etc., Co., 166 Mass. 4; Reed v. Moore, 82 C. C. A. 434, 153 Fed. 358, 25 L. R. A. (N. S.) 331.

Same rule where servants are engaged in getting defective tools, etc., to the place of repair. Southern Ry. Co. v. Lyons, 95 C. C. A. 55, 169 Fed. 557, 25 L. R. A. (N. S.) 335.

[45] Stodden v. Anderson Mfg. Co., 138 Iowa, 398, 16 L. R. A. (N. S.) 614.

[46] Felch v. Allen, 98 Mass. 572; Kauffman v. Maier, 94 Cal. 269, 18 L. R. A. 124; Morrison v. Burgess Fibre Co., 70 N. H. 406, 85 Am. St. Rep. 634; Saunders v. Eastern Brick Co., 63 N. J. L. 554, 76 Am. St. Rep. 222.

in respect of the appliances, tools, etc., furnished to his servants, is not liable to one servant for dangers arising from the negligent use of them by fellow servants. That the servants in using the appliances, tools, etc., do not carefully adjust them or secure them or otherwise manage or handle them in the shifting exigencies of the work, is not ordinarily one of the dangers against which the master is bound to furnish protection.[47]

§ 1630. III. For injuries resulting from failure to repair as agreed. Should the servant discover that the service has become more hazardous than usual, or than he had reasonably anticipated, by reason of defective machinery, the retaining of unfaithful fellow-servants, or other similar cause, the general rule, as will be more fully seen hereafter, is that he must quit the service, as he may, or assume the extra risks to which he is so exposed.[48] But this general rule is subject to certain exceptions. The servant has a right to expect that, if the defect were brought to the knowledge of the master, he would remedy or remove it. On the other hand, the servant has no right to complain of dangers or defects known to him but which he fails to communicate to the master, so as to give the latter an opportunity to remove them. Where, therefore, the servant discovers defects in machinery, or other similar thing that renders the service more hazardous, he should at once report the same to the master or to the person who is authorized to represent him in that respect,[49] and unless he does so, he cannot recover from the master for injuries occasioned by extra perils which he thus voluntarily encounters without notice to the master. The re-

[47] See Loud v. Lane, 103 Me. 309, 19 L. R. A. (N. S.) 680; Brown v. People's Gas L. Co., 81 Vt. 477, 22 L. R. A. (N. S.) 738.

Putting in fresh pieces or parts, as needed, from a proper supply furnished for that purpose by the master, to replace those necessarily and ordinarily worn out or consumed in the work, is part of the work and not the master's duty. Johnson v. Boston Tow Boat Co., 135 Mass. 209, 46 Am. Rep. 458.

[48] See *post*, §§ 1659–1661.

Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425; Eureka Co. v. Bass, 81 Ala. 200, 60 Am. Rep. 152.

[49] Complaint must be made to, and promise to repair obtained from, some one who represented the master in that behalf. Weber Wagon Co. v. Kehl, 139 Ill. 644; Pleart v. Chicago, etc., R. Co., 82 Iowa, 148; Poli v. Numa Coal Co., 149 Iowa, 104, 33 L. R. A. (N. S.) 646; Atchison, etc., R. Co. v. Sadler, 38 Kan. 128, 5 Am. St. Rep. 729; Ehmcke v. Porter, 45 Minn. 338; Lyttle v. Chicago, etc., R. Co., 84 Mich. 289; Wust v. Erie Iron Works, 149 Pa. 263; Hollis v. Widener, 228 Pa. 466, 139 Am. St. Rep. 1010; Jones v. File Co., 21 R. I. 125; Utah Consol. Min. Co. v. Paxton, 80 C. C. A. 68, 150 Fed. 114.

Where mere notice is involved, the ordinary rules of notice to an agent apply. Baldwin v. St. Louis, etc., Ry. Co., 75 Iowa, 297, 9 Am. St. Rep. 479; Wellston Coal Co. v. Smith, 65 Ohio St. 70, 87 Am. St. Rep. 547, 55 L. R. A. 99.

lation of principal and agent, or of master and servant, imposes no obligation on the principal or master to take more care of the agent or servant than the latter is willing to observe for his own safety.[50] But where the master, on being notified by the servant of defects that render the service he is engaged in negligently hazardous, expressly promises to make the necessary repairs, the servant may continue in the employment for a reasonable time to permit the performance of the promise, without being guilty of negligence, and if any injury results therefrom during that time he may recover,[51] unless the danger were so imminent that no prudent person would undertake to perform the service.[52] The reason upon which the rule is said to rest is that

[50] Missouri Furnace Co. v. Abend, *supra;* Indianapolis, etc., R. Co. v. Flanigan, 77 Ill. 365; Pennsylvania Co. v. Lynch, 90 Ill. 334; Columbus, etc., Ry. Co. v. Troesch, 68 Ill. 545, 18 Am. Rep. 578.

[51] Eureka Co. v. Bass, 81 Ala. 200, 60 Am. Rep. 152; Cheeney v. Ocean Steamship Co., 92 Ga. 726, 44 Am. St. Rep. 113; Morden Frog & Crossing Works v. Fries, 228 Ill. 246, 119 Am. St. Rep. 428; Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425; Indianapolis, etc., Ry. Co. v. Watson, 114 Ind. 20, 5 Am. St. Rep. 578; Meador v. Lake Shore, etc., Ry. Co., 138 Ind. 290, 46 Am. St. Rep. 384 (restricting the operation of the rule to machinery or instrumentalities more complicated than such ordinary tools as a shovel or a ladder); Buehner v. Creamery Pkg. Mfg. Co., 124 Iowa, 445, 104 Am. St. Rep. 354; Southern Kansas Ry. Co. v. Croker, 41 Kan. 747, 13 Am. St. Rep. 320; Breckenridge v. Hicks, 94 Ky. 362, 42 Am. St. Rep. 361; Dempsey v. Sawyer, 95 Me. 295; Roux v. Blodgett & Davis Lbr. Co., 85 Mich. 519, 24 Am. St. Rep. 102, 13 L. R. A. 728; Greene v. Minneapolis & St. Louis Ry. Co., 31 Minn. 248, 47 Am. Rep. 785; Le Clair v. Railroad Co., 20 Minn. 1; Conroy v. Vulcan Iron Works, 62 Mo. 35; Rice v. Eureka Paper Co., 174 N. Y. 385, 95 Am. St. Rep. 585, 62 L. R. A. 611; Union Manufacturing Co. v. Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669; Patterson v. Pittsburg, etc., R. R. Co., 76 Pa. 389, 18 Am. Rep. 412; Brownfield v. Hughes, 128 Pa. 194, 15 Am. St. Rep. 667; Galveston, etc., Ry. Co. v. Drew, 59 Tex. 10, 46 Am. Rep. 261; Gulf, etc., Ry. Co. v. Donnelly, 70 Tex. 371, 8 Am. St. Rep. 608; Gulf, etc., Ry. Co. v. Brentford, 79 Tex. 619, 23 Am. St. Rep. 377; Brabbits v. Ry. Co., 38 Wis. 289; Maitland v. Gilbert Paper Co., 97 Wis. 476, 65 Am. St. Rep. 137; Yerkes v. Northern Pacific Ry. Co., 112 Wis. 184, 88 Am. St. Rep. 961; Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612; Holmes v. Clarke, 6 H. & N. 349; Clarke v. Holmes, 7 H. & N. 937. And for a case where the promise was to discharge an incompetent servant, see Williams v. Kimberly & Clark Co., 131 Wis. 303, 120 Am. St. Rep. 1049, 10 L. R. A. (N. S.) 1043, 11 Ann. Cas. 622. See also, Cheeney v. Ocean Steamship Co., 92 Ga. 726, 44 Am. St. Rep. 113. But see Sweeney v. Berlin, etc., Co., 101 N. Y. 520, 54 Am. Rep. 722.

[52] McKelvey v. Ches. & O. R. Co., 35 W. Va. 500; Indianapolis & St. Louis R. Co. v. Watson, 114 Ind. 20, 5 Am. St. Rep. 578; Erdman v. Illinois Steel Co., 95 Wis. 6, 60 Am. St. Rep. 66; Anderson v. Fielding, 92 Minn. 42, 104 Am. St. Rep. 665; North Chicago St. R. Co. v. Aufmann, 221 Ill. 614, 112 Am. St. Rep. 207; Dist. of Columbia v. McElligott, 117 U. S

the promise of the master to repair defects relieves the servant from the conclusion of assumption or the charge of negligence in continuing in the service after the discovery of the extra perils to which he would be exposed.[53]

Notwithstanding the promise to repair, the servant may lose his right of recovery by his own contributory negligence in conduct not relating to his mere reliance upon the promise.[54]

§ 1631. ——— The mere fact that the servant has complained of the defect will not entitle him to recover. There must, in addition, by the weight of authority, be shown a promise to repair upon which the servant has relied, and which has induced him to continue in the service.[55] And if he continues to serve without further assurances

621, 29 L. Ed. 946; Hough v. Railway Co., 100 U. S. 218, 25 L. Ed. 612; Miller v. Bullion-Beck, etc., Min. Co., 18 Utah, 358; Smith v. E. W. Backus Lumber Co., 64 Minn. 447; Brewer v. Tennessee Coal, etc., Co., 97 Tenn. 615; Schiglizzo v. Dunn, 211 Pa. 258, 107 Am. St. Rep. 567; Williams v. Kimberly & Clark Co., 131 Wis. 303, 120 Am. St. Rep. 1049, 10 L. R. A. (N. S.) 1043, 11 Ann. Cas. 622; Comer v. Meyer, 78 N. J. L. 464, 29 L. R. A. (N. S.) 597.

Where the tool, etc., is a simple and ordinary one, and is openly defective and dangerous, it is held in many cases that the servant who continues to use it assumes the risk, notwithstanding a promise to repair. McGill v. Cleveland, etc., Co., 79 Ohio St. 203, 128 Am. St. Rep. 705, 19 L. R. A. (N. S.) 793; St. Louis, etc., Ry. Co. v. Kelton, 55 Ark. 483; Webster Mfg. Co. v. Nisbett, 205 Ill. 273; Conley v. American Exp. Co., 87 Me. 352; Erdman v. Illinois Steel Co., 95 Wis. 6, 60 Am. St. Rep. 66; Gulf, etc., Ry. Co. v. Brentford, 79 Tex. 619, 23 Am. St. Rep. 377. But many other cases repudiate this distinction, and hold that there is no distinction between simple tools and others, unless the danger of continued use is so great and obvious that no reasonable man would undertake it. Brouseau v. Kellogg Switchboard Co., 158 Mich. 312, 27 L. R. A. (N. S.) 1052; Southern Kan. R. Co. v. Croker, 41 Kan. 747, 13 Am. St. Rep. 320, in which many other cases will be found cited.

[53] Missouri Furnace Co. v. Abend, *supra;* Clarke v. Holmes, *supra;* Hough v. Railway Co., *supra;* Dempsey v. Sawyer, *supra.*

[54] See Miller v. White Bronze M. Co., 141 Iowa, 701, 18 Ann. Cas. 957; Levesque v. Janson, 165 Mass. 16; Trudeau v. American Mill Co., 41 Wash. 465; Erdman v. Illinois Steel Co., 95 Wis. 6, 60 Am. St. Rep. 66; Crookston Lumber Co. v. Boutin, 79 C. C. A. 368, 149 Fed. 680.

[55] Indianapolis, etc., R. Co. v. Watson, 114 Ind. 20, 5 Am. St. Rep. 578; East Tenn., etc., R. Co. v. Duffield, 12 Lea (Tenn.), 63, 47 Am. Rep. 319; Galveston, etc., R. Co. v. Drew, 59 Tex. 10, 46 Am. Rep. 261; Pleart v. Chicago, etc., R. Co., 82 Iowa, 148; Showalter v. Fairbanks, etc., Co., 88 Wis. 376; Erdman v. Ill. Steel Co., 95 Wis. 6, 60 Am. St. Rep. 66; Bodwell v. Nashua Mfg. Co., 70 N. H. 390; Hayball v. Detroit, etc., Co., 114 Mich. 135; Rothenberger v. Northwestern Consol. Mill. Co., 57 Minn. 461; Union Mfg. Co. v. Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669; Lewis v. New York, etc., R. Co., 153 Mass. 73, 10 L. R. A. 513; McFarlan Carriage Co. v. Potter, 153 Ind. 107; Brewer v. Tennessee Coal, etc., Co., 97 Tenn. 615.

after the expiration of a reasonable time from the date of the promise to repair, which has not been kept, he will, ordinarily, be deemed to have accepted the risk of the dangers, and the master will not be liable.[56] Whether under the circumstances and in view of the promise to repair, the servant exercised due care in continuing to use the defective machinery, is a question for the jury to determine.[57]

This question most frequently occurs in those cases in which the defects or dangers arise after the servant has entered upon his service, and not in those in which he was fully aware of the dangers when he accepted the employment, but even in such cases the agent has a right to rely upon the master's promise that he will repair.

But the rule now under consideration presupposes that there are defects in the tools, machinery or appliances furnished. If, on the other hand, those furnished by the master are reasonably safe and proper for use, although not the best possible, or of the latest design, the master has done his duty and the servant assumes the risk. In such a case, not even the express promise of the master that he will furnish new or better ones, or will take greater precautions for the servant's safety, will give the servant a right of action for an injury received from the old.[58]

§ 1632. IV. For employment of incompetent servants.—It is the duty of the principal or master to use reasonable care and prudence in

[56] Eureka Co. v. Bass, 81 Ala. 200, 60 Am. Rep. 152; Woodward Iron Co. v. Jones, 80 Ala. 123; Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425; Greene v. Minn. & St. Louis R. Co., 31 Minn. 248, 47 Am. Rep. 785; Union Mfg. Co. v. Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669; Patterson v. Pittsburg, etc., R. R. Co., 76 Pa. 389, 18 Am. Rep. 412; Lansing v. N. Y. Cent. R. R. Co., 49 N. Y. 512, 10 Am. Rep. 417; East Tennessee, etc., R. Co. v. Duffield, 12 Lea (Tenn.), 63, 47 Am. Rep. 319; Galveston, etc., Ry. Co. v. Drew, 59 Tex. 10, 46 Am. Rep. 261; Conroy v. Vulcan Iron Works, 62 Mo. 35, s. c. 6 Mo. App. 102; Crutchfield v. Railroad Co., 78 N. C. 300; Albrecht v. Chicago, etc., R. Co., 108 Wis. 530, 53 L. R. A. 653; Holmes v. Clarke, 6 H. & N. 349.

In Albrecht v. Chicago, etc., R. Co., *supra*, a period of about two hours in which to make the needed repairs, which were very simple, was held to be reasonable, and after that the servant, who knew they had not been made, assumed the risk.

[57] Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612; Ford v. Fitchburg R. R. Co., 110 Mass. 261, 14 Am. Rep. 598; Laning v. New York Cent. R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Snow v. Housatonic R. R. Co., 8 Allen (Mass.), 441, 82 Am. Dec. 720.

[58] Marsh v. Chickering, 101 N. Y. 356 (reported also in note to 54 Am. Rep. at p. 727); Sweeney v. Berlin, etc., Envelope Co., 101 N. Y. 520, 54 Am. Rep. 722; Nealand v. Lynn, etc., R. Co., 173 Mass. 42; Coin v. Talge Lounge Co., 222 Mo. 488, 25 L. R. A. (N. S.) 1179, 17 Ann. Cas. 888; Higgins v. Fanning, 195 Pa. 599; Leonard v. Herrmann, 195 Pa. 222; Branstrator v. Keokuk, etc., R. Co., 108 Iowa, 377; Jones v. Yazoo, etc., R. Co., 90 Miss. 547.

the selection and employment of his agents and servants, and for a want of such care and prudence, he is liable to all of his other servants and agents who directly and proximately suffer injury therefrom.[59] This being his duty as to the selection and employment, he is under a like duty as to the retention of his servants and agents. If having received knowledge of their incompetence or unfitness, he still retains them in his employ, he must respond in damages to others who are injured thereby.[60]

[59] Southern P. Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; First Nat. Bank v. Chandler, 144 Ala. 286, 113 Am. St. Rep. 39; Tyson v. Railroad Co., 61 Ala. 554; Still v. San Francisco, etc., Ry. Co., 154 Cal. 559, 129 Am. St. Rep. 177, 20 L. R. A. 322; Western Stone Co. v. Whalen, 151 Ill. 472, 42 Am. St. Rep. 244; Columbus, etc., R. Rep. 578; Indianapolis, etc., R. Co. R. Co. v. Troesch, 68 Ill. 545, 18 Am. v. Foreman, 162 Ind. 85, 102 Am. St. Rep. 185; Evansville & Terre Haute R. R. Co. v. Geyton, 115 Ind. 450, 7 Am. St. Rep. 458; Chicago, etc., R. R. Co. v. Harney, 28 Ind. 28, 92 Am. Dec. 282; Norfolk & Western R. R. Co. v. Hoover, 79 Md. 253, 25 L. R. A. 710, 47 Am. St. Rep. 392; Blake v. Maine Cent. R. R. Co., 70 Me. 60, 35 Am. Rep. 297; Gilman v. Eastern R. R. Co., 13 Allen (Mass.), 433, 90 Am. Dec. 210; Beers v. Prouty Co., 200 Mass. 19, 128 Am. St. Rep. 374, 20 L. R. A. (N. S.) 39 (ability to speak English required); Friberg v. Builders, etc., Co., 201 Mass. 461, 131 Am. St. Rep. 412 (same not required); Kean v. Rolling Mills, 66 Mich. 277, 11 Am. St. Rep. 492; Walkowski v. Penokee Mines, 115 Mich. 629, 41 L. R. A. 33; Davis v. Detroit, etc., R. R. Co., 20 Mich. 105, 4 Am. Rep. 364; Smith v. St. Louis, etc., R. R. Co., 151 Mo. 391, 48 L. R. A. 368; Moss v. Pacific R. R. Co., 49 Mo. 167, 8 Am. Rep. 126; Harper v. Indianapolis, etc., R. R. Co., 47 Mo. 567, 4 Am. Rep. 353; Bunnell v. St. Paul, etc., Ry. Co., 29 Minn. 305; New Orleans, etc., R. R. Co. v. Hughes, 49 Miss. 258; Enright v. Oliver, 69 N. J. L. 357, 101 Am. St. Rep. 710; Rosenstiel v. Pittsburg Rys. Co., 230 Pa. 273, 33 L. R. A. (N. S.) 751; Mexican Nat. R. R. Co. v. Mussette, 86 Tex. 708, 24 L. R. A. 642; South West Improv. Co. v. Smith, 85 Va. 306, 17 Am. St. Rep. 59; Conover v. Neher-Ross Co., 38 Wash. 172, 107 Am. St. Rep. 841; Pearson v. Alaska Pac. S. Co., 51 Wash. 560, 130 Am. St. Rep. 1117; Williams v. Kimberly, 131 Wis. 303, 120 Am. St. Rep. 1049, 10 L. R. A. (N. S.) 1043, 11 Ann. Cas. 622.

[60] First Nat. Bank v. Chandler, 144 Ala. 286, 113 Am. St. Rep. 39; Indianapolis Rapid Transit Co. v. Foreman, 162 Ind. 85, 102 Am. St. Rep. 185; Pittsburg, etc., R. R. Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111; Robbins v. Lewiston, etc., Ry. Co., 107 Me. 42, 30 L. R. A. (N. S.) 109; Norfolk & Western R. R. Co. v. Hoover, 79 Md. 253, 25 L. R. A. 710, 47 Am. St. Rep. 392; Kean v. Rolling Mills, 66 Mich. 277, 11 Am. St. Rep. 492; Walkowski v. Penokee Mines, 115 Mich. 629, 41 L. R. A. 33; Davis v. Detroit, etc., R. R. Co., 20 Mich. 105, 4 Am. Rep. 364; Coppins v. N. Y., etc., R. R. Co., 122 N. Y. 557, 19 Am. St. Rep. 523; Park v. N. Y., etc., R. R. Co., 155 N. Y. 215, 63 Am. St. Rep. 663; Laning v. N. Y. Cent. R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Baulec v. N. Y., etc., R. R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Chapman v. Erie Ry. Co., 55 N. Y. 579; Handley v. Daly Mining Co., 15 Utah, 176, 62 Am. St. Rep. 916; Williams v. Kimberly Clark Co., 131 Wis. 303, 120 Am. St. Rep. 1049; 10 L. R. A. (N. S.) 1043, 11 Ann. Cas. 622;

He is not a guarantor, however, of the fitness or competence of those whom he employs, and it is not enough to show the fact of the incompetence, but it must also be shown, in the one case that he might by exercise of reasonable care and diligence have discovered the incompetence at the time of the employment,[61] and in the other case that knowledge, or facts sufficient to have led to knowledge, of the incompetency had been brought home to him, and that he nevertheless continued them in the service.[62]

§ 1633. ——— Sufficient number.—This duty to furnish competent servants may include the question of number as well as of fitness, and it is the duty of the master in those cases in which he has undertaken, or in which reasonable care imposes upon him the duty, to furnish assistants, to exercise reasonable care to provide a sufficient number of other servants to enable the work to be performed with reasonable safety.[63]

Southern P. Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288.

[61] First Nat. Bank v. Chandler, 144 Ala. 286, 113 Am. St. Rep. 39; Western Stone Co. v. Whalen, 151 Ill. 472, 42 Am. St. Rep. 244; Norfolk & Western R. R. Co. v. Hoover, 79 Md. 253, 25 L. R. A. 710, 47 Am. St. Rep. 392; Conover v. Neher-Ross Co., 38 Wash. 172, 107 Am. St. Rep. 841.

[62] Southern P. Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; Alabama, etc., R. R. Co. v. Waller, 48 Ala. 459; Indianapolis Rapid Transit Co. v. Foreman, 162 Ind. 85, 102 Am. St. Rep. 185; Ohio, etc., Ry. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134; Chicago, etc., R. R. Co. v. Doyle, 18 Kan. 58; Kean v. Rolling Mills, 66 Mich. 277, 11 Am. St. Rep. 492; Walkowski v. Penokee Mines, 115 Mich. 629, 41 L. R. A. 33; Huffman v. Chicago, etc., R. R. Co., 78 Mo. 50; Kersey v. Kansas City, etc., R. R. Co., 79 Mo. 362; Coppins v. N. Y., etc., R. R. Co., 122 N. Y. 557, 19 Am. St. Rep. 523; Park v. N. Y. etc., R. R. Co., 155 N. Y. 215, 63 Am. St. Rep. 663; Huntingdon, etc., R. R. Co. v. Decker, 84 Pa. 419; East Tennessee, etc., R. R. Co. v. Gurley, 12 Lea (Tenn.), 46; Walton v. Burchel, 121 Tenn. 715, 130 Am. St. Rep. 788; Handley v. Daly Mining Co., 15 Utah, 176, 62 Am. St. Rep. 916; Williams v. Kimberly, etc., Co., 131 Wis. 303, 120 Am. St. Rep. 1049, 10 L. R. A. (N. S.) 1043, 11 Ann. Cas. 622. See also, cases in preceding note.

[63] Flike v. Boston & A. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Supple v. Agneu, 191 Ill. 439; Jones v. Cotton Mills, 82 Va. 140, 3 Am. St. Rep. 92; South West Improv. Co. v. Smith, 85 Va. 306, 17 Am. St. Rep. 59; Johnson v. Ashland Water Co., 71 Wis. 553, 5 Am. St. Rep. 243; Cheeney v. Steamship Co., 92 Ga. 726, 44 Am. St. Rep. 113.

This, of course, means something more than merely that the work is hard or heavy or pressing. The master must either have agreed to furnish help or it must be negligence not to do so. Where the servant continues to do heavy work without objection and is later injured, he cannot recover merely on this ground. See Skipp v. Eastern Counties Ry. Co., 9 Exch. 223.

Where the master has furnished a sufficient number, he is not liable where the foreman in charge of the work improperly distributes them on the work. Dair v. New York, etc., S. S. Co., 204 N. Y. 341, 40 L. R. A. (N. S.) 918.

§ 1634. ——— The risks resulting from the non-performance of the duty of the master, in these respects as in others already referred to, may be assumed by the servant under substantially the same conditions as in other cases. If a servant discovers that incompetent or insufficient servants have been employed or are being retained, he should notify the master and may rely for a reasonable period upon the latter's promise to remedy the difficulty. If he makes no such complaint or if he continues in the service after the force of the master's promise is spent, he will be deemed to have assumed the risk.[64]

§ 1635. **V. For not making and enforcing rules.**—Where the business to be carried on is complex and dangerous, as usually in the case of railroads, mines, and the like, it is the duty of the principal or master to exercise reasonable care and prudence in making and promulgating such necessary and proper rules and regulations as may be required to enable the business to be carried on with reasonable safety;[65] and then to exercise like care and prudence to see that such rules and regulations are enforced and obeyed.[66]

As in the case of tools and appliances, however, the master is not obliged to adopt any particular system, or to ensure either the best possible rules or the strictest possible observance: reasonable care and prudence is the measure of his duty.[67]

Moreover, the duty to make and enforce rules applies only in those kinds of business or in those kinds of work whose complexity or danger makes such rules reasonably necessary. There is, for example, no

[64] Williams v. Kimberly & Clark Co., 131 Wis. 303, 120 Am. St. Rep. 1049, 10 L. R. A. (N. S.) 1043, 11 Ann. Cas. 622; Cheeney v. Ocean Steamship Co., 92 Ga. 726, 44 Am. St. Rep. 113.

[65] Abel v. Delaware, etc., C. Co., 128 N. Y. 662; Merrill v. Oregon Short Line, 29 Utah, 264, 110 Am. St. Rep. 695; Reagan v. St. Louis, etc., R. Co., 93 Mo. 348, 3 Am. St. Rep. 542; Fitzgerald v. Worcester, etc., St. Ry. Co., 200 Mass. 105, 19 L. R. A. (N. S.) 239; Richlands Iron Co. v. Elkins, 90 Va. 249; Moore Lime Co. v. Richardson, 95 Va. 326, 64 Am. St. Rep. 785; Pittsburg, etc., R. Co. v. Powers, 74 Ill. 341; Evansville, etc., R. Co. v. Tohill, 143 Ind. 49; Sprague v. New York, etc., R. Co., 68 Conn. 345, 37 L. R. A. 638; Szymanski v. Blumenthal, 4 Penne. (Del.) 511, 103 Am. St. Rep. 132.

The giving of warning of occasional dangers may fall within this principle. Polaski v. Pittsburg Coal Co., 134 Wis. 259, 14 L. R. A. (N. S.) 952. But there is no such duty where the general situation is well known, and the master does not know and has no reason to expect the particular danger. Ahern v. Amoskeal Mfg. Co., 75 N. H. 99, 21 L. R. A. (N. S.) 89.

[66] Doing v. New York, etc., R. Co., 151 N. Y. 579; Merrill v. Oregon Short Line, 29 Utah, 264, 110 Am. St. Rep. 695; St. Louis, etc., R. Co. v. Triplett, 54 Ark. 289, 11 L. R. A. 773.

[67] Hannibal, etc., R. Co. v. Kanaley, 39 Kan. 1.

duty to prescribe rules for the performance of simple and ordinary operations where the nature of the operation or the circumstances of its performance sufficiently indicate the course of conduct which ought to be pursued.[68]

§ 1636. VI. For not furnishing necessary superintendence.—For similar reasons, where the work which the servant is called upon to perform is complicated or difficult, requiring the co-operation of several servants at once or at intervals, under circumstances in which they can not properly control themselves, involving the necessity of signals or warnings, needing expert advice or instructions for its proper performance, and the like, it is the duty of the master to exercise reasonable care to see that suitable superintendence and direction are supplied, and for a breach of this duty he will be liable if injury results.[69]

But this rule, like the one in the preceding section, depends upon exceptional facts. If the work is simple and ordinary, such as a group of men or a single man can usually perform in safety with no outside direction, no superintendence would be required. The master is not bound to watch over the details of ordinary work or direct its performance or constantly follow after his servants to see that his proper directions are strictly obeyed.[70]

§ 1637. VII. For injuries outside of employment.—It is those risks only which are incident to the undertaking of the servant or agent, which he is ordinarily deemed to have assumed, and not those of some other or different duty or employment.[71] Hence, if the principal or master requires of the servant the performance of an act outside of the scope of his employment, the servant is under no obligation to perform it. If, however, he does consent to perform it, a situation not unlike the ordinary one presents itself. It is not *per se* wrongful

[68] Morgan v. Hudson River, etc., Co., 133 N. Y. 666; Voss v. Delaware, etc., R. Co., 62 N. J. L. 59; Texas, etc., R. Co. v. Echols, 87 Tex. 339; Moore Lime Co. v. Richardson, 95 Va. 326, 64 Am. St. Rep. 785; Norfolk, etc., R. Co. v. Graham, 96 Va. 430.

[69] Engelking v. Spokane, 59 Wash. 446, 29 L. R. A. (N. S.) 481 ("the duty of superintendence is not a fixed legal duty, but may arise from the facts of any given case"); Trainor v. Philadelphia, etc., R. Co., 137 Pa. 148; Hill v. Big Creek Lumber Co., 108 La. 162, 58 L. R. A. 346; McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181.

[70] See Anderson v. Oregon R. & N. Co., 28 Wash. 467; Central R. Co. v. Keegan, 160 U. S. 257, 40 L. Ed. 418.

[71] Chicago, etc., Ry. Co. v. Bayfield, 37 Mich. 205; Railroad Co. v. Fort, 17 Wall. (U. S.) 553 Fed. Cas. No. 4,952; Lalor v. Chicago, etc., R. R. Co., 52 Ill. 401, 4 Am. Rep. 616; Dallemand v. Saalfeldt, 175 Ill. 310, 67 Am. St. Rep. 214, 48 L. R. A. 753.

for the master to give such instructions,[72] and if the servant undertakes to obey them he will ordinarily be deemed to have assumed the risks so far as they were open and obvious to him.[73] Where the risks are not obvious and are known to the master, but not to the servant, it is the master's duty to fully inform the servant of the perils of the undertaking and warn him against them. If he fails in this duty and the servant thereby suffers injury, the master is liable.[74]

This is particularly true where the servant is young or inexperienced, and not likely to anticipate or guard himself against injury.[75]

§ 1638. ——— It is, of course, true as has been stated that the servant would be under no obligation to obey instructions which required of him the performance of a duty beyond the scope of his undertaking, but, as bearing upon the question whether the situation presented itself to the servant as one within, or without his undertaking, and therefore as involving unfamiliar risks, it has been well said that where one contracts to submit himself to the orders of another, there must be some presumption that the orders he receives are lawful. The giving of the orders is, of itself, an assumption that they are lawful, and the servant or agent who refused to obey would take upon himself the burden of showing a lawful reason for the refusal, and in case of a failure so to do, he would incur the double risk of losing his employment and being compelled to pay damages. These

[72] Anderson v. Morrison, 22 Minn. 274.

[73] Richmond, etc., R. Co. v. Finley, 12 C. C. A. 595, 63 Fed. 228; Cole v. Chicago, etc., R. Co., 71 Wis. 114, 5 Am. St. Rep. 201; Gavigan v. Lake Shore, etc., R. Co., 110 Mich. 71; Maltbie v. Belden, 167 N. Y. 307, 54 L. R. A. 52; Chicago, etc., R. Co. v. Crotty, 73 C. C. A. 147, 141 Fed. 913; Dougherty v. West Superior Iron Co., 88 Wis. 343.

[74] Chicago, etc., Ry. Co. v. Bayfield, 37 Mich. 205; Brown v. Ann Arbor R. Co., 118 Mich. 205; Lalor v. Chicago, etc., R. R. Co., 52 Ill. 401, 4 Am. Rep. 616; Wheeler v. Wason Mfg. Co., 135 Mass. 294; Thompson v. Hermann, 47 Wis. 602, 32 Am. Rep. 784; O'Connor v. Adams, 120 Mass. 427; Jones v. Lake Shore, etc., Ry. Co., 49 Mich. 573; Broderick v. Detroit Union Depot Co., 56 Mich. 261, 56 Am. Rep. 382; Kennedy v. Swift, 234 Ill. 606, 123 Am. St. Rep. 113.

[75] Quinn v. Johnson Forge Co., 9 Houst. (Del.) 338; Camp v. Hall, 39 Fla. 535; Meier v. Way, 136 Iowa, 302, 125 Am. St. Rep. 254; Newbury v. Getchel, etc., Mfg. Co., 100 Iowa, 441, 62 Am. St. Rep. 582; Vohs v. Shorthill, 130 Iowa, 538; Dallemand v. Saalfeldt, 175 Ill. 310, 67 Am. St. Rep. 214, 48 L. R. A. 753; James v. Rapides Lbr. Co., 50 La. Ann. 717, 44 L. R. A. 33; Bourg v. Brownell Lumber Co., 120 La. 1009, 124 Am. St. Rep. 448; Brown v. Ann Arbor R. Co., 118 Mich. 205; Brennan v. Gordon, 118 N. Y. 489, 8 L. R. A. 818; Lofrano v. New York & M. V. Walter Co., 55 Hun (N. Y.), 452; Kehler v. Schwenk, 151 Pa. 505, 31 Am. St. Rep. 777; Texarkana, etc., Ry. Co. v. Preachet (Tex. Civ. App.), 59 S. W. 593; Gulf, etc., Ry. Co. v. Newman, 27 Tex. Civ. App. 77; Michael v. Roanoke Mach. Works, 90 Va. 492, 44 Am. St. Rep. 927.

are sufficient reasons for excusing him if he declines to take this responsibility in any case in which doubts can fairly exist; he should assume that the order is given in good faith and in the belief that it is rightful, and if in his own judgment it is unwarranted, it is not for the principal to insist that he was wrong in not refusing obedience,[76] unless the danger is so extreme and obvious that no reasonable man would, under the circumstances, expose himself to it.[77]

3. Negligence of his General Superintendent or other Representative.

§ 1639. Principal can not relieve himself by delegating duties.—It has been seen in the preceding sections that the master undertakes that reasonable care shall be exercised for the protection of the servant in a number of particulars, as, for example, in the furnishing and maintaining of a reasonably safe place to work; in supplying and keeping in repair reasonably safe appliances, tools and machinery; in employing and retaining reasonably competent servants; in making and enforcing reasonable rules and regulations, and the like. It is part of the undertaking of the master that these duties shall be performed, and it is entirely immaterial, so far as the responsibility of the master is concerned, whether he undertakes to perform them in person or confides the performance to some representative or substitute. Whoever undertakes to act for the master in this particular, whether he be a general superintendent, a general manager, or a person exercising similar duties by whatever name, is the representative of the master, charged with the performance of the master's duties, and the master must answer for the way in which they are performed. In the sense that the master cannot escape responsibility by delegating the performance of these duties to another, these duties are often called non-delegable or non-assignable ones.

§ 1640. Liable for negligence of general agent or superintendent—Vice-principal.—It is therefore well settled that where the principal or master entrusts to a general agent—often called a vice-princi-

[76] Per Cooley, C. J., in Chicago, etc., Ry. Co. v. Bayfield, 37 Mich. 204.

[77] Chicago, etc., Ry. Co. v. Bayfield, 37 Mich. 205; Thompson v. Hermann, 47 Wis. 602, 32 Am. Rep. 784; Michael v. Roanoke Mach. Works, 90 Va. 492, 44 Am. St. Rep. 927; Helm v. O'Rourke, 46 La. Ann. 178; Northern Pac. Coal Co. v. Richmond, 7 C. C. A. 435, 58 Fed. 756; Louisville, etc., R. Co. v. Hanning, 131 Ind. 528, 31 Am. St. Rep. 443; Pittsburg, etc., R. Co. v. Adams, 105 Ind. 151; Brazil Coal Co. v. Hoodlet, 129 Ind. 327; Taylor v. Evansville R. Co., 121 Ind. 124, 16 Am. St. Rep. 372, 6 L. R. A. 584; Consolidated Coal Co. v. Haenni, 146 Ill. 614; Chicago, etc., Ry. Co. v. McCarty, 49 Neb. 475; Fox v. Chicago, etc., R. Co., 86 Iowa, 368, 17 L. R. A. 289; English v. Chicago, etc., Ry. Co., 24 Fed. 906.

pal because for the time being he is performing a master's or principal's duties—the power and the duty to purchase, control or keep in repair the implements or machinery to be used; or the power and duty to employ, regulate and discharge on his account the agents or servants to be employed, and the like, the principal is liable to an agent or servant for a neglect in the performance of these duties by such general agent, in the same manner and to the same extent as though the neglect had been that of the principal himself were he personally managing and controlling the business.[78] The fact that the principal has exercised due care in his selection does not alter the result, if the superintendent, however carefully chosen, has not performed the master's duty.

Such a general agent or superintendent, called by whatever name, while engaged in the performance of that class of duties, is not a fellow-servant or co-employee of the agents or servants employed by and acting under him. For the time being and as to those duties he stands in the principal's place, and his neglect is the neglect of the principal.[79] This rule applies alike to corporations and to individuals,

[78] Tyson v. North, etc., Rr. Co., 61 Ala. 554, 32 Am. Rep. 8; Wilson v. Willimantic Linen Co., 50 Conn. 433, 47 Am. Rep. 653; Brown v. Sennett, 68 Cal. 225, 58 Am. Rep. 8; Beeson v. Green Mountain Co., 57 Cal. 20; Taylor v. Georgia Marble Co., 99 Ga. 512, 59 Am. St. Rep. 238 (but see Hilton, etc., Lbr. Co. v. Ingram, 119 Ga. 652, 100 Am. St. Rep. 204); Baier v. Selke, 211 Ill. 512, 103 Am. St. Rep. 208; Mitchell v. Robinson, 80 Ind. 281, 41 Am. Rep. 812; Brice-Nash v. Barton Salt Co., 79 Kan. 110, 131 Am. St. Rep. 284, 19 L. R. A. (N. S.) 749; Ford v. Fitchburg Rr. Co., 110 Mass. 240, 14 Am. Rep. 598; Shanny v. Androscoggin Mills, 66 Me. 420; Cumberland, etc., R. Co. v. State, 44 Md. 283, s. c. 45 Md. 229; Brown v. Gilchrist, 80 Mich. 56, 20 Am. St. Rep. 496; Rick v. Saginaw Bay Towing Co., 132 Mich. 237, 102 Am. St. Rep. 422; Ryan v. Bagaley, 50 Mich. 179, 45 Am. Rep. 35; Harper v. Indianapolis, etc., R. Co., 47 Mo. 567, 4 Am. Rep. 353; Gormley v. Vulcan Iron Works, 61 Mo. 492; Dowling v. Allen, 74 Mo. 13, 41 Am. Rep. 298; Brothers v. Cartter, 52 Mo. 373, 14 Am. Rep. 424; Bushby v. N. Y., etc., R. R. Co., 107 N. Y. 374, 1 Am. St. Rep. 844; Flike v. Boston, etc., R. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Corcoran v. Holbrook, 59 N. Y. 517, 17 Am. Rep. 369; Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Fuller v. Janett, 80 N. Y. 46, 36 Am. Rep. 575; Cowles v. Richmond, etc., R. Co., 84 N. C. 309, 37 Am. Rep. 620; Kelly Island, etc., Co. v. Pachuta, 69 Ohio St. 462, 100 Am. St. Rep. 706; Medra's Admr. v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Schiglizzo v. Dunn, 211 Pa. 253, 107 Am. St. Rep. 567; Mullan v. Philadelphia, etc., Steamship Co., 78 Pa. 25, 21 Am. Rep. 2; Clavin v. Tinkham Co., 29 R. I. 599, 132 Am. St. Rep. 836; Gunter v. Graniteville Mfg. Co., 18 S. C. 262, 44 Am. Rep. 573; East Tennessee, etc., R. Co. v. Duffield, 12 Lea (Tenn.), 63, 47 Am. Rep. 319; Sullivan v. Wood & Co., 43 Wash. 259, 117 Am. St. Rep. 1047; Massy v. Milwaukee El. Ry. Co., 143 Wis. 220, 139 Am. St. Rep. 1096; Johnson v. First Nat. Bank, 79 Wis. 414, 24 Am. St. Rep. 722; Brabbits v. Chicago, etc., Ry. Co., 38 Wis. 289.

[79] See cases, *supra*.

although from the very nature of the case, the occasions or necessities for the employment of such a general agent are much greater in the case of corporations than in that of individuals.[80]

Where, however, the agent or servant in question not only performs the duty of management or direction, but also, at times, joins with the other servants in the performance of the service, he is, by the weight of authority and reason, as to the latter class of duties to be regarded not as a representative of the master but as a fellow servant.[81]

4. Negligence of Independent Contractor Performing Master's Duties.

§ 1641. Liable for negligence of independent contractor performing master's duties.—For similar reasons the same result should follow where the master, instead of performing in person his duties of furnishing a safe place to work, supplying proper tools and appliances, and the like, makes a contract with one carrying on an independent calling to perform them for him: he should still be held liable if they are not performed, even though he has exercised due care in the selection of the contractor. That is to say, reasonable care must be exercised in furnishing a reasonably safe place, reasonably safe tools and appliances, etc. If the master does not perform this duty in person, his delegate must perform it. It must be performed by one or the other. If either one performs it, the master is not liable, though injury results. If neither one performs it, the master is liable, even though he selected his delegate with due care. To this effect is the weight of authority,[82] though there are a few cases not easily to be reconciled with this conclusion.[83]

[80] See cases, *supra*.

[81] See *post*, § 1654.

See also, Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Madigan v. Oceanic Steam Navigation Co., 178 N. Y. 242, 102 Am. St. Rep. 495; Baier v. Selke, 211 Ill. 512, 103 Am. St. Rep. 208.

[82] Pullman Palace Car Co. v. Laack, 143 Ill. 242, 18 L. R. A. 215; Bernheimer v. Bager, 108 Md. 551, 129 Am. St. Rep. 458; Sweat v. Boston & Albany Rr. Co., 156 Mass. 284; Morton v. Detroit, etc., R. Co., 81 Mich. 423; Burnes v. Kansas City, etc., R. Co., 129 Mo. 41; Herdler v. Buck's Stove Co., 136 Mo. 3; Story v. Concord & Montreal R., 70 N. H. 364; Trainor v. Philadelphia & Reading R. Co., 137 Pa. 148 (but see Ardesco Oil Co. v. Gilson, 63 Pa. St. 146); Ortlip v. Philadelphia, etc., Trac. Co., 198 Pa. 586; Moran v. Corliss Steam Engine Co., 21 R. I. 386, 45 L. R. A. 267; Gulf, Colo., etc., R. Co. v. Delaney, 22 Tex. Civ. App. 427; Walton v. Miller, 109 Va. 210, 132 Am. St. Rep. 908; Vickers v. Kanawha, etc., Ry. 64 W. Va. 474, 131 Am. St. Rep. 929, 20 L. R. A. (N. S.) 793; Toledo Brewing & Malting Co. v. Bosch, 101 Fed. 530, 41 C. C. A. 482; Macdonald v. Wyllie & Son, 1 Scotch Sess. Cases, 5th Ser., 339.

[83] Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311. See also, Stourbridge

§ 1642. When liable to agents of contractor.—Care should be taken, however, to distinguish between the case considered in the last section, and that of the servant of an independent contractor who has undertaken to perform certain services for the principal, and to furnish the necessary machinery, appliances and labor. The agent or servant of such a contractor could not be considered to be the agent or servant of the principal, nor could the contractor himself be considered such an *alter ego* of the principal as to render the latter liable, to a servant or agent of the contractor, for an injury occasioned by the neglect of the contractor in furnishing and keeping in repair the necessary machinery, or in employing or retaining incompetent servants.[84] The principal would, however, be liable to the servant or agent of the contractor for an injury received from perils or dangers in the principal's premises, where such servant or agent had a right to be,

v. Brooklyn City R. Co., 9 App. Div. (N. Y.) 129; Kaye v. Rob Roy Hosiery Co., 51 Hun (N. Y.), 519; Carlson v. Phoenix Bridge Co., 55 Hun (N. Y.), 485; Butler v. Townsend, 126 N. Y. 105; Norfolk, etc., R. Co. v. Stevens, 97 Va. 631, 46 L. R. A. 367 (distinguished in Walton v. Miller, 109 Va. 210 cited in the following note).

Kiddle v. Lovett, 16 Q. B. Div. 605.

Buying from reputable manufacturers.—It is held in a number of cases that where the master buys tools, machinery, supplies, etc., of a reputable manufacturer by whom they have been tested, and himself subjects them to such inspection or examination as is usual and practicable in such cases, he has exercised due care and is not liable for latent defects. He is not obliged to tear it to pieces or destroy it in search for latent defects. See Taylor v. Centralia Coal Co., 155 Ill. App. 324; Kansas City, etc., R. Co. v. Ryan, 52 Kan. 637; Shea v. Wellington, 163 Mass. 364; Reynolds v. Merchants' Woolen Co., 168 Mass. 501; Fuller v. New York, etc., R. Co., 175 Mass. 424; Mooney v. Beattie, 180 Mass. 451, 70 L. R. A. 831; but not if he was not a manufacturer of that sort of article, Murphy v. Huber-Hodgman Printing Press Co., 203 Mass. 549; Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537; Dompier v. Lewis, 131 Mich. 144; Jenkins v. St. Paul R. Co. 105 Minn. 504, 20 L. R. A. (N. S.) 401; Tallman v. Nelson, 141 Mo. App. 478 (especially in the case of simple and familiar articles, like a delivery wagon); Carlson v. Phoenix Bridge Co., 132 N. Y. 273.

Master owes no duty of inspecting before delivering to the servant for use where the servant who uses it is in the best situation to inspect it before he uses it. Gibson v. Milwaukee Light, etc., Co., 144 Wis. 140. See also, Wachsmuth v. Shaw Electric Crane Co., 118 Mich. 275; Longpre v. Big Blackfoot Mill. Co., 38 Mont. 99; Gulf, etc., R. Co. v. Larkin, 98 Tex. 225, 1 L. R. A. (N. S.) 944.

But in Hailey-Ola Coal Co. v. Parker, 32 Okla. 642, 40 L. R. A. (N. S.) 1120 it is said that it is not enough to buy of a reputable manufacturer, but that the master, before starting the use of the new article, is bound to submit it to reasonable inspection, and of this the jury is the judge.

[84] Knoxville Iron Co. v. Dobson, 7 Lea (Tenn.), 367; King v. New York, etc., R. R. Co., 66 N. Y. 181, 23 Am. Rep. 37.

of which the principal had knowledge but of which the agent or servant was left in ignorance. This liability does not rest upon the relation of principal and agent, or of master and servant, but upon the broad and familiar principle that every man who expressly or by implication invites others to come upon his premises, assumes to all who accept the invitation, the duty of warning them of any danger in coming, which he knows of or ought to know of, and of which they are not aware.[85] So if the principal was by the terms of the contract under obligation to the contractor to furnish the necessary machinery or appliances, or to supply a portion of the labor, it is held that he will be liable to the agent or servant of the contractor for an injury sustained by reason of his neglect to use due and reasonable care in selecting and keeping in repair the proper machinery or appliances, or in employing and retaining competent servants, not upon the ground of any contractual relation between himself and the person injured, but, according to some cases, upon the inherently dangerous character of the thing he furnishes,[86] and, according to others, "upon a failure to per-

[85] Samuelson v. Cleveland Iron Mining Co., 49 Mich. 164, 43 Am. Rep. 456; Southcote v. Stanley, 1 H. & N. 247; Indermaur v. Dames, L. R. 1 C. P. 274, s. c. 2 Id. 311; Francis v. Cockrell, L. R. 5 Q. B. 184; Elliott v. Pray, 10 Allen (Mass.), 378, 87 Am. Dec. 653; Coughtry v. Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387; Tobin v. Portland, etc., R. R. Co., 59 Me. 183, 8 Am. Rep. 415; Latham v. Roach, 72 Ill. 179; Gillis v. Pennsylvania R. R. Co., 59 Pa. 129, 98 Am. Dec. 317; Malone v. Hawley, 46 Cal. 409; Deford v. Keyser, 30 Md. 179; Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120; Pugmire v. Oregon Short Line Ry., 33 Utah, 27, 13 L. R. A. (N. S.) 565, 14 Ann. Cas. 384.

[86] Coughtry v. Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387, is the leading case. In this case, O contracted to put a cornice on defendant's mill, defendant agreeing to erect the necessary scaffolding free of cost to O. Defendant erected the scaffolding so negligently that it fell, killing a servant of O, who was at work upon it. It was held that defendant was liable. The court distinguished the case from Winterbottom v. Wright, 10 M. & W. 109; Longmeid v. Halliday, 6 Eng. Law & Eq. 761; Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 543; Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638. The scaffolding here was fifty feet high, "and unless properly constructed would be a most dangerous trap, imperilling the life of any person who might go upon it."

The same principle was announced in Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311, in holding liable the contractor who defectively constructed a scaffold about ninety feet high. The case was said to fall within the principle of Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455 (the case of a druggist who carelessly labeled a deadly poison as a harmless drug and was held liable to one with whom there was no privity of contract).

In Kahner v. Otis Elevator Co., 96 N. Y. App. Div. 169, the case is put upon the ground that, though the machine may not be inherently dangerous, yet if it is made so by the neglect of the manufacturer, having notice and knowledge that it is to be used by

form a duty assumed by one which results in injury to another," [87] a principle so broadly stated as to be of doubtful accuracy.

5. *Negligence of Fellow-servant.*

§ 1643. Master not liable to one servant for negligence of a fellow-servant.—The liability of the master *to third persons* for the negligence or misconduct of his servant is discussed in another chapter. As will there be seen, the master is held liable to third persons in many cases even though he is not personally at fault, and has done all that could reasonably be done to prevent the causing of injury. This rule imposing liability where there is no blame, is, in itself, an exception to a wider principle that every person shall answer for his own misconduct only; it often works great hardship upon innocent masters, and is difficult to account for except upon considerations of expediency rather than natural justice. Nevertheless it had become firmly established in our law for many years before the question arose whether the same exceptional rule should be extended to cases in which the person injured was not a stranger but a fellow-servant working for the same master and engaged in furthering the same general enterprise. The question was first suggested in an English case [88] arising in 1837, and was first maturely considered in an American case [89] decided in 1842, which has since been regarded both in England and America as the leading case upon the subject. It was urged that the established rule was that the master should answer, and therefore he should be made answerable here. But it was pointed out by Chief Justice Shaw that the rule of *respondeat superior* was a rule applicable to the case in which the person injured was a stranger, and that the

others than the purchaser, he will be liable to such user.

[87] This is the language used in McMullen v. New York, 110 N. Y. App. Div. 117, followed in Dougherty v. Weeks, 126 N. Y. App. Div. 786. See also, Jewell v. Kansas City Bolt Co., 231 Mo. 176, 140 Am. St. Rep. 515.

[88] Priestly v. Fowler, 3 M. & W. 1.

[89] Farwell v. Boston & Worcester R. Co., 4 Metc. (Mass.) 49, 38 Am. Dec. 339.

The case of Murray v. South Carolina R. Co., 1 McMull. L. (S. Car.) 385, 36 Am. Dec. 268, was decided a year before the Farwell case and reached the same result, though the court was divided in opinion. The great reputation of Chief Justice Shaw, the standing of the court, and the unanimity of opinion of the judges, as well as the careful consideration bestowed upon the case, have operated to make the Farwell case the leading case upon the subject, both American and English courts having accepted its reasoning as conclusive.

The Farwell case has often been referred to in the English cases and is reprinted in 3 Macq. 316. See Bartonshill Coal Co. v. Reid, 3 Macq. 266; Coldrick v. Partridge, [1909] 1 K. B. 530.

considerations which support the rule have no application to the case of a fellow-servant. There being, then, no established rule for such a case, it must be decided in contemplation of the contract between the parties and such considerations of policy as should be thought to be applicable. Considerations of policy were thought to lead to the conclusion that the safety of the servants and the public would be promoted if the servants were left with no other remedy for an injury than recourse to the fellow-servant who caused it, thus making each solicitous for the safety of all. From the standpoint of the contract, it was held that inasmuch as the servant presumptively knew, at the time he entered upon the employment, what the ordinary risks and perils of the business were, and that this was one of them, and had not stipulated for protection by the master, and was, further, at liberty to insist upon a compensation commensurate with the risks, it was fair to presume that he had assumed this risk along with the other risks of the business, in consideration of the compensation paid to him. It was therefore held that the servant could not recover, where the master had been guilty of no fault in selecting or retaining the servant or otherwise.

§ 1644. ——— Although sometimes dissented from, this doctrine has been generally adopted, and the principle is now firmly established, both in England and the United States, that a master is not liable to one servant for an injury received by the latter, resulting from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business.[90] As has been stated, it is inevitable in

[90] The cases upon this point are exceedingly numerous, and no attempt will be made to cite them all. But the following are among the number: Priestly v. Fowler, 3 M. & W. 1; Hutchinson v. York, etc., Ry. Co., 5 Ex. 343; Wigmore v. Jay, 5 Ex. 354; Clarke v. Holmes, 7 H. & N. 937; Wiggett v. Fox, 11 Ex. 832; Degg v. Midland Ry. Co., 1 H. & N. 773; Bartonshill Coal Co. v. Reid, 3 Macq. 266; Bartonshill Coal Co. v. McGuire, 3 Macq. 300; Coldrick v. Partridge, [1909] 1 K. B. 530; Burr v. Theatre Royal, [1907] 1 K. B. 544; Tenn., etc., R. Co. v. Bridges, 144 Ala. 229, 113 Am. St. Rep. 35; Southern Pacific Co. v. McGill, 5 Ariz. 36; St. Louis, etc., Rr. Co. v. Triplett, 54 Ark. 289, 11 L. R. A. 773; Beeson v. Green Mountain G. M. Co., 57 Cal. 20; Novelty Theater Co. v. Whitcomb, 47 Cal. 110, 37 L. R. A. (N. S.) 514; Colorado, etc., R. Co. v. Ogden, 3 Colo. 499; Peterson v. New York, etc., Rr. Co., 77 Conn. 351; Taylor v. Bush, etc., Co. 5 Pennewill (Del.), 378; Hughson v. Richmond, etc., R. Co., 2 App. Cases (Dist. of Cal.) 98; Parrish v. Pensacola R. Co., 28 Fla. 251; Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698; Larsen v. Le Doux, 11 Idaho, 49; Illinois, etc., R. R. v. Cox, 21 Ill. 20; Chicago, etc., R. v. Keefe, 47 Id. 108; Columbus, etc., Ry. v. Troesch, 68 Id. 545, 18 Am. Rep. 578; Indianapolis, etc., Transit Co. v. Foreman, 162 Ind. 85, 102 Am. St. Rep. 185; Ohio, etc., R. R. v. Tindall, 13 Ind. 366; Wilson v. Madison, etc., R. Co.,

those employments in which the servant is liable to come in contact with other servants, engaged in the same general business, that he will incur more or less of risk from their negligence or default, but

18 Id. 226; Gormley v. Ohio, etc., Ry. Co., 72 Id. 31; Ohio, etc., Ry. Co. v. Collarn, 73 Id. 261, 38 Am. Rep. 134; Robertson v. Terre Haute, etc., R. Co., 78 Ind. 77, 41 Am. Rep. 552; Helfrich v. Williams, 84 Ind. 553; Collingwood v. Illinois, etc., Fuel Co., 125 Iowa, 537; Atchison & E. Bridge Co. v. Miller, 71 Kan. 13, 1 L. R. A. (N. S.) 682; Ft. Hill Stone Co. v. Orm, 84 Ky. 183; Louisville, etc., R. Co. v. Collins, 2 Duv. 114; Hubgh v. N. O. & C. R. Co., 6 La. Ann. 495, 54 Am. Dec. 565; Satterly v. Morgan, 35 La. Ann. 1166; Osborne v. Knox, etc., R. R., 68 Me. 49; Blake v. Maine Central R. Co., 70 Id. 60, 35 Am. Rep. 297; O'Connell v. Baltimore, etc., R. Co., 20 Md. 212; Shauck v. Northern, etc., Ry. Co., 25 Id. 462; Cumberland Coal Co. v. Scally, 27 Id. 589; Hanrathy v. Northern, etc., Ry. Co., 46 Id. 280; Pennsylvania R. Co. v. Wachter, 60 Id. 395; Kelley v. Norcross, 121 Mass. 508; Harkins v. Standard Sugar Refinery, 122 Id. 400; Colton v. Richards, 123 Id. 484; Kelley v. Boston Lead Co., 128 Id. 456; Curran v. Merchant's Mfg. Co., 130 Id. 374, 39 Am. Rep. 457; McDermott v. City of Boston, 133 Mass. 349; Flynn v. City of Salem, 134 Id. 351; Floyd v. Sudgen, Id. 563; Day v. Toledo, etc., Ry. Co., 42 Mich. 523; Smith v. Flint, etc., Ry. Co., 46 Id. 258, 41 Am. Rep. 161; Greenwald v. Marquette, etc., R. Co., 49 Mich. 197; Brown v. Winona, etc., R. Co., 27 Minn. 162, 38 Am. Rep. 285; Collins v. St. Paul, etc., R. Co., 30 Minn. 31; Brown v. Minneapolis, etc., Ry. Co., 31 Id. 553; McMaster v. Illinois Cent. R. Co., 65 Miss. 264, 7 Am. St. Rep. 653; Chicago, etc., R. Co. v. Doyle, 60 Miss. 977; Parker v. Hannibal, etc., R. Co., 109 Mo. 362, 18 L. R. A. 802; Brothers v. Cartter, 52 Mo. 373, 14 Am. Rep. 424; Conner v. Chicago, etc., R. Co., 59 Mo. 285; Hastings v. Montana Union R. Co., 18 Mont. 493; Chicago, etc., R. Co. v. Sullivan, 27 Neb. 673; Manning v. Manchester Mills, 70 N. H. 582; McAndrews v. Burns, 39 N. J. L. 117; Enright v. Oliver, 69 N. J. L. 357, 101 Am. St. Rep. 710; Lutz v. Atlantic, etc., R. Co., 6 N. M. 496, 16 L. R. A. 819; Sherman v. Rochester, etc., R. Co., 17 N. Y. 153; Laning v. N. Y. Cent. R. Co., 49 Id. 521, 10 Am. Rep. 417; Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; McCosker v. Long Island R. R. Co., 84 N. Y. 77; Harvey v. N. Y. Cent., etc., R. Co., 88 Id. 481; Young v. N. Y., etc., R. Co., 30 Barb. 229; Marvin v. Muller, 25 Hun, 163; Cowles v. Richmond, etc., R. Co., 84 N. C. 309, 37 Am. Rep. 620; Ell v. Northern Pac. R. Co., 1 N. D. 336, 26 Am. St. Rep. 621, 12 L. R. A. 97; Kelly Island Lime, etc., Co. v. Pachuta, 69 Ohio St. 462, 100 Am. St. Rep. 706; Columbus, etc., R. Co. v. Webb, 12 Ohio St. 475; Pittsburg, etc., Ry. Co. v. Devinney, 17 Id. 197; Lake Shore, etc., Ry. Co. v. Knittal, 33 Id. 468; Railway Co. v. Ranney, 37 Id. 665; McCabe v. Wilson, 17 Okla. 355; Knahtla v. Oregon Short Line Rr. Co., 21 Ore. 136; Willis v. Oregon, etc., R. R., 3 West Coast Rep. 240 (Or.); Weger v. Pennsylvania R. Co., 55 Pa. St. 460; Lehigh Valley Coal Co. v. Jones, 86 Id. 432; Delaware, etc., Canal Co. v. Carroll, 89 Pa. St. 374; Keystone Bridge Co. v. Newberry, 96 Id. 246, 42 Am. Rep. 543; Mann v. Oriental Print Works, 11 R. I. 152; Lasure v. Graniteville Mfg. Co., 18 S. C. 275; Guntir v. Graniteville Mfg. Co., Id. 262, 44 Am. Rep. 573; Gates v. Chicago, etc., Ry. Co., 45 D. 433; Ragsdale v. Memphis, etc., R. R., 3 Baxt. (Tenn.) 426; Nashville, etc., R. R. v. Wheless, 10 Lea (Tenn.), 741, 43 Am. Rep. 317; Houston, etc., R. Co. v. Myers, 55 Tex. 110; Texas Mexican Ry. Co. v. Whitmore, 58 Id. 276; Pool v. Southern Pacific Co., 20

this is one of the risks incident to the business, and, by accepting the employment, the servant assumes this with the others.

The servant, at the same time, has a right to rely upon the principal's performance of his duty to use due and reasonable care and diligence to select and retain none but reasonably competent and careful servants. If, therefore, as has been seen, the servant receives injury by reason of the employment of a fellow servant, who was employed, or who has been retained, in violation of this duty of the master's, the master, subject to the further doctrine of the assumption of risks, is liable.[91]

Utah, 210; Davis v. Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590; Norfolk, etc., Rr. Co. v. Nuckols, 91 Va. 193; Metzler v. McKenzie, 34 Wash. 470; Cochran v. Shanahan, 51 W. Va. 137; Brabbits v. Chicago, etc., R. Co., 38 Wis. 289; Naylor v. Chicago, etc., Ry. Co., 53 Id. 661; Howland v. Milwaukee, etc., Ry. Co., 54 Id. 226; Hoth v. Peters, 55 Id. 405; Whitnam v. Wisconsin, etc., R. Co., 58 Id. 408; Heine v. Chicago, etc., Ry. Co., Id. 525; McBride v. Union Pac. Ry. Co., 3 Wyo. 248; Northern Pacific Rr. Co. v. Peterson, 162 U. S. 346, 40 L. Ed. 994; Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 368, 37 L. Ed. 772; Chicago, etc., Ry. Co. v. Ross, 112 U. S. 377, 28 L. Ed. 787; Randall v. Baltimore & Ohio R. Co., 109 U. S. 478, 27 L. Ed. 1003; New England R. Co. v. Conroy, 175 U. S. 323, 44 L. Ed. 181; Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612; Halverson v. Nisen, 3 Saw. (U. S. C. C.) 562; Melville v. Missouri River, etc., R. R., 4 McCrary (U. S. C. C.), 194; Yager v. Atlantic, etc., R. Co., 4 Hughes (U. S. C. C.), 192; Jordan v. Wells, 3 Woods (U. S. C. C.), 527; Thompson v. Chicago, etc., Ry. Co., 18 Fed. Rep. 239; Crew v. St. Louis, etc., Ry. Co., 20 Id. 87.

Infants.—The fact that the servant injured was an infant (unless where he was a child too young to have responsibility imputed to him), does not affect the rule. Houston, etc., R. Co. v. Miller, 51 Tex. 270; Fisk v. Central Pac. R. Co., 72 Cal. 38, 1 Am. St. Rep. 22; King v. Boston, etc., R. Co., 9 Cush. (Mass.) 112.

[91] First Nat. Bk. v. Chandler, 144 Ala. 286, 113 Am. St. Rep. 39; Daves v. Southern Pacific Co., 98 Cal. 19, 35 Am, St, Rep. 133; Keith v. Walker Iron & Coal Co., 81 Ga. 49, 12 Am. St. Rep. 296; Western Stone Co. v. Whalen, 151 Ill. 472, 42 Am. St. Rep. 244; Hinckley v. Horazdowsky, 133 Ill. 359, 23 Am. St. Rep. 618, 8 L. R. A. 490; Illinois Cent. R. Co. v. Jewell, 46 Ill. 99, 92 Am. Dec. 240; Indianapolis, etc., Transit Co. v. Foreman, 162 Ind. 85, 102 Am. St. Rep. 185; New Pittsburg Coal & Coke Co. v. Peterson, 136 Ind. 398, 43 Am. St. Rep. 327; Norfolk, etc., R. Co. v. Hoover, 79 Md. 253, 47 Am. St. Rep. 392, 25 L. R. A. 710; Snow v. Housatonic, etc., R. Co., 8 Allen (Mass.), 441, 85 Am. Dec. 720; Walkowski v. Consolidated Mines, 115 Mich. 629, 41 L. R. A. 33; McMaster v. Illinois Cent. R. Co., 65 Miss. 264, 7 Am. St. Rep. 653; Smith v. St. Louis, etc., R. Co., 151 Mo. 391, 48 L. R. A. 368; Harper v. Indianapolis, etc., R. Co., 47 Mo. 567, 4 Am. Rep. 353; Enright v. Oliver, 69 N. J. L. 357, 101 Am. St. Rep. 710; Wright v. N. Y. Cent. R. Co., 25 N. Y. 562; Handley v. Daly Mining Co., 15 Utah, 176, 62 Am. St. Rep. 916; Noyes v. Smith, 28 Vt. 63, 65 Am. Dec. 222; Big Stone Gap Iron Co. v. Ketron, 102 Va. 23, 102 Am. St. Rep. 839; Maitland v. Gilbert Paper Co., 97 Wis. 476, 65 Am. St. Rep. 137; Zabawa v. Oberbeck Mfg. Co., 146 Wis.

§ 1645. ——— So, too, as it is those risks only which are incident to his employment, which the servant assumes, he does not assume the responsibility for negligence or misconduct of other servants engaged in another and different employment.[92]

§ 1646. ——— Moreover, if the master has been guilty of actionable negligence, the fact that the negligence of a fellow servant contributed will not defeat the servant's right of recovery against the master.[93]

§ 1647. ——— Of course, the doctrines here considered do not affect the liability of the servant, whose negligence caused the injury, to the servant injured. As has been pointed out in other sections, the servant is usually liable for his own negligence, even though the law makes the master liable also, and there is nothing in the fellow servant situation to change that liability.[94]

621, Ann. Cas. 1912 C. 419; Southern Pacific Co. v. Hetzer, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; Baltimore, etc., Rr. Co. v. Baugh, 149 U. S. 368, 37 L. Ed. 772.

[92] This is, of course, true under the departmental theory. Pool v. Chicago, etc., Ry. Co., 56 Wis. 227; Cumberland, etc., R. R. Co. v. State, 44 Md. 283; Green v. Banta, 48 N. Y. Super. 156, 97 N. Y. 627; Nashville, etc., R. R. Co. v. Jones, 9 Heisk. (Tenn.) 27; Sheehan v. New York, etc., R. R. Co., 91 N. Y. 332; Shanny v. Androscoggin Mills, 66 Me. 420. But the same rule applies where, though the master was the same, the employments were different; Bain v. Athens Foundry, etc., Works, 75 Ga. 718; McTaggart v. Eastman's Co., 27 N. Y. Misc. 184; Connolly v. Davidson, 15 Minn. 519, 2 Am. Rep. 154; Indiana Pipe Line Co. v. Neusbaum, 21 Ind. App. 361; Sell v. Lumber Co., 70 Mich. 479.

[93] Fisk v. Central Pac. Ry. Co., 72 Cal. 38, 1 Am. St. Rep. 22; Farrell v. Eastern Mach. Co., 77 Conn. 484, 107 Am. St. Rep. 45, 68 L. R. A. 239; Loveless v. Standard Gold Min. Co., 116 Ga. 427, 59 L. R. A. 596; Siegel-Cooper & Co. v. Trcka, 218 Ill. 559, 109 Am. St. Rep. 302, 2 L. R. A. (N. S.) 647; Illinois, etc., R. Co. v. Marshall, 210 Ill. 562, 66 L. R. A. 297; Eureka Block Co. v. Wells, 29 Ind. App. 1, 94 Am. St. Rep. 259; Schwarzschild, etc., Co. v. Weeks, 72 Kan. 190, 4 L. R. A. (N. S.) 515; Fuller v. Tremont Lbr. Co., 114 La. 266, 108 Am. St. Rep. 348; Noble v. Bessemer S. S. Co., 127 Mich. 103, 54 L. R. A. 456; Franklin v. Winona, etc., R. Co., 37 Minn. 409, 5 Am. St. Rep. 856; Root v. Kansas City, etc., R. Co., 195 Mo. 348, 6 L. R. A. 212; Coppins v. N. Y., etc., R. Co., 122 N. Y. 557, 19 Am. St. Rep. 523; Railroad Co. v. Spence, 93 Tenn. 173, 42 Am. St. Rep. 907; Merrill v. Oregon Short Line R. Co., 29 Utah, 264, 110 Am. St. Rep. 695; Norfolk, etc., R. Co. v. Thomas, 90 Va. 205, 44 Am. St. Rep. 906; Howe v. Northern Pac. R. Co., 30 Wash. 569, 60 L. R .A. 949; Grant v. Keystone Lbr. Co., 119 Wis. 229, 100 Am. St. Rep. 883; Chicago Junction Ry. Co. v. King, 169 Fed. 372, 94 C. C. A. 652.

The same result would follow where there was negligence of a servant, not a fellow servant, though the negligence of a fellow servant also contributed. Kansas City, etc., R. Co. v. Becker, 67 Ark. 1, 77 Am. St. Rep. 78, 46 L. R. A. 814.

[94] Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437; Hinds v. Overacker, 66 Ind. 547, 32 Am. Rep. 114; Rogers

§ 1648. ——— The fact that the servant injured is a superior servant, who might not be regarded in all states as a fellow servant of a servant injured by his negligence,[95] does not affect the master's exemption from liability under the general rule. The negligent servant is a fellow servant of the superior servant for this purpose, even if the superior servant might not be deemed a fellow servant if the other servant had been injured by the superior servant's negligence.[96]

§ 1649. **Who is a fellow-servant?**—Although it is thus firmly established in English law, where not changed by statute, that the master is not liable to one servant for injuries caused by the negligence of a fellow servant, the principles upon which it shall be determined who is a fellow servant within this rule have not been everywhere agreed upon. Among the reasons given for the rule in the leading American case[97] was that the servants, because of their association in the labor, were so situated that each could be an observer of the conduct of the others, could exert influence over the others for securing his own safety and could give notice to the master of any misconduct, incapacity or neglect of duty on the part of his fellow servant.

§ 1650. ——— **Association rule.**—Seizing upon this theory, as the leading argument in support of the rule, the courts in several of the states, notably in Illinois,[98] have adopted what is sometimes called the consociation or association rule, which limits the application of the general rule to those servants "who are co-operating at the time of the injury in the particular business in hand, or whose usual duties are of the nature to bring them into habitual association or into such relations that they can exercise an influence upon each other promotive of proper caution."[99]

v. Overton, 87 Ind. 410; Hare v. McIntire, 82 Me. 240, 17 Am. St. Rep. 476, 8 L. R. A. 450; Griffiths v. Wolfram, 22 Minn. 185; Durkin v. Kingston Coal Co., 171 Pa. 193, 50 Am. St. Rep. 801, 29 L. R. A. 808; Lawton v. Waite, 103 Wis. 244, 45 L. R. A. 616.

[95] See *post*, § 1652.

[96] McGrory v. Ultima Thule, etc., Ry. Co., 90 Ark. 210, 134 Am. St. Rep. 24, 23 L. R. A. (N. S.) 301.

[97] Farwell v. Boston, etc., R. Co., 4 Metc. (Mass.) 49, 38 Am. Dec. 339.

[98] Chicago, etc., R. Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Illinois Steel Co. v. Ziemkowski, 220 Ill. 324, 4 L. R. A. (N. S.) 1161; Chicago City Ry. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216; Illinois Steel Co. v. Bauman, 178 Ill. 351, 69 Am. St. Rep. 316; Aldrich v. Illinois Cent. R. Co., 241 Ill. 402, 132 Am. St. Rep. 220.

(This list does not purport to be complete.)

[99] A number of states are often cited as those in which the association rule prevails, but in several of them it is certain that if the rule ever prevailed, it no longer does so or is treated as part of the departmental rule.

See St. Louis, etc., R. Co. v. Weaver, 35 Kan. 412, 57 Am. Rep. 176. Compare Atchison & E. Bridge Co. v.

§ 1651. ——— **Departmental rule.**—It was also contended in the leading case referred to that where the master's business was an extensive one the rule should only apply to those servants who were working together in the same general department. This rule was rejected in that case as impracticable of application, but a number of courts have made it the basis of a distinction.[1]

§ 1652. ——— **Superior servant distinction.**—It has further been held that where one servant, who might otherwise be regarded as a fellow servant, was given the power of direction and control over other servants, while engaged in the performance of the work, even though the nature of his duties did not bring him within the field of the general manager or the vice-principal, he was, by reason of such power of control, distinguishable from the other servants working under him and was not to be regarded as a fellow servant with them when one of them is injured by his negligence.[2]

Miller, 71 Kan. 13, 1 L. R. A. (N. S.) 682.

In Kentucky, see Louisville, etc., Ry. Co. v. Edmund's Admr., 23 Ky. Law Rep. 1049; Louisville, etc., Ry. Co. v. Hibbitt, 139 Ky. 43, 139 Am. St. Rep. 464; Louisville, etc., Ry. Co. v. Brown, 127 Ky. 732, 13 L. R. A. (N. S.) 1135.

In Utah, see Dryburg v. Mercur Gold Mining Co., 18 Utah, 410; though this case was largely affected by the Utah statute. Compare Stephani v. Southern Pacific Ry., 19 Utah, 196; Pool v. Southern Pacific Co., 20 Utah, 210.

In Missouri, compare Relyea v. Kansas City, etc., Ry. Co., 112 Mo. 86, 18 L. R. A. 817, with Grattis v. Kansas City, etc., Ry. Co., 153 Mo. 380, 77 Am. St. Rep. 721, 48 L. R. A. 399.

In Nebraska, see Union Pacific Ry. Co. v. Erickson, 41 Neb. 1, 29 L. R. A. 137.

(No attempt has been made to collect all of the cases.)

[1] See Leouis v. Bancroft, 114 La. 105; Louisville, etc., R. Co. v. Lome, 118 Ky. 260, 65 L. R. A. 122; Pool v. Southern Pacific Co., 20 Utah, 210.

In Indiana the earlier cases so held. See Fitzpatrick v. N. A., etc., R. Co., 7 Ind. 436. But they were soon overruled. See Columbus, etc., Ry. Co. v. Arnold, 31 Ind. 174, 99 Am. Dec. 615; Gormley v. Ohio, etc., Ry. Co., 72 Ind. 31.

In Missouri, see Grattis v. Kansas City, etc., Ry. Co., 153 Mo. 380, 77 Am. St. Rep. 721, 48 L. R. A. 399; Koerner v. St. Louis Car Co., 209 Mo. 141, 17 L. R. A. (N. S.) 292.

In Tennessee the rule is restricted to railroads. See Coal Creek Mining Co. v. Davis, 90 Tenn. 711; Louisville, etc., Rr. Co. v. Dillard, 114 Tenn. 240, 108 Am. St. Rep. 894, 69 L. R. A. 746.

The California statute of 1907 adopts this distinction. Judd v. Letts, 158 Cal. 359, 41 L. R. A. (N. S.) 156.

[2] The superior servant doctrine was early announced in Ohio in Little Miami R. Co. v. Stevens (1851), 20 Ohio, 416, and was followed in that state and others, several of which have since repudiated it. In Ohio, see Cleveland, etc., R. Co. v. Keary, 3 Ohio St. 201; Pittsburgh, etc., Railway Co. v. Ranney, 37 Ohio St. 665; Cleveland, etc., R. Co. v. Shanower, 70 Ohio St. 166; Berea Stone Co. v. Kraft, 31 Ohio St. 287, 27 Am. Rep. 510.

The most potent influence, however, in spreading this doctrine was undoubtedly the case of Chicago, etc.,

§ 1653. ——— **The general rule.**—The departmental rule and the consociation rule have been found difficult of application [3] and have not been generally followed. The superior servant rule, so far as it is based on the mere fact that one servant is given the power to control or direct the performance of the work, fails to recognize that the giving of such directions may be as essential and inseparable a part of the work as the obedience to them, and it therefore rests on no logical distinction.[4]

The great weight of authority in the United States ignores these distinctions and holds all to be fellow servants who are in the employment of the same master, engaged in the same general business and employed in furthering the same general purpose.

Ry. Co. v. Ross (1884), 112 U. S. 377, 28 L. Ed. 787, overruled in fact in Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368, 37 L. Ed. 772, and formally in New England R. Co. v. Conroy, 175 U. S. 323, 44 L. Ed. 181.

Some state courts which followed the Ross case have since overruled their own holdings to conform with the Baugh and Conroy cases. Wisconsin has applied much the same rule in cases involving the use of electrical current. Massy v. Milwaukee Electric Ry. Co., 143 Wis. 220, 30 L. R. A. (N. S.) 814.

For the general doctrine, see Consolidated Coal Co. v. Wombacher, 134 Ill. 57; Chicago & Alton R. Co. v. May, 108 Ill. 288; Spencer v. Brooks, 97 Ga. 681; Walker v. Gillett, 59 Kan. 214; Illinois Cent. R. Co. v. Josey, 110 Ky. 342, 96 Am. St. Rep. 455, 54 L. R. A. 78; Bloyd v. St. Louis, etc., Ry. Co., 58 Ark. 66, 41 Am. St. Rep. 85; Bonnin v. Crowley, 112 La. 1025; Wilson v. Banner Lbr. Co., 108 La. 590; Williams v. Lumber Co., 125 La. 1087, 136 Am. St. Rep. 365, 19 Ann. Cas. 1244; Purcell v. Southern Ry. Co., 119 N. C. 728; New Omaha, etc., Light Co. v. Baldwin, 62 Neb. 180; Bell v. Rocheford, 78 Neb. 304, 126 Am. St. Rep. 595; Ft. Worth, etc., Ry. Co. v. Peters, 87 Tex. 222; Pittsburg, etc., R. Co. v. Lewis, 33 Ohio St. 196; Andreson v. Ogden Union Ry. Co., 8 Utah, 128; Sherrin v. St. Joseph, etc., Ry. Co., 108 Mo. 378, 28 Am. St. Rep. 881; Taylor v. Georgia Marble Co., 99 Ga. 512, 59 Am. St. Rep. 238; Louisville, etc., R. Co. v. Dillard, 114 Tenn. 240, 108 Am. St. Rep. 894, 69 L. R. A. 746; Electric Ry. Co. v. Lawson, 101 Tenn. 406; Louisville & N. Ry. Co. v. Lahr, 86 Tenn 335 (distinguishing between "personal" and "official" neglect of superior servant).

See also, Daniel's Admr. v. Chesapeake, etc., Ry. Co., 36 W. Va. 397, 32 Am. St. Rep. 870, 16 L. R. A. 383 (overruled in Jackson v. Norfolk, etc., R. Co., 43 W. Va. 380, 46 L. R. A. 337); Flannegan v. Chesapeake, etc., Ry. Co., 40 W. Va. 436, 52 Am. St. Rep. 896. See also, Miller v. Missouri Pacific Ry. Co., 109 Mo. 350, 32 Am. St. Rep. 673.

(No attempt is made in these notes to collect all of the cases.)

[3] See Grattis v. Kansas City, etc., Ry. Co., 153 Mo. 380, 77 Am. St. Rep. 721, 48 L. R. A. 399; Atchison, etc., Bridge Co. v. Miller, 71 Kan. 13, 1 L. R. A. (N. S.) 682.

[4] As pointed out by Brewer, J., in Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368, 37 L. Ed. 772, "The truth is, the various employes of one of these large corporations are not graded like steps in a stair case,—those on each step being as to those on the step below in the relation of masters and not of fellow servants, and only those on the same steps fellow serv-

§ 1654. ——— According to the general rule it is well settled that where there is one general object, in attaining or furthering which all the servants are engaged, the rule applies although the servant injured and the servant through whose negligence he was injured, were not engaged in doing the same kind of work.[5] Nor is the liability of the master enlarged where the servant who has sustained the injury is of a grade inferior to that of the servant or agent whose negligence, carelessness or misconduct has caused the injury, if the services of each, in his particular labor, are directed to the same general end.[6] Nor does

ants because not subject to any control by one over the other. *Prima facie*, all who enter into the employ of a single master are engaged in a common service and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants. All enter into the service of the same master to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employes, and that risk, which he knows exists, he assumes in entering into the employment. . . . But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply co-workers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and thus assumed by the employee, it includes all co-workers to the same end, whether in control or not."

Giving warning of dangers as they arise in the ordinary progress of the work is not usually a master's duty, but the circumstances may make it such. See Anderson v. Pittsburg Coal Co., 108 Minn. 455, 26 L. R. A. (N. S.) 624.

[5] Mann v. O'Sullivan, 126 Cal. 61, 77 Am. St. Rep. 149; Livingstone v. Kodiak Packing Co., 103 Cal. 258; American Bridge Co. v. Valente, 7 Pen. (Del.) 370, Ann. Cas. 1912 D. 69; Fagundes v. Cent. Pac. R. Co., 79 Cal. 97, 3 L. R. A. 824; Georgia Coal Co. v. Bradford, 131 Ga. 289, 62 S. E. 192, 127 Am. St. Rep. 228; Chicago City Ry. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216; Blake v. Maine Cent. R. Co., 70 Me. 60, 35 Am. Rep. 297; Wonder v. Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143; Seaver v. Boston, etc., R. Co., 14 Gray (Mass.), 467; Adams v. Iron Cliffs Co., 78 Mich. 271, 18 Am. St. Rep. 441; Louisville, etc., Ry. Co. v. Petty, 67 Miss. 255, 19 Am. St. Rep. 304; Laning v. N. Y. Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Pleasants v. Raleigh, etc., R. Co., 121 N. C. 492, 61 Am. St. Rep. 674; Spees v. Boggs, 198 Pa. 112, 82 Am. St. Rep. 792, 52 L. R. A. 998; Lewis v. Seifert, 116 Pa. 628, 2 Am. St. Rep. 631; Grant v. Keystone Lbr. Co., 119 Wis. 229, 100 Am. St. Rep. 883; New England Rr. Co. v. Conroy, 175 U. S. 323, 44 L. Ed. 181; Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 38 L. Ed. 1009; Charles v. Taylor, L. R. 3 C. P. D. 492; Lovell v. Howell, 1 Id. 161; Tunney v. Midland Ry. Co., L. R. 1 C. P. 291.

[6] Laning v. New York Central R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Lawler v. Androscoggin R. R. Co., 62 Me. 463, 16 Am. Rep. 492; Brown v. Winona, etc., R. R. Co., 27 Minn. 162, 38 Am. Rep. 285; Thayer v. St. Louis, etc., R. R. Co., 22 Ind. 26, 85

it make any difference that the servant guilty of the negligence is a servant of superior authority, whose lawful directions given while all are engaged in the doing of the work the servant injured was bound to obey,[7] unless such superior servant arises to the grade of the vice-principal of the principal.[8]

Am. Dec. 409; Columbus, etc., R. R. Co. v. Arnold, 31 Ind. 174, 99 Am. Dec. 615; Peterson v. Whitebreast, 50 Iowa, 673, 32 Am. Rep. 143; Shauck v. Northern, etc., R. R. Co., 25 Md. 462; Hard v. Vermont, etc., R. R. Co., 32 Vt. 473; Pittsburg, etc., Ry. Co. v. Lewis, 33 Ohio St. 196; Warner v. Erie Ry. Co., 39 N. Y 468; Wood v. New Bedford Coal Co., 121 Mass. 252; Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Pittsburg, etc., R. R. Co. v. Devinney, 17 Ohio St. 197; St. Louis, etc., R. R. Co. v. Britz, 72 Ill. 256.

[7] Georgia Pac. Ry. Co. v. Davis, 92 Ala. 300, 25 Am. St. Rep. 47; Livingstone v. Kodiak Packing Co., 103 Cal. 258; Collier v. Steinhart, 51 Cal. 116; McLean v. Mining Co., Id. 255; New Pittsburg Coal & Coke Co. v. Peterson, 136 Ind. 398, 43 Am. St. Rep. 327; Taylor v. Evansville, etc., R. Co., 121 Ind. 124, 16 Am. St. Rep. 372, 6 L. R. A. 584; Indianapolis Trac. Co. v. Kinney, 171 Ind. 612, 23 L. R. A. (N. S.) 711; Lawler v. Androscoggin R. Co., 62 Me. 463, 16 Am. Rep. 492; Blake v. Maine Cent. R. Co., 70 Me. 60, 35 Am. Rep. 297; Beaulieu v. Portland Co., 48 Me. 291; Conley v. Portland, 78 Me. 217; Gillshannon v. Stony Brook R. Co., 10 Cush. (Mass.) 228; Kenney v. Shaw, 133 Mass. 501; O'Connor v. Roberts, 120 Mass. 227; Floyd v. Sugden, 134 Mass. 563; Avikainen v. Baltic Min. Co., 160 Mich. 375, 136 Am. St. Rep. 443; Brown v. Winona, etc., R. Co., 27 Minn. 162, 38 Am. Rep. 285; Gonsior v. Minneapolis, etc., Ry. Co., 36 Minn. 385; Pasco v. Minneapolis Steel Co., 105 Minn. 132, 18 L. R. A. (N. S.) 153; Marshall v. Schricker, 63 Mo. 308; Enright v. Oliver, 69 N. J. L. 357, 101 Am. St. Rep. 107; Keenan v. N. Y., etc., R. Co., 145 N. Y. 190, 45 Am. St. Rep. 604; Laning v. N. Y., etc., R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Ell v. Northern Pacific R. Co., 1 N. D. 336, 26 Am. St. Rep. 621, 12 L. R. A. 97; Lewis v. Seifert, 116 Pa. 628, 2 Am. St. Rep. 631; Keystone Bridge Co. v. Newberry, 96 Pa. 246, 42 Am. Rep. 543; Reese v. Biddle, 112 Pa. 72; Jenkins v. Richmond, etc., R. Co., 39 S. C. 507, 39 Am. St. Rep. 750; Hard v. Vermont Cent. R. Co., 32 Vt. 473; Lane Bros. & Co. v. Bauserman, 103 Va. 146, 106 Am. St. Rep. 872; Knudsen v. La Crosse Stone Co., 145 Wis. 394, 33 L. R. A. (N. S.) 223; Gereg v. Milwaukee Gaslight Co., 128 Wis. 35, 7 L. R. A. (N. S.) 367; Hoth v. Peters, 55 Wis. 405; Dwyer v. American Express Co., Id. 453; Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 38 L. Ed. 1009; Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 40 L. Ed. 994; New England R. Co. v. Conroy, 175 U. S. 323, 44 L. Ed. 181.

[8] See *ante*, § 1640. Alabama, etc., R. Co. v. Vail, 142 Ala. 134, 110 Am. St. Rep. 23; Tyson v. North, etc., R. Co., 61 Ala. 554, 32 Am. Rep. 8; Daves v. Southern Pacific Co., 98 Cal. 19, 35 Am. St. Rep. 133; Brown v. Sennett, 68 Cal. 225, 58 Am. Rep. 8; Beeson v. Green Mt. Mining Co., 57 Cal. 20; Colorado Midland Ry. Co. v. Naylon, 17 Colo. 501, 31 Am. St. Rep. 335; McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181; Wilson v. Willimantic Co., 50 Conn. 433, 47 Am. Rep. 653; Cheeney v. Ocean Steamship Co., 92 Ga. 726, 44 Am. St. Rep. 113; Moore v. Dublin Cotton Mills, 127 Ga. 609, 10 L. R. A. (N. S.) 772; Illinois Steel Co. v. Ziemkowski, 220 Ill. 324, 4 L. R. A. (N. S.) 1161; Chicago, etc., R. Co. v. Kneirim, 152

§ 1655. ——— It is immaterial, also, that the service was an occasional or job service. It is the quality, and not the length of time, or extent of the work, which fixes, in this respect, the character of the servant and the service. The servant may be engaged by the day, week or year, or by piece-work, yet if his employment is in the way of accomplishing a result which the other employees are also working to bring about, their service is common.[9]

§ 1656. ——— Servants employed by different masters engaged in independent pursuits, though working together at the same time and place and for the general accomplishment of the same end, are not usually fellow servants within the rule.[10] To make them such there must be a common employment or the general servant of one master

Ill. 458, 43 Am. St. Rep. 259; Chicago, etc., R. Co. v. Eaton, 194 Ill. 441, 88 Am. St. Rep. 161; Chicago, etc., R. Co. v. May, 108 Ill. 288; Chicago Union Traction Co. v. Sawusch, 218 Ill. 130, 1 L. R. A. (N. S.) 610; New Pittsburg Coal Co. v. Peterson, 136 Ind. 398, 43 Am. St. Rep. 327; Mitchell v. Robinson, 80 Ind. 281, 41 Am. Rep. 812; Taylor v. Evansville, etc., R. Co., 121 Ind. 124, 16 Am. St. Rep. 372, 6 L. R. A. 584; Newbury v. Gechtel, etc., Mfg. Co., 100 Iowa 441, 62 Am. St. Rep. 582; Harrison v. Detroit, etc., R. Co., 79 Mich. 409, 19 Am. St. Rep. 180, 7 L. R. A. 623; Ryan v. Bagaley, 50 Mich. 179, 45 Am. Rep. 35; Dayharsh v. Hannibal, etc., R. Co., 103 Mo. 570, 23 Am. St. Rep. 900; Gormley v. Vulcan Iron Works, 61 Mo. 492; Brothers v. Cartter, 52 Mo. 373, 14 Am. Rep. 424; McLaine v. Head & Dowst Co., 71 N. H. 294, 93 Am. St. Rep. 522, 58 L. R. A. 462; Knutter v. N. Y., etc., Teleph. Co., 67 N. J. L. 646, 58 L. R. A. 808; Hankins v. N. Y., etc., R. Co., 142 N. Y. 416, 40 Am. St. Rep. 616, 25 L. R. A. 396; Corcoran v. Holbrook, 59 N. Y. 517, 17 Am. Rep. 369; Madigan v. Oceanic Steam Navigation Co., 178 N. Y. 242, 102 Am. St. Rep. 495; Ell v. Northern Pacific R. Co., 1 N. D. 336, 26 Am. St. Rep. 621, 12 L. R. A. 97; Mast v. Kern, 34 Ore. 247, 75 Am. St. Rep. 580; Anderson v. Bennett, 16 Ore. 515, 8 Am. St. Rep. 311; Mullan v. Philadelphia Steamship Co., 78 Penn. 25, 21 Am. Rep. 2; Jenkins v. Richmond, etc., R. Co., 39 S. C. 507, 39 Am. St. Rep. 750; Gunter v. Graniteville Mfg. Co., 18 S. C. 262, 44 Am. Rep. 573; Galveston, etc., Ry. Co. v. Smith, 76 Tex. 611, 18 Am. St. Rep. 78; Lane Bros. v. Bauserman, 103 Va. 146, 106 Am. St. Rep. 872; Norfolk, etc., R. Co. v. Houchins, 95 Va. 398, 64 Am. St. Rep. 791; Sroufe v. Moran Bros. Co., 28 Wash. 381, 92 Am. St. Rep. 847, 58 L. R. A. 313; Jackson v. Norfolk, etc., R. Co., 43 W. Va. 380, 46 L. R. A. 387; Daniels' Admr. v. Chesapeake & Ohio R. Co., 36 W. Va. 397, 32 Am. St. Rep. 870, 16 L. R. A. 383; Wiskie v. Montello Granite Co., 111 Wis. 443, 87 Am. St. Rep. 885; Mulcairns v. Janesville, 67 Wis. 24; Northern Pacific R. Co. v. Peterson, 162 U. S. 346, 40 L. Ed. 994.

[9] Ewan v. Lippincott, 47 N. J. L. 192, 54 Am. Rep. 148.

[10] Swainson v. Northeastern Ry. Co., 3 Ex. D. 341; Morgan v. Smith, 159 Mass. 570; Kelly v. Tyra, 103 Minn. 176, 17 L. R. A. (N. S.) 334; Murray v. Dwight, 161 N. Y. 301, 48 L. R. A. 673; Coates v. Chapman, 195 Pa. 109.

must for the time being have become the special servant of the other in whose service the injury occurred.[11]

§ 1657. What risks within the rule.—The risks which are ordinarily affected by the fellow servant rule are the risks of the service as they must have been fairly contemplated at the time the service was entered upon,[12] but additional risks may also be included under the theory of the assumption of risks.[13] They usually are risks of personal injury, but may extend also to property used in or connected with the service. In order to make the rule applicable, the servant must have been in the service. Ordinarily the risks will be those arising upon the master's premises, but they are not confined to those; as where the servants of a contractor are working upon the premises of a third person, or the servants of a truckman are working in the highway. Ordinarily, also, the risks will be those of injury to the servant himself, and will not extend to injuries to the members of his family for example, unless they were associated with and for him in the service. Usually the risks will be those incurred while the servant is actually at work, but they are not confined to those, but may include injuries received while he is temporarily suspending work or going to or from some place in pursuance of the service.[14]

[11] Delory v. Blodgett, 185 Mass. 126, 102 Am. St. Rep. 328, 64 L. R. A. 114; Hasty v. Sears, 157 Mass. 123, 34 Am. St. Rep. 267.

[12] In Gannan v. Housatonic R. Co., 112 Mass. 234, 17 Am. Rep. 82, a track employee was held entitled to recover for an injury to his wife caused by the negligence of a switchman of the same company caused while she was riding as a passenger upon a train. "The implied contract on the part of the servant by which he assumes the risk of the negligence of others, has reference to those direct injuries to which he is exposed in the course of his employment."

[13] See *ante*, § 1651; *post*, § 1660.

[14] In the following cases it was held that an employee, while on his employer's premises on his way to work, was then in the service of the employer and cannot recover if injured by the negligence of a fellow servant. Olsen v. Andrews, 168 Mass. 261; Ewald v. Chicago, etc., Ry. Co., 70 Wis. 420, 5 Am. St. Rep. 178; Boldt v. New York Cent. R. Co., 18 N. Y. 432. So, while going from one part of the building to another to eat his lunch. Boyle v. Columbian Fire Proofing Co., 182 Mass. 93; or to change his clothes before leaving for the day; Willmarth v. Cardoza, 99 C. C. A. 475, 176 Fed. 1.

In the following cases the employee was held not to be in the service of his employer. Savannah, etc., Ry. Co. v. Flannagan, 82 Ga. 579, 14 Am. St. Rep. 183 (flagman injured as he was returning home from work); Baird v. Pettit, 70 Pa. 477 (officeman injured as he was leaving the office); C. N. O. & T. P. Ry. Co. v. Conley, 14 Ky. Law Rep. 568 (section hand injured while he was taking a day off).

In St. Louis, etc., R. Co. v. Welch, 72 Tex. 298, 2 L. R. A. 839, an employee who was asleep in a "bunk-car" on a side-track, but liable to be called for duty at any time, was held

§ 1658. Volunteer assisting servant can not recover.—It is well settled that a person who, without any employment and without any interest in the performance or result of the service, voluntarily undertakes to perform service for another, or to assist the servants of another in the service of their master, either at the request or without the request of such servants, who have no authority to employ other servants, stands in no better situation, for the time being, than that of a fellow servant with those whom he undertakes to assist and is to be regarded as assuming all the risks incident to the business. If he is injured by the negligence of such servants, he has, therefore, no recourse to the principal.[15]

to be in the service of the company and a fellow servant of train hands of a passing freight train.

An employee, while being transported in the master's vehicles to and from work according to agreement with employer, and as part of the service is in the service of his employer while so being carried. Indianapolis, etc., Transit Co. v. Foreman, 162 Ind. 85, 102 Am. St. Rep. 185; Ellington v. Beaver Dam Co., 93 Ga. 53; Roland v. Tift, 131 Ga. 683, 20 L. R. A. (N. S.) 354; McGuirk v. Shattuck, 160 Mass. 45, 39 Am. St. Rep. 454; Gillshannon v. Stony Brook R. Co., 10 Cush. (Mass.) 228; Kilduff v. Boston El. Ry. Co., 195 Mass. 307, 9 L. R. A. (N. S.) 873; Louisville, etc., R. Co. v. Stuber, 48 C. C. A. 149, 54 L. R. A. 696; Dayton Coal Co. v. Dodd, 110 C. C. A. 395, 188 Fed. 597, 37 L. R. A. (N. S.) 456; Coldrick v. Partridge, etc., [1909] 1 K. B. 530, [1910] App. Cas. 77; Ionnone v. N. Y., etc., R. Co., 21 R. I. 452, 79 Am. St. Rep. 812; Abend v. Terre Haute, etc., R. Co., 111 Ill. 202, 53 Am. Rep. 616; Ross v. New York, etc., R. Co., 5 Hun, 488, affirmed 74 N. Y. 617; Wright v. Northampton, etc., R. Co., 122 N. C. 852.

A fortiori, it is held that an employee engaged in ballasting a track or removing obstructions therefrom, whose duty requires constant transporting from one point to another, is, while so being transported as a part of his work, in the service of his employer. Kumler v. Junction, etc., R. Co., 33 Ohio St. 150; Knahtla v. Oregon Short Line R. Co., 21 Ore. 136; Heine v. Chicago, etc., R. Co., 58 Wis. 525.

In Enos v. Rhode Island, etc., Ry. Co., 28 R. I. 291, 12 L. R. A. (N. S.) 244, a flagman was furnished with tickets to be used in going to and from work, and the court held him not to be in the service of the company while returning from work. Peterson v. Seattle Traction Co., 23 Wash. 615, 53 L. R. A. 586, was similar.

In Dickinson v. West End St. Ry. Co., 177 Mass. 365, 83 Am. St. Rep. 284, 52 L. R. A. 326, an employee while off duty but exercising the privileges accorded him by his employer of free transportation, was held not to be in the service of the employer. See, to like effect, State, use of Abell v. Western Md. Ry. Co., 63 Md. 433; Harris v. City R. Co., 69 W. Va. 65, Ann. Cas. 1912 D. 59.

In Williams v. Oregon Short L. R. Co., 18 Utah, 210, 72 Am. St. Rep. 777, a person going on a free pass to a distant point on the road at which he was to be given employment, was held not to be in the service. See also, Chattanooga Rapid Transit Co. v. Venable, 105 Tenn. 460, 51 L. R. A. 886; Simmons v. Oregon R. Co., 41 Oreg. 151.

[15] Flower v. Pennsylvania R. Co., 69 Penn. St. 210, 8 Am. Rep. 251; New Orleans, etc., R. Co. v. Harrison,

But the rule is otherwise where the person injured, is not a mere volunteer, but assists for the purpose of aiding or advancing his own, or his own master's, business. Though performing a service which may be beneficial to both parties, he is doing so in his own behalf, or in the behalf of his own master, and not as if he were the servant of the master whose servants he assists. Their request or acquiescence may give him the right to assist, but the fact that he does so in his own behalf, or in behalf of his own master, however beneficial may be his assistance to the master of the other servants, gives him the right to be protected against their negligence.[16] The act done by him, should, however, be a prudent and reasonable one, and not a wrongful interference and intermeddling with business in which he had no concern.[17]

6. Assumption of Risks.

§ 1659. In general.—It has been seen in an earlier section that the master is not liable to the servant for injuries received by the latter by reason of the natural and ordinary dangers which inhere in the business itself and for which the master is not at fault. These dangers

48 Miss. 112, 12 Am. Rep. 356; Osborne v. Knox, etc., R. R., 68 Me. 49, 28 Am. Rep. 16; Mayton v. Texas, etc., R. Co., 63 Tex. 77, 51 Am. Rep. 637; Street Railway Co. v. Bolton, 43 Ohio St. 224, 54 Am. Rep. 803; Eason v. S. & E. T. Ry. Co., 65 Tex. 577, 57 Am. Rep. 606; Welch v. Maine Cent. R. Co., 86 Me. 552, 25 L. R. A. 658; Wischam v. Rickards, 136 Pa. 109, 20 Am. St. Rep. 900, 10 L. R. A. 97; Cincinnati, etc., Co. v. Finnell, 108 Ky. 135, 57 L. R. A. 266; Railroad Co. v. Ward, 98 Tenn. 123, 60 Am. St. Rep. 848; Bonner v. Bryant, 79 Tex. 540, 23 Am. St. Rep. 361; Johnson v. Ashland Water Co., 71 Wis. 553, 5 Am. St. Rep. 243; Knicely v. West Va. R. Co., 64 W. Va. 278, 17 L. R. A. (N. S.) 370; Degg v. Midland Ry. Co., 1 H. & N. 773; Potter v. Faulkner, 1 Best & S. 800. But see Rhodes v. Georgia, etc., R. Co., 84 Ga. 320, 20 Am. St. Rep. 362.

Where a servant is loaned or hired to one who assumes control over him, such servant becomes the fellow-servant of the employees of the borrower or hirer. DeLory v. Blodgett, 185 Mass. 126, 102 Am. St. Rep. 328, 64 L. R. A. 114; Hasty v. Sears, 157 Mass. 123, 34 Am. St. Rep. 267; Brooks v. Central Sainte Jeane, 228 U. S. 688.

[16] Street Railway Co. v. Bolton, 43 Ohio St. 224, 54 Am. Rep. 803; Eason v. S. & E. T. Ry. Co., *supra;* Murray v. Dwight, 161 N. Y. 301, 48 L. R. A. 673; Welch v. Maine Cent. R. Co., 86 Me. 552, 25 L. R. A. 658; Jones v. St. Louis, etc., Ry. Co., 125 Mo. 666, 46 Am. St. Rep. 514, 26 L. R. A. 718; Bonner v. Bryant, 79 Tex. 540, 23 Am. St. Rep. 361; Railroad Co. v. Ward, 98 Tenn. 123, 60 Am. St. Rep. 848; Sanford v. Standard Oil Co., 118 N. Y. 571, 16 Am. St. Rep. 787; Kelly v. Tyra, 103 Minn. 176, 17 L. R. A. (N. S.) 334; Miner v. Franklin County Tel. Co., 83 Vt. 311, 26 L. R. A. (N. S.) 1195; Wright v. London, etc., Ry. Co., 1 Q. B. Div. 252; Holmes v. North Eastern Ry. Co., L. R. 4 Ex. 254.

[17] Street Railway Co. v. Bolton, 43 Ohio St. 224, 54 Am. Rep. 803.

presumptively are as well known to the servant as to the master, and the servant, who, with this knowledge, seeks and accepts service in the business, is commonly said to assume the risks by the mere fact of accepting the emplyoment.

There is, however, another aspect of the doctrine of the assumption of risks, radically different from the foregoing one and of very great significance, which must be separately considered.

§ 1660. ——— Assumption of risks resulting from master's negligence.—As has been stated, the risks referred to in the earlier section are those which naturally and ordinarily inhere in the business itself, when carried on in the usual manner and under ordinary conditions. These risks, however, may be greatly added to or increased by the actual methods or conditions under which the particular business was carried on. (1) These methods or conditions may be purely local or accidental and not attributable to the act or omission of any one and especially not to any act or omission of the employer. (2) They may be owing to the act or omission of the employer and yet not impute to him any legal or moral fault; as where, for example, he carries on his business, as he lawfully may, with other than the latest and most improved appliances or equipment, provided they are still reasonably safe. The first two of these classes usually fall within the same legal rules as those which ordinarily inhere in the business itself. They are not attributable to the legal fault of the master, and he is not legally responsible to the servant, except, perhaps, in cases in which he would owe the servant a duty to warn him of unusual dangers, known to the master (though not attributable to his fault) but not known to the servant. (3) On the other hand, the risks may be increased because the employer, through heedlessness, indifference or positive disregard, either of ordinary legal duties or of express statutory requirements, carries on his business in such a way as to subject his employees to unnecessary or unjustifiable perils. These last named risks lie outside the range of those which ordinarily and necessarily inhere in the business and continuance, being due to the master's breach of duty, would justify ing out of the mere fact of accepting the employment; their existence itself; they are not covered by any implied agreement or consent growthe employee, even if he had made a contact for a definite term, in refusing to go on with the service; if he were immediately injured by them he could recover damages of the master; he may lawfully quit if they are not corrected. Suppose, however, that without protesting against them and exacting a promise to remove them, he continues, after the unusual perils become fully obvious to him, to perform the

service in the midst of these perils and is ultimately injured because of them. May he now recover damages from the employer? He certainly may unless he has lost his right by some conduct of his own. Has he lost it? He may usually lose it in but one of two ways: either by his contributory negligence, or by some undertaking to assume the risk himself. The defence of contributory negligence will be later considered. The remaining defence that he has assumed the risk of the master's negligence is here to be dealt with. At this point we are confronted with a unique and difficult situation, though the legal solution seems in general to be well established.

§ 1661. ——— With reference to such of these perils as do not involve a violation of express statutory requirement (which will be considered later), the answer given to the question by the weight of authority is that the servant has lost his right and may not recover.[18]

[18] Birmingham, etc., R. Co. v. Allen, 99 Ala. 359, 20 L. R. A. 457; Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 4 L. R. A. (N. S.) 837, 7 Ann. Cas. 430; Limberg v. Glenwood Lbr. Co., 127 Cal. 598, 49 L. R. A. 33; Illinois Central R. Co. v. Fitzpatrick, 227 Ill. 478, 118 Am. St. Rep. 280; Martin v. Chicago, etc., R. Co., 118 Iowa, 148, 96 Am. St. Rep. 371, 59 L. R. A. 698; Buehner v. Creamery Package Mfg. Co., 124 Iowa, 445, 104 Am. St. Rep. 354; St. Louis, etc., R. Co. v. Irwin, 37 Kan. 701, 1 Am. St. Rep. 266; Consolidated Gas. Co. v. Chambers, 112 Md. 324, 26 L. R. A. (N. S.) 509; Baltimore, etc., R. Co. v. State, 75 Md. 152, 32 Am. St. Rep. 372; Lamson v. American Axe Co., 177 Mass. 144, 83 Am. St. Rep. 267; Lewis v. New York, etc., R. Co., 153 Mass. 73, 10 L. R. A. 513; Lynch v. Saginaw Val. Tr. Co., 153 Mich. 174, 21 L. R. A. (N. S.) 774; Reberk v. Horne, etc., Co., 85 Minn. 326; Chicago, etc., R. Co. v. Curtis, 51 Neb. 442, 66 Am. St. Rep. 456; Johnson v. Devoe Snuff Co., 62 N. J. L. 417; Odell v. N. Y., etc., R. Co., 120 N. Y. 323, 17 Am. St. Rep. 650; Knisley v. Pratt, 148 N. Y. 372, 32 L. R. A. 367 (overruled in Fitswater v. Warren, 206 N. Y. 355); Smith v. Wilmington, etc., R. Co., 129 N. C. 173, 85 Am. St. Rep. 740; Consolidated Coal, etc., Co. v. Floyd, 51 Ohio St. 542, 25 L. R. A. 848; Brossman v. Railroad Co., 113 Pa. 490, 57 Am. Rep. 479; Gann v. Railroad, 101 Tenn. 380, 70 Am. St. Rep. 687; Leach v. Oregon Short Line R. Co., 29 Utah, 285, 110 Am. St. Rep. 708; McDuffee v. Boston & M. R. Co., 81 Vt. 52, 130 Am. St. Rep. 1019; Johnson v. Boston, etc., R. Co., 78 Vt. 344, 4 L. R. A. (N. S.) 856; Seldomridge v. Railroad Co., 46 W. Va. 569; Sanderson v. Panther Lbr. Co., 50 W. Va. 42, 88 Am. St. Rep. 841, 55 L. R. A. 908; Sweet v. Ohio Coal Co., 78 Wis. 127, 9 L. R. A. 861; Mielke v. Chicago, etc., Ry. Co., 103 Wis. 1, 74 Am. St. Rep. 834; Brotzki v. Wisconsin Granite Co., 142 Wis. 380, 27 L. R. A. (N. S.) 982; Butler v. Frazee, 211 U. S. 459, 53 L. Ed. 281; Utah Consolidated Mining Co. v. Bateman, 99 C. C. A. 365, 176 Fed. 57, 27 L. R. A. (N. S.) 958; St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 126 Fed. 495, 63 L. R. A. 551.

In Missouri, this form of the doctrine does not seem to be recognized. Jewell v. Kansas City Bolt Co., 231 Mo. 176, 140 Am. St. Rep. 515. The servant may recover unless he has been guilty of contributory negligence; and it is held that continuance after knowledge of the defect

In the language of the courts, he is said to have assumed the risks. The employee is said to have assumed the risks which are inherent in the business because he presumptively knows them and accepts the employment in view of that knowledge. The assumption of these unusual risks caused by the master's negligence cannot be put upon that ground. The servant was not bound to anticipate them, but he learned before he was injured that they were present. He was not obliged to assume them; he might have quit, but with knowledge of the situation and the danger he continued in the service without objection. By doing so he is ordinarily held to have assumed these risks also. That he was induced by economic necessity is usually held not to affect the result.[19]

§ 1662. ——— "The doctrine of assumption of risk," it is said in a leading case,[20] "is placed by the authorities and sustained upon two grounds. That doctrine is that, while it is the duty of the master to exercise ordinary care to provide a reasonably safe place for the servant to work and reasonably safe appliances for him to use, and while, unless he knows or by the exercise of reasonable care would have known that this duty has not been discharged by the master, he may assume that it has been, and may recover for any injury resulting from the

cannot, as a matter of law, be said to be negligence on the part of the servant, unless it is so glaringly unsafe as to threaten immediate injury; or, as it is often put, it is not negligence, as a matter of law, if it was reasonable to suppose that the place or instrument might be safely used by the exercise of care and precaution. Clippard v. St. Louis Transit Co., 202 Mo. 432; Curtis v. McNair, 173 Mo. 270; Doyle v. M. K. & T. Trust Co., 140 Mo. 1; Soeder v. St. Louis, etc., Ry. Co., 100 Mo. 673, 18 Am. St. Rep. 724; O'Mellia v. Kansas City, etc., R. Co., 115 Mo. 205; Settle v. St. Louis, etc., R. Co., 127 Mo. 336, 48 Am. St. Rep. 633; Huhn v. Missouri Pacific Ry. Co., 92 Mo. 440.

In North Carolina, also, a similar rule seems to prevail. Thus in Russ v. Harper, 156 N. Car. 444, it is said: "Whatever may be the ruling in other jurisdictions, it is now very well established in this State that this doctrine of assumption of risk, in its proper acceptation, does not apply to conditions caused or created by the employer's negligence, or, in such case, if it exists in name, it is to be determined on the principles applicable to contributory negligence."

In Virginia, see Richmond, etc., Ry. Co. v. Norment, 84 Va. 167, 10 Am. St. Rep. 827.

[19] Thus in Lamson v. American Axe Co., 177 Mass. 144, 83 Am. St. Rep. 267, it is said per Holmes, J.: "He stayed and took the risk. He did so none the less that the fear of losing his place was one of his motives." Same: Wescott v. New York, etc., R. Co., 153 Mass. 460; Leary v. Boston & Albany R., 139 Mass. 580, 52 Am. Rep. 733; Haley v. Case, 142 Mass. 316; Burke v. Davis, 191 Mass. 20, 114 Am. St. Rep. 591, 4 L. R. A. (N. S.) 971.

[20] St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 63 L. R. A. 551.

failure to discharge it, yet he assumes all the ordinary risks and dangers incident to the employment upon which he enters and in which he continues, including those resulting from the negligence of his master which are known to him, or which would have been known to a person of ordinary prudence and care in his situation by the exercise of ordinary diligence. The first ground upon which this rule of law rests is the maxim, *Volenti non fit injuria.* A servant is not compelled to begin or continue to work for his master. Ordinarily, he does not work for him under a contract for a stated time. He is at liberty to retire from his employment, and his master is free to discharge him, at any time. The latter constantly offers him day by day his wages, his place to work, and the appliances which he is to use. The former day by day voluntarily accepts them. By the continuing acceptance of the work and the wages he voluntarily accepts and assumes the risk of the defects and dangers which a person of ordinary prudence in his place would have known. No one can justly be held liable to another for an injury resulting from a risk which the latter knowingly and willingly consented to incur.

"The second ground upon which assumption of risk is based is that every servant who enters or continues in the employment of a master without complaint thereby either expressly or impliedly agrees with him to assume the risks and dangers incident to the employment which a person of ordinary prudence in his situation would have known by the exercise of ordinary diligence and care, and to hold his master free from liability therefor."

§ 1663. ——— With reference to the grounds suggested for this doctrine, however, some distinctions are to be made. So far as the ordinary and inherent risks of the business are concerned, it may perhaps be fairly said that the servant assumes these as part of the contract of employment. With reference to the extraordinary and unnecessary risks caused by the negligence of the master which are subsequently found to exist in the business, the foundation of contract is not so clear. What is the consideration? Where the employment is for an indefinite time, as in the above quotation it is said it ordinarily is, it may be said that continuation in an employment terminable at pleasure furnishes the consideration. But how in the case of a contract for a definite term? Does retention here furnish a consideration? Pretty certainly not. Even if a consideration can be found, is the contract a lawful one to make? It is at least questionable.[21] If not,

[21] General executory contracts to release the master from the consequences of his own negligence are usually held to be opposed to public

we must here fall back upon consent, or the maxim *Volenti non fit injuria.*

§ 1664. ——— It has been insisted by other courts that the matter of assumption of risks was not one of contract at all. Thus in one case [22] it is said: "The law regarding the assumption of risk is the law which governs the relation of master and servant, and is independent of the will of either. It is not a term of the contract of employment. If it were, then the master and servant could retain it or abolish it in each contract of employment. But they can do neither. It is a principle of the common law, and must be repealed, if at all, by the law making power. It is the law of the land governing all persons who assume the relation of master and servant. It is over and above the contract, and depends in no manner for its existence upon the agreement of the parties. It is founded upon public policy, the status assumed by master and servant, and upon the maxim, *Volenti non fit injuria.*"

§ 1665. ——— The truth is that the whole matter is in a most confused and unsatisfactory condition. The assumption of the inherent risks, which is one thing and not difficult to account for, has been confused with the assumption of the risks caused by the master's negligence, which is quite a different thing and not easy to account for; and both have been confused with the question of contributory negligence. There is nowhere agreement as to the grounds upon which assumption of the risks caused by the master's negligence is to be based.[23] It can not be deemed part of the original contract in the ordinary case, since undoubtedly that contract ordinarily is based upon the assumption that the master will not be negligent. If it be said that a contract of employment made with knowledge that the master is conducting his business in a negligent way includes by implication a term releasing the master from the consequences of a possible future injury, we are at once confronted by the fact that such general executory

policy and void. See *post*, § 1681. A contract to assume in a forbidden employment, *e. g.* that of a minor under the statutory age, is said to be unenforceable. Berdos v. Tremont, etc., Mills, 209 Mass. 489, Ann. Cas. 1912 B. 797.

[22] Denver, etc., R. Co. v. Norgate, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981 (citing Langlois v. Dunn Worsted Mills, 25 R. I. 645; Martin v. Chicago, etc., R. Co., 118 Iowa, 148, 96 Am. St. Rep. 371, 59 L. R. A. 698; O'Maley v. Gas L. Co., 158 Mass. 135, 47 L. R. A. 161, and other cases); Contrast Dowd v. New York, etc., R. Co., 170 N. Y. 459.

[23] See, for examples of the difficulties such cases as Dowd v. New York, etc., R. Co., 170 N. Y. 459; Johnston v. Fargo, 184 N. Y. 379, 6 Ann. Cas. 1, 7 L. R. A. (N. S.) 537; Rase v. Minneapolis, etc., R. Co., 107 Minn. 260, 21 L. R. A. (N. S.) 138.

waivers of the consequences of the master's negligence are usually held in this country to be opposed to public policy.[24] There is, of course, room to distinguish between a general waiver of the consequences of unknown future negligence, and a specific waiver of the consequences of a particular act with which the servant is unexpectedly confronted in the course of the employment, but whose dangers he understands and whose risks he is willing to assume; and perhaps such a narrow contract might be upheld. In actual experience, however, there is doubtless no thought of contract or consideration in these cases at all, and to set up such an implied contract seems forced. If there be any principle here applicable it seems to be that already referred to of *Volenti non fit injuria,* which has an established place in the law outside the field of master and servant,[25] and which has in certain cases an equitable root not substantially different from that which supports estoppel in pais. No one who reads the cases, however, can escape the conclusion that it has been greatly overworked in this field.

§ 1666. ——— Not all courts, moreover, accept this doctrine of the assumption of risks by knowingly continuing in the employment. It is urged that, however true it may be in theory that the servant has an option in the matter and is free to choose, practically there is an entire absence of economic freedom. Thus it is said in Virginia,[26] with reference to the refusal of the trial court to instruct that continuance in the work with knowledge of the dangers would release the master from liability for injuries caused by defects resulting from his negligence: "The court did not err in rejecting this instruction. It was palpably improper. It is sanctioned neither by reason, justice nor law. The usual and legal duty of every employer is to provide all means and appliances reasonably necessary for the safety of those in his employment. It is a cruel—an inhuman—doctrine that the employer, though he is aware that his own neglect to furnish the proper safeguards for the lives and limbs of those in his employment puts them in constant hazard of injury, is not to be held accountable to those employees who,

[24] See *post,* § 1681.

[25] See for some account of its history and scope, Beven on Negligence (3d ed.), p. 632 *et seq.*

[26] Richmond, etc., Ry. Co. v. Norment, 84 Va. 167, 10 Am. St. Rep. 827.

Compare Lord Bramwell, in Smith v. Baker, [1891] App. Cas. 325, 346: "It is said that to hold the plaintiff is not to recover is to hold that a master may carry on his work in a dangerous way and damage his servants. I do so hold, if the servant is foolish enough to agree to it. This sounds very cruel. But do not people go to see dangerous sports. Acrobats daily incur fearful dangers, as do lion tamers and the like. Let us hold to the law. If we want to be charitable, gratify ourselves out of our own pockets."

serving him under such circumstances, are injured by his negligent acts and omissions, if the injured parties, after themselves becoming cognizant of the peril occasioned by their employer's negligent way of conducting his business, continue in his employment and receive his pay, though they may be virtually compelled to remain by the stern necessity of earning the daily food essential to keep away starvation itself."

Other courts have been reluctant to draw the inference of assumption where the servant was young or inexperienced and therefor not likely to really appreciate the situation.[27]

§ 1667. Obviousness of risk.—In order to make this doctrine of assumption of risks applicable, it is essential that the risks shall either have been in fact known to the servant or so open and obvious that they must be deemed to have been within the contemplation of an ordinarily prudent man exercising reasonable care for his own safety. The servant is not bound to suspect defects. He is not bound to make critical inspection: that is the master's duty. Neither is the servant bound to go in search of defects where there is nothing to suggest their existence. He assumes that only which can reasonably be said to be either known or obvious.[28]

On the other hand, the servant may not close his eyes to the obvious, and thereby escape the consequences of an assumption of the risk.[29]

And not only must the *defect* be obvious, but it must appear that the

[27] See, for example, the dissenting opinion of Thayer, J., in St. Louis Cordage Co. v. Miller, *supra;* Mansell v. Conrad, 125 N. Y. App. Div. 634.

In Owens v. Cotton Mills, 83 S. Car. 19, it is held that the presumption is that an infant employee under 14 years of age is incapable of assuming the risks of danger. See also, Bare v. Crane Creek Coal Co., 61 W. Va. 28, 123 Am. St. Rep. 966, 8 L. R. A. (N. S.) 284.

[28] Texas & Pacific Ry. v. Swearingen, 196 U. S. 51, 49 L. Ed. 382; Choctaw Ry. v. McDade, 191 U. S. 64, 48 L. Ed. 96; St. Louis Cordage Co. v. Miller, 66 C. C. A. 477, 63 L. R. A. 551; St. Louis, etc., Ry. Co. v. Birch, 89 Ark. 424, 28 L. R. A. (N. S.) 1250; Rase v. Minneapolis St. Paul Ry., 107 Minn. 260, 21 L. R. A. (N. S.) 138; St. Louis Southwestern Ry. v. Hynson, 101 Texas, 543; Dowd v. New York, etc., R. Co., 170 N. Y. 459; Davidson v. Cornell, 132 N. Y. 228; Alton Paving Co. v. Hudson, 176 Ill. 270; Postal Teleg. Co. v. Likes, 225 Ill. 249; Bowen v. Penn. Ry., 219 Pa. 405; Laughy v. Bird Lumber Co., 136 Wis. 301; Burnside v. Peterson, 43 Colo. 382, 17 L. R. A. (N. S.) 76; McDuffee v. Boston & M. R. Co., 81 Vt. 52, 130 Am. St. Rep. 1019; Finnegan v. Winslow Skate Co., 189 Mass. 580; Young v. Snell, 200 Mass. 242, 19 L. R. A. (N. S.) 242.

[29] "Of course, a servant is bound to use his senses, and cannot be heard to plead ignorance of a danger that was obvious to any one on inspection." Mitchell, J., in Wuotilla v. Duluth Lumber Co., 87 Minn. 153. The same idea is present in various forms in most of the cases cited in this section.

risk was either actually appreciated or so patent as to warrant the assumption that it was appreciated.[30]

§ 1668. Voluntary action—Coercion—Command.—If assumption of risk in these cases rests upon the maxim *Volenti non fit injuria*, the servant must not only have knowledge of the risk but he must voluntarily assume it. As is pointed out by the English judges in several cases, the maxim is not *Scienti* but *Volenti*. When, however, we come to inquire closely as to whether one is *volens* or not, we are confronted with very great difficulties, and, if we seek to determine it by other than the ordinary external standards of conduct, we may easily be led into metaphysical discussions which are too refined for practical application. The English courts have pursued the matter further than is commonly done in the American courts; thus, it has been said in several of the English cases that a servant who knowingly continues in a risky service because he is directed to do so by his master, or for fear of losing his employment, cannot necessarily be said to have done so voluntarily.[31] On the other hand, the current American view seems to be that continuing to serve with knowledge, even under such circumstances, is sufficient evidence of voluntary action.[32] Thus, it was said of the servant in one such case in Massachusetts by Holmes, C. J.,

[30] Brown v. West Riverside Coal Co., 143 Iowa, 662, 28 L. R. A. (N. S.) 1260; Seeds v. Amer. Bridge Co., 68 Kan. 522; Myers v. Iron Co., 150 Mass. 125, 15 Am. St. Rep. 176; Ferren v. Railroad Co., 143 Mass. 197; Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155, 31 Am. St. Rep. 537; Wuotilla v. Lumber Co., 37 Minn. 153, 5 Am. St. Rep. 832; Peterson v. Merchants' Elev. Co., 111 Minn. 105, 137 Am. St. Rep. 537, 27 L. R. A. (N. S.) 816; Hamilton v. Mining Co., 108 Mo. 364; Rogers v. Roe, 74 N. J. L. 615, 13 L. R. A. (N. S.) 691; Tuckett v. Am. Steam Laundry, 30 Utah, 273, 116 Am. St. Rep. 832, 4 L. R. A. (N. S.) 990; Kreigh v. Westinghouse, etc., Co., 214 U. S. 249.

[31] See Smith v. Baker, [1891] App. Cas. 325; Baddeley v. Granville, 19 Q. B. Div. 423; Yarmouth v. France, 19 Q. B. Div. 647; Thomas v. Quartermaine, 18 Q. B. Div. 685. See also, Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 7 Ann. Cas. 430; Lloyd v. Hanes, 126 N. C. 359. But see, Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327.

[32] Thus in Massachusetts, see Leary v. Boston & Albany Ry., 139 Mass. 580, 52 Am. Rep. 733; Haley v. Case, 142 Mass. 316; Westcott v. New York & New England R. R. Co., 153 Mass. 460; Lamson v. American Axe Co., 177 Mass. 144, 83 Am. St. Rep. 267; Burke v. Davis, 191 Mass. 20, 4 L. R. A. (N. S.) 971, 114 Am. St. Rep. 591. In the last case it was said: "The fact that she [the servant] consented to undertake the work only reluctantly, and under a threat of dismissal, if she should refuse to do it, will not save her from being held to have assumed all the obvious risks of her undertaking." See also, Milby Coal Co. v. Balla, 7 Ind. Terr. 629, 18 L. R. A. (N. S.) 695; Atchison, Topeka Ry. v. Schroeder, 47 Kan. 315; Maltbie v. Belden, 167 N. Y. 307, 54 L. R. A. 52; Reed v. Stockmeyer, 20 C. C. A. 381, 74 Fed. 186; Brazil Block

"He complained and was notified that he could go if he would not face the chance. He stayed and took the risk. He did so none the less that the fear of losing his place was one of his motives." [33]

Many cases, however, give more effect to the master's orders than those above referred to.[34]

§ 1669. ——— Emergencies—Assurances of safety.—But even though continuing to serve in the face of risks, although because of commands or the fear of losing employment, may be regarded as evidence of assumption in the ordinary case in which there is time and opportunity to deliberate, there are many cases of haste or emergency or necessary absorption in the work where this would not necessarily be true, and in which the question whether the servant, who had obeyed commands or directions under the circumstances, had thereby assumed the risks, would fairly be an open one to be decided by a jury in view of all of the facts.[35]

So, too, continuing at the work under assurances of safety, given by the master or his proper representative, where the danger is not obvious, and the master may reasonably be supposed to have superior knowledge, is not necessarily an assumption of the risks.[36]

Coal Co. v. Hoodlet, 129 Ind. 327; Bradshaw's Adm'r v. Louisville, etc., Ry., 14 Ky. L. R. 688, 21 S. W. 346; Dougherty v. West Superior Iron Co., 88 Wis. 343; Hencke v. Ellis, 110 Wis. 532.

That the master's direction or command to do the work does not ordinarily alter the situation, see Briggs v. Tennessee Coal Co., 163 Ala. 237; Southern Cotton Oil Co. v. Walker, 164 Ala. 33; Worlds v. Georgia R. Co. 99 Ga. 283; Hanson v. Hammell, 107 Iowa, 171; Cunningham v. Lynn R. Co., 170 Mass. 298; Bier v. Hosford, 35 Wash. 544.

[33] In Burke v. Davis, *supra*.

[34] See Zearfoss v. Norway Iron Co., 218 Pa. 594; Kansas City, etc., R. Co. v. Thornhill, 141 Ala. 215; Jelinek v. St. Paul, etc., Ry. Co., 104 Minn. 249; Dallemand v. Saalfeldt, 175 Ill. 310, 67 Am. St. Rep. 214, 48 L. R. A. 753.

[35] Thus in Perrier v. Dunn Worsted Mills, 29 R. I. 396, it was said, *per* Parkhurst, J.: "The question, whether an employee has assumed the risk or has been guilty of contributory negligence, in a case where he is required to do his work in haste, either under orders of his superior, or by reason of the exigency of his position or because of an emergency, and where his whole energy and attention are absorbed in his work; or whether he may be excused from the degree of care ordinarily required or for temporary forgetfulness of a risk previously known to him, or of a risk which he might under other circumstances have remembered or appreciated, have been generally held to be questions for the jury under all the facts of the particular case" citing many cases.

[36] See McKee v. Tourtellotte, 167 Mass. 69, 48 L. R. A. 542; Lord v. Wakefield, 185 Mass. 214; Brown v. Lennane, 155 Mich. 686, 30 L. R. A. (N. S.) 453; Burkhard v. Leschen Rope Co., 217 Mo. 466; Anderson v. Pitt Min. Co., 103 Minn. 252; McKane v. Marr, 79 Vt. 13; Sullivan v. Wood, 43 Wash. 259, 117 Am. St. Rep.

Where the command and the assurances of safety are combined, the case against assumption is, of course, still stronger.

§ 1670. ——— Inexperience—Youth, etc.—Where the servant is young, inexperienced or ignorant, and especially where there was an unperformed duty to warn, the inference of assumption of risk is reluctantly drawn, and it is usually a question for the jury whether, under all the circumstances, there was an intelligent appreciation of the risk and a voluntary assumption of it.[87]

§ 1671. ——— Assumption of risks existing in violation of statute.—Where the peril is increased by reason of the failure of the employer to do some act, or to take some precaution, expressly required by statute, a somewhat different question arises. Until it is obvious that it has not been or will not be done, the employee has a right to assume that the employer has complied or will comply with the statute, and during that interval he does not assume the added risk. When, however, it becomes obvious to him that the statute has not been or will not be complied with, the question whether, by continuing in the service without objection, he assumes the risk, is one upon which the

1047. See also, Owensboro v. Gabbert, 135 Ky. 346, 135 Am. St. Rep. 462.

[87] *Minors.* See Owens v. Laurens Cotton Mills, 83 S. C. 19; Shirley v. Abbeville Furn. Co., 76 S. Car. 452, 121 Am. St. Rep. 952; Tucker v. Buffalo Cotton Mills, 76 S. Car. 539, 121 Am. St. Rep. 957; Lowe v. Southern Ry. Co., 85 S. Car. 363, 137 Am. St. Rep. 904; Stuler v. Hart, 65 Mich. 644; Ewing v. Lanark Fuel Co., 65 W. Va. 726, 29 L. R. A. (N. S.) 487; Bare v. Crane Creek Coal Co., 61 W. Va. 28, 123 Am. St. Rep. 966, 8 L. R. A. (N. S.) 284; Walton v. Burchel, 121 Tenn. 715, 130 Am. St. Rep. 788; O'Connor v. Golden Gate Mfg. Co., 135 Cal. 537, 87 Am. St. Rep. 127; Omaha Bottling Co. v. Theiler, 59 Neb. 257, 80 Am. St. Rep. 673; Dallemand v. Saalfeldt, 175 Ill. 310, 67 Am. St. Rep. 214, 48 L. R. A. 753; Siegel, Cooper & Co. v. Trcka, 218 Ill. 559, 109 Am. St. Rep. 302, 2 L. R. A. (N. S.) 647; Addicks v. Christoph, 62 N. J. L. 786, 72 Am. St. Rep. 687; Saller v. Freedman Bros. Shoe Co., 130 Mo. App. 712; Chambers v. Woodbury Mfg. Co., 106 Md. 496, 14 L. R. A. (N. S.) 383; Magone v. Portland Mfg. Co., 51 Ore. 21.

Child labor statutes are usually construed to deprive the master of the defense of assumption of risk if the injury occurred in an employment in violation of them. Inland Steel Co. v. Yedinak, 172 Ind. 423, 139 Am. St. Rep. 389; Madden v. Wilcox, 174 Ind. 657; Stehle v. Jaeger Machine Co., 225 Pa. 348, 133 Am. St. Rep. 884, 14 Ann. Cas. 122; Lenahan v. Pittston Coal Co., 218 Pa. 311, 120 Am. St. Rep. 885, 12 L. R. A. (N. S.) 461; Strafford v. Republic Iron Co., 238 Ill. 371, 20 L. R. A. (N. S.) 876; Berdos v. Tremont & Suffolk Mills, 209 Mass. 489, Ann. Cas. 1912 B. 797; Glucina v. Goss Brick Co., 68 Wash. 401; Norman v. Virginia Pocahontas Coal, 68 W. Va. 405, 31 L. R. A. (N. S.) 504.

Inexperienced persons.—See Di Bari v. Bishop Co., 199 Mass. 254, 127 Am. St. Rep. 497, 17 L. R. A. (N. S.) 773; Republic Iron Co. v. Ohler, 161 Ind. 393; Fletcher Bros. v. Hyde, 36 Ind. App. 96.

authorities are in conflict. The statute may, indeed, and sometimes does, expressly provide that an assumption of the risk shall not be permitted.[38] Where there is no such provision, it is held by some courts to be contrary to sound policy to permit an assumption of the risk to be inferred.[39] Other courts hold, on the contrary, that there is no

[38] Johnson v. Southern Pac. R. R. Co., 196 U. S. 1, 49 L. Ed. 363; Schlemmer v. Buffalo, etc., Ry. Co., 205 U. S. 1, 51 L. Ed. 681; Kansas City, etc., R. R. Co. v. Flippo, 138 Ala. 487 (referring to the federal act in regard to automatic couplers for railroads); Luken v. Lakeshore, etc., Ry. Co., 248 Ill. 377, 140 Am. St. Rep. 220 (same).

In North Carolina, see Coley v. N. C. R. Co., 128 N. C. 534, 57 L. R. A. 817; Mott v. Southern Ry. Co., 131 N. C. 234; Thomas v. Raleigh, etc., R. R. Co., 129 N. C. 392; Cogdell v. Southern R. R. Co., 129 N. C. 398. See also, Coley v. N. C. R. Co., 129 N. C. 407, 57 L. R. A. 817.

For constitutional provisions, see Buckner v. Richmond, etc., R. Co., 72 Miss. 873; Youngblood v. S. C., etc., R. Co., 60 S. C. 9, 85 Am. St. Rep. 824; Carson v. Southern Ry. Co., 68 S. C. 55; Norfolk, etc., R. R. Co. v. Cheatwood, 103 Va. 856.

[39] Narramore v. Cleveland, etc., Ry. Co., 37 C. C. A. 499, 48 L. R. A. 68; St. Louis, etc., R. Co. v. White, 93 Ark. 368; Johnson v. Mammoth Vein Coal Co., 88 Ark. 243, 19 L. R. A. (N. S.) 646; Streeter v. Western Wheeled Scraper Co., 254 Ill. 244, 41 L. R. A. (N. S.) 628; Waschow v. Kelley Coal Co., 245 Ill. 516; Peebles v. O'Gara Coal Co., 239 Ill. 370; Spring Valley Coal Co. v. Patting, 210 Ill. 342; Spring Valley Coal Co. v. Rowatt, 196 Ill. 156; Catlett v. Young, 143 Ill. 74. See also, Browne v. Siegel Cooper & Co., 191 Ill. 226; Landgraf v. Kuh, 188 Ill. 484; United States Cement Co. v. Cooper, 172 Ind. 599; Davis v. Mercer Lbr. Co., 164 Ind. 413; Green v. American Car & Foundry Co., 163 Ind. 135; Davis Coal Co. v. Polland, 158 Ind. 607, 92 Am. St. Rep. 319; Monteith v. Kokomo, etc., Co., 159 Ind. 149, 58 L. R. A. 944; Indiana, etc., Coal Co. v. Neal, 166 Ind. 458, 9 Ann. Cas. 424; Bromer v. Locke, 31 Ind. App. 353. See also, American Rolling Mill Co. v. Hullinger, 161 Ind. 673; Poli v. Numa Coal Co., 149 Iowa, 104, 33 L. R. A. (N. S.) 646; Stephenson v. Sheffield Brick Co., 151 Iowa, 371; Western, etc., Mfg. Co. v. Bloom, 76 Kan. 127, 123 Am. St. Rep. 123, 11 L. R. A. (N. S.) 225; Low v. Clear Creek Coal Co., 140 Ky. 754, 33 L. R. A. (N. S.) 656; Sipes v. Michigan Starch Co., 137 Mich. 258; Murphy v. Grand Rapids Veneer Works, 142 Mich. 677; Rivers v. Bay City Trac. Co., 164 Mich. 696; Kleinfelt v. Somers Coal Co., 156 Mich. 473, 132 Am. St. Rep. 532; Durant v. Lexington Coal Min. Co., 97 Mo. 62; McGinnis v. Printing Co., 122 Mo. App. 227; Nairn v. National Biscuit Co., 120 Mo. App. 144; Stafford v. Adams, 113 Mo. App. 717 (but see *dictum* in Spiva v. Osage Coal & Min. Co., 88 Mo. 68); Fitzwater v. Warren, 206 N. Y. 355, 42 L. R. A. (N. S.) 1229; Greenlee v. Southern Ry. Co., 122 N. C. 977, 65 Am. St. Rep. 734, 41 L. R. A. 399; Hill v. Saugestad, 53 Oreg. 178, 22 L. R. A. (N. S.) 634; Solt v. Williamsport Radiator Co., 231 Pa. 585 *(dictum)*; Kilpatrick v. Grand Trunk Ry. Co., 74 Vt. 288, 93 Am. St. Rep. 887; Gustafson v. West Lbr. Co., 51 Wash. 25; Whelan v. Washington Lbr. Co., 41 Wash. 153, 111 Am. St. Rep. 1006; Hoveland v. Hall Bros. etc., Co., 41 Wash. 164; Hall v. West, etc., Mill Co., 39 Wash. 447, 4 Ann. Cases 587; Johnson v. Far West Lumb. Co., 47 Wash. 492; Anderson v. Pac. Lumb. Co., 60 Wash. 415; Dukette v. Northwestern Co., 61 Wash. 95.

sound reason for a distinction between the employer's common-law duty and such a statutory duty, and that the risk may be assumed in either case.[40] If the considerations suggested with reference to the assumption of the risks caused by the master's failure to perform non-statutory duties have any weight, *a fortiori* ought they to operate here to prevent assumption in the case of statutory duties.

§ 1672. ——— Assumption of risk of the sort here in question as in the case of the non-statutory sort cannot be regarded as a matter of executory agreement.[41] It is a question of conduct in view of an existing state of facts. Regarded as a matter of executory contract with reference to future negligence, it would usually be condemned as opposed to public policy.[42] New York, for example, which upholds assumption of risk even in the case of statutory duties, declares invalid an executory agreement to release the master from the consequences of his negligence.[43]

§ 1673. ——— **Assumption of risk distinguishable from contributory negligence.**—Assumption of risk is a different matter from contributory negligence.[44] As has already been pointed out, the term

[40] St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 63 L. R. A. 551; Denver, etc., R. R. Co. v. Norgate, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981; Nottage v. Sawmill Phoenix, 133 Fed. 979; Birmingham R. & Electric Co. v. Allen, 99 Ala. 359, 20 L. R. A. 457; Denver, etc., R. Co. v. Gannon, 40 Colo. 195, 11 L. R. A. (N. S.) 216. See also, Browne v. Siegel, Cooper & Co., 191 Ill. 226; Martin v. C. R. I. & P. Ry. Co., 118 Iowa, 148, 96 Am. St. Rep. 371, 59 L. R. A. 698; Gillin v. Patten & S. R. Co., 93 Me. 80 (probably distinguishable); O'Maley v. South Boston Gaslight Co., 158 Mass. 135, 47 L. R. A. 161; Keenan v. Edison, etc., Co., 159 Mass. 379; Cassady v. Boston & A. R. R. Co., 164 Mass. 168; Marshall v. Norcross, 191 Mass. 568; Anderson v. Nelson Lbr. Co., 67 Minn. 79; Swenson v. Osgood & B. Mfg. Co., 91 Minn. 509; McGinty v. Waterman, 93 Minn. 242, 3 Ann. Cas. 39; Seely v. Tennant, 104 Minn. 354; Knisley v. Pratt, 148 N. Y. 372, 32 L. R. A. 367; White v. Witteman Lithographing Co., 131 N. Y. 631; Jenks v. Thompson, 179 N. Y. 20. But these are now apparently overruled in Fitzwater v. Warren, 206 N. Y. 355, 42 L. R. A. (N. S.) 1229; Mika v. Passaic Print Works, 76 N. J. L. 561; Hesse v. Columbus, etc., R. R. Co., 58 Ohio St. 167; Johns v. Cleveland, etc., R. R. Co., 23 Ohio Cir. Ct. 442; affirmed without opinion in 69 Ohio St. 532; Cleveland R. R. Co. v. Somers, 24 Ohio Cir. Ct. 67; Langlois v. Dunn Worsted Mills, 25 R. I. 645; Holum v. Chicago, etc., R. R. Co., 80 Wis. 299; Helmke v. Thilmany, 107 Wis. 216; Williams v. Wagner Co., 110 Wis. 456.

[41] The contrary of this is, indeed, stated in the opinion in Dowd v. New York, etc., R. Co., 170 N. Y. 459. It must be conceded, however, that some of the language in that opinion was unfortunately chosen. See Johnston v. Fargo, 184 N. Y. 379, 7 L. R. A. (N. S.) 537, 6 Ann. Cas. 1.

[42] See *post*, § 1681.

[43] Johnston v. Fargo, *supra*.

[44] Choctaw, etc., R. Co. v. McDade, 191 U. S. 64, 68, 48 L. Ed. 96. (Cf. Schlemmer v. Buffalo, etc., R. Co., 205 U. S. 1, 51 L. Ed. 681.) St. Louis

properly applies, not to the ordinary, necessary and inherent risks which usually belong to the business even when carried on under normal circumstances and with due care, but to those unusual and extraordinary risks which arise, occasionally because of unusual physical conditions, but most frequently from the negligent manner in which the master carries on his business. As has also been pointed out, the time of assumption *may* be when the servant accepts the employment with full knowledge of these unusual risks in addition to the ordinary and inherent ones, but it is usually when the servant, having entered upon the service without such knowledge, finds, after he is in it, that they exist, and then remains in the employment without protesting and obtaining a promise that the conditions will be changed. Now, remaining in the service under these circumstances is not *per se* contributory negligence, though it is usually held to be an assumption of the risk. The servant finding himself in the midst of unexpected risks decides to remain and to try to get along with the situation. If the risks are so obvious and so necessary and immediate that no reasonable man would so remain, the act of remaining may constitute contributory negligence; here assumption of risk and contributory negligence are substantially merged, but it certainly sounds very ill in the mouth of the master to urge that the act of the servant in remaining at his post amid dangers caused by the master's negligence is to be regarded as contributory negligence on the part of the servant unless that conclusion is practically irresistible.

But while remaining in the service is not necessarily contributory negligence, it is possible that the servant while acting in his perilous situation, instead of exercising reasonable care not to be injured by the assumed risks, may so carelessly conduct himself as to receive injuries which reasonable care would have prevented. Such a failure to exercise due care would constitute contributory negligence.

In practical results, the outcome may not be different. The servant's assumption of the risks would make the defence of contributory negligence unnecessary. If assumption of the risks should not be found, but contributory negligence existed, that would be a defence. If the servant had not assumed the risks and had still conducted himself with due care in his perilous situation, neither defence could be successfully urged by the master.

Cordage Co. v. Miller, 61 C. C. A. 477, 63 L. R. A. 551; Bradburn v. Wabash R. Co., 134 Mich. 575; Rase v. Minneapolis, etc., Ry. Co., 107 Minn. 260, 21 L. R. A. (N. S.) 138; Solt v. Williamsport Radiator Co., 231 Pa. 585; Johnson v. Mammoth Vein Coal Co., 88 Ark. 243, 19 L. R. A. (N. S.) 646.

§ 1674. ——— How determined—Court or jury.—Whether the question of the assumption of the risk is one of fact to be determined in each case by the jury, or whether it may be determined by the court is a question on which there seems to be some difference of opinion. In the case from which quotation has been already made,[45] it was said: "Now, while it is true, as the decisions to which we have adverted declare, that mere knowledge of a defect by a servant who continues in the employment does not necessarily establish the fact as a matter of law that he has assumed the risk it entails, and while it is also true that he does not assume such a risk unless an ordinarily prudent person of his capacity in his situation would have appreciated the danger from it, it is equally true that a servant who enters or continues in the employment of his master in the presence of visible or obvious defects and plain or apparent dangers from them, which he knows or appreciates, or which an employee of his intelligence and capacity would by the exercise of ordinary care and prudence know and appreciate, assumes the risk of these dangers, and he cannot be heard to say that he did not appreciate them, and when the uncontradicted evidence establishes these facts no case arises in his favor, no question remains for the jury, and it is the duty of the court to peremptorily instruct them to return a verdict for the master. This is a familiar and well-established rule of law." [46]

In order to make this rule applicable it should appear, as has been pointed out, not only that the *defect* was obvious but that the *risk* was either actually appreciated or so patent as to warrant the assumption that it was appreciated. Where there is room for reasonable difference of opinion about this, the case should go to the jury.[47]

[45] St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 63 L. R. A. 551.

[46] To same effect: Podvin v. Pepperel Mfg. Co., 104 Me. 561, 121 Am. St. Rep. 411; Milby Coal Co. v. Balla, 7 Ind. Ter. 629, 18 L. R. A. (N. S.) 695; Utah Consol. Min. Co. v. Bateman, 99 C. C. A. 365, 27 L. R. A. (N. S.) 958; Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 125 Fed. 524; Burke v. Union Coal Co., 84 C. C. A. 626, 157 Fed. 178; Chicago, etc. Ry. v. Crotty, 73 C. C. A. 147, 4 L. R. A. (N. S.) 832; Lamson v. American Axe Co., 177 Mass. 144, 83 Am. St. Rep. 267; Republic Iron Co. v. Thomasino, 99 C. C. A. 523, 29 L. R. A. (N. S.) 606.

[47] Fitzgerald v. Paper Co., 155 Mass. 155, 31 Am. St. Rep. 537; Brown v. Coal Co., 143 Iowa, 662, 28 L. R. A. (N. S.) 1260; Meier v. Way, 136 Iowa, 302, 125 Am. St. Rep. 254; Browne v. Siegel, 191 Ill. 226; Choctaw, etc., Ry. v. McDade, 191 U. S. 64, 48 L. Ed. 96; Marshall v. Dalton Paper Mills, 82 Vt. 489, 24 L. R. A. (N. S.) 128; Chicago, M. & St. P. Ry. v. Benton, 65 C. C. A. 660, 132 Fed. 460; Mahoney v. Dore, 155 Mass. 513; Hilgar v. Walla, 50 Wash. 470, 19 L. R. A. (N. S.) 367; Rankel v. Buck-

The English cases, holding as has been seen a more liberal rule respecting the voluntary character of the servant's conduct, treat the question of assumption as one for the jury in many cases in which the American courts would direct a verdict.[48]

§ 1675. ——— **Protests against doctrine.**—There is undoubtedly a growing feeling against this doctrine of the assumption of risks.[49] The doctrine is based upon our legal conceptions of freedom of contract and freedom to accept or reject risks at pleasure. Practically, however, it may be urged that while there is theoretic freedom there is economic dependence. The servant is not free to choose. He must work and rather than lose his place, he accepts conditions which menace his safety. Frequently he is so young, inexperienced or immature that he does not in fact appreciate the danger however much he ought to have done so. Moreover, his safety alone is not the only interest involved. The interests of those who are dependent upon him are involved; and society is interested, because, if the servant or those dependent upon him become derelict, society must assume the burden of caring for them. In behalf of these latter interests, therefore, it may be urged that the master ought not to be permitted to throw the burden of his own failure to perform his legal duties upon the servant, even though the latter may have been ready to assume it. Certainly no one can read the cases upon the subject without being forced to believe at least that assumption of risks is often too easily and readily found.

7. Contributory Negligence.

§ 1676. **Contributory negligence of servant defeats his recovery.**—Notwithstanding the fact of the master's negligence, the servant's right of recovery may be defeated by his own contributory negligence. The same rules which govern the question of contributory negligence in other cases apply here. A servant has no cause of action against his master for an injury resulting from the negligence of the master, if

staff-Edwards Co., 138 Wis. 442, 20 L. R. A. (N. S.) 1180; Burgess v. Davis Sulphur Ore Co., 165 Mass. 71; Ferren v. Old Colony Ry., 143 Mass. 197; Choctaw, etc., Ry. v. Craig, 79 Ark. 53; Murphy v. O'Neil, 204 Mass. 42, 26 L. R. A. (N. S.) 146; Crimmins v. Booth, 202 Mass. 17, 132 Am. St. R. 468; Rase v. Minneapolis St. P. Ry., 107 Minn. 260, 21 L. R. A. (N. S.) 138.

[48] See Smith v. Baker, [1891] App. Cas. 325; Baddeley v. Granville, 19 Q. B. Div. 423; Thomas v. Quartermaine, 18 Q. B. Div. 685; Fitzgerald v. Paper Co., *supra*.

[49] See Johnston v. Fargo, 184 N. Y. 379, 6 Ann. Cas. 1, 7 L. R. A. (N. S.) 537; Butler v. Frazee, 211 U. S. 459; Richmond, etc., R. Co. v. Norment, 84 Va. 167, 10 Am. St. Rep. 827.

the servant's own negligence directly contributed to cause the injury.[50] Even though the master's negligence was greater than the servant's, the common law does not, in general, undertake to compare the degrees or to apportion the blame accordingly. Statutes upon the subject, however, sometimes provide for such an apportionment.[51]

[50] Warden v. Louisville, etc., R. Co., 94 Ala. 277, 14 L. R. A. 552; St. Louis, etc., Ry. Co. v. Dupree, 84 Ark. 377, 120 Am. St. Rep. 74; St. Louis, etc., Ry. Co. v. Rice, 51 Ark. 467, 4 L. R. A. 173; Victor Coal Co. v. Muir, 20 Colo. 320, 46 Am. St. Rep. 299, 26 L. R. A. 435; Baker v. Hughes, 2 Colo. 79; Elliott v. Chicago, etc., R. Co., 5 Dak. 523, 3 L. R. A. 363; Florida, etc., R. Co. v. Mooney, 45 Fla. 286, 110 Am. St. Rep. 73; Carroll v. East Tenn., etc., R. Co., 82 Ga. 452, 6 L. R. A. 214; Campbell v. Atlanta, etc., R. Co., 53 Ga. 488; N. Y., etc., R. Co. v. Hamlin, 170 Ind. 20, 15 Ann. Cas. 988, 10 L. R. A. (N. S.) 881; Davis Coal Co. v. Polland, 158 Ind. 607, 92 Am. St. Rep. 319; Muldowney v. Illinois Cent. R. Co., 39 Iowa, 615; Lancaster's Admr. v. Central City Light Co., 137 Ky. 355; Potts v. Shreveport Belt Ry. Co., 110 La. 1, 98 Am. St. Rep. 452; Schoultz v. Eckardt Mfg. Co., 112 La. 568, 104 Am. St. Rep. 452; Buzzell v. Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212; Wormell v. Maine Cent. R. Co., 79 Me. 397, 1 Am. St. Rep. 321; State v. Malster, 57 Md. 287; Grand v. Michigan, etc., R. Co., 83 Mich. 564, 11 L. R. A. 402; Vicksburg, etc., R. Co. v. Wilkins, 47 Miss. 404; Seibert v. Missouri, etc., R. Co., 188 Mo. 657, 70 L. R. A. 72; O'Hare v. Cocheco Mfg. Co., 71 N. H. 104, 93 Am. St. Rep. 499; Johnston v. Syracuse Lighting Co., 193 N. Y. 592, 127 Am. St. 988; Bennett v. Northern Pac. R. Co., 2 N. D. 112, 13 L. R. A. 465; Solt v. Williamsport Radiator Co., 231 Pa. 585; Honor v. Albrighton, 93 Penn. 475; Green, etc., Ry. Co. v. Bresmer, 97 Penn. 103; Houston, etc., Ry. Co. v. DeWalt, 96 Tex. 121, 97 Am. St. Rep. 877; Darracott v. Chesapeake, etc., R. Co., 83 Va. 288, 5 Am. St. Rep. 266; Miller v. Moran Bros. Co., 39 Wash. 631, 109 Am. St. Rep. 917, 1 L. R. A. (N. S.) 283; Stratton v. Nichols Lbr. Co., 39 Wash. 323, 109 Am. St. Rep. 881; Chicago, etc., R. Co. v. Crotty, 73 C. C. A. 147, 4 L. R. A. (N. S.) 832; Atchison, etc., R. Co. v. Reesman, 19 U. S. App. 596, 9 C. C. A. 20, 23 L. R. A. 768; Cunningham v. Railway Co., 17 Fed. 882.

[51] The Federal Employers' Liability Act of 1906 (declared unconstitutional on other grounds) provided that the contributory negligence of the employee should not bar his recovery where his negligence was slight and that of the employer was gross in comparison, but that the damages should be diminished accordingly.

The Act of 1908 provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." Sec. 3.

The Georgia Code (1895, § 2322) provides that "No person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him."

A doctrine of comparative negligence at one time prevailed in Illinois, but "The doctrine of comparative negligence no longer exists in this state." Macon v. Holcomb, 205 Ill. 643.

The effect of contributory negligence is, in general, as potent where the liability is a statutory one as it is where common law liabilities are concerned.[52]

The fact that the servant is an infant, if old enough to be charged with the duty of care, does not ordinarily affect the application of the doctrine of contributory negligence; but this is not true under many of the statutes forbidding the employment of minors.[53]

§ 1677. ——— As has been already pointed out, contributory negligence is a different matter from that of assumption of risk. Where the servant has assumed the risks, either usual or unusual, of the employment in which he is engaged, and is injured by reason of one of them (as he may be though in the exercise of due care in the dangerous situation in which he has consented to work), the master is not liable because, by the hypothesis, the servant has taken this risk upon himself. It is entirely possible, however, that the servant may have failed to exercise due care and thus have brought upon himself an in-

Comparative negligence was also thought to be the rule in Tennessee at one time, but it has been repudiated in the later cases. Railway Co. v. Hull, 88 Tenn. 33; Railway Co. v. Aiken, 89 Tenn. 245. So, in Kansas: Atchison, etc., R. Co. v. Henry, 57 Kan. 154.

[52] Narramore v. Cleveland, etc., Ry. Co., 37 C. C. A. 499, 48 L. R. A. 68; Taylor v. Carew Mfg. Co., 143 Mass. 470; Keenan v. Edison, etc., Co., 159 Mass. 379; Victor Coal Co. v. Muir, 20 Colo. 320, 46 Am. St. Rep. 299, 26 L. R. A. 435; Chicago, etc., Ry. Co. v. Brown, 44 Kan. 384; Grand v. Michigan Cent. R. Co., 83 Mich. 564; Farquhar v. Alabama, etc., R. Co., 78 Miss. 193; Wabash, etc., R. Co. v. Thompson, 15 Ill. App. 117; Ford v. Chicago, etc., R. Co., 91 Iowa, 179, 24 L. R. A. 657; Kilpatrick v. Grand Trunk Ry. Co., 72 Vt. 263, 82 Am. St. Rep. 939; Krause v. Morgan, 53 Ohio St. 26; Queen v. Dayton Coal & Iron Co., 95 Tenn. 458, 49 Am. St. Rep. 935, 30 L. R. A. 82; Christner v. Cumb., etc., Coal Co., 146 Pa. 67; Graham v. Newbury, etc., Coke Co., 38 W. Va. 273; Holum v. Chicago, etc., R. Co., 80 Wis. 299; Lake Erie, etc., Ry. Co. v. Craig, 73 Fed. 642; Anderson v. Lumber Co., 67 Minn. 79; Munn v. Wolff, 94 Ill. App. 122; Johnson v. Mammoth Vein Coal Co., 88 Ark. 243, 19 L. R. A. (N. S.) 646.

[53] Where the employment of minors is expressly forbidden by statute, it is held by some courts that the defense of contributory negligence can not be made. See Lenahan v. Pittston Coal Mining Co., 218 Pa. 311, 120 Am. St. Rep. 885, 12 L. R. A. (N. S.) 461; Stehle v. Jaeger Machine Co., 225 Pa. 348, 133 Am. St. Rep. 884, 14 Ann. Cas. 122; Strafford v. Republic Iron Co., 238 Ill. 371, 128 Am. St. Rep. 129, 20 L. R. A. (N. S.) 876; Marino v. Lehmaier, 173 N. Y. 530. By other courts, the effect of the statute is deemed to be to make the master liable for all injuries caused by the service, but not those caused by the infant's own negligence. Darsam v. Kohlman, 123 La. 164, 20 L. R. A. (N. S.) 881; Norman v. Virginia Pocahontas Coal Co., 68 W. Va. 405, 31 L. R. A. (N. S.) 504; Evans v. American Iron Co., 42 Fed. 519; Queen v. Dayton Coal Co., 95 Tenn. 458, 49 Am. St. Rep. 935, 30 L. R. A. 82.

jury which, notwithstanding the dangerous situation, would not otherwise have happened to him. He could not recover for this, primarily because he had assumed the entire risk, and, even if he had not, because of his contributory negligence. If the doctrine of assumption of risks be not adopted, then the servant's failure to protect himself would have its usual significance.

§ 1678. ——— Effect of express command of master.—Contributory negligence is not to be so readily imputed to the servant where he did the act, alleged to be negligent on his part, as the result of the express direction or command of the master or of someone who represented the master in that behalf. Ordinarily it may be presumed that the master knows better than the servant the dangers of the employment. There is, too, as has been seen, a presumption that the master's orders are proper and lawful, and the servant who disobeys them must take upon himself the burden of showing that they were otherwise.[54] It is to be expected therefore that great weight will be given by the servant to his master's orders which he has undertaken to obey, and where the service is continued, or the task undertaken, by the express order or command of the master or those who represent him, this fact must be taken into consideration in determining the question of the servant's contributory negligence. The command of the master would not justify the servant in going into plain, undoubted and imminent danger, such as no man of ordinary prudence would encounter.[55] But in determining this question, too, regard must be had to the exigencies of the case. A prudent man even will run more risks in times of hazard or threatened disaster, than at other times when there is no pressing need. And so, under such circumstances, men cannot be expected to weigh the chances with nice precision. Each case is left to be judged by its own circumstances and surroundings. The rule of contributory negligence is, therefore, to be modified in this regard, that if the servant incur risk by the express command of the master or his agent, and the danger was not so inevitable or imminent that a man of ordinary prudence would not, under the circumstances, have incurred it, the servant is not to be deemed guilty of contributory negligence.[56]

[54] See *ante*, § 1244 *et seq.*

[55] Mason v. Post, 105 Va. 494; Lowe Mfg. Co. v. Payne, 167 Ala. 245, 30 L. R. A. (N. S.) 436; Roul v. Railway Co., 85 Ga. 197; Shortel v. St. Joseph, 104 Mo. 114, 24 Am. St. Rep. 317.

[56] Southern Ry. Co. v. Shields, 121 Ala. 460, 77 Am. St. Rep. 66; Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 7 Ann. Cas. 430, 4 L. R. A. (N. S.) 837; Foley v. California Horseshoe Co., 115 Cal. 184, 56 Am. St. Rep. 87;

The fact that the servant was young or inexperienced may also be taken into account, since he may have neither the judgment to realize the danger nor the strength of will to resist an unwarranted direction.[57]

8. *Statutes Changing Common Law Rules.*

§ 1679. Statutory changes.—Attempts have been made in a number of instances to change or modify the rules of the common law respecting the master's liability to his servant. A detailed statement of these statutes is not appropriate here, but a general reference to them may not be out of place. In 1880 the English Parliament passed an employers' liability act, which, in general terms, made the employer liable for injuries caused by negligently defective "ways, work, machinery or plant" or by the negligence of any servant charged with the power of superintendence or direction or by the negligence of servants charged with the control of signals, switches, engines and trains. In 1897 a new act was passed, revised and extended in 1906 (and which did not supersede the act of 1880), which proceeded upon the theory, then entirely new in English law, of requiring the employer to make certain fixed compensation, without regard to his negligence, whenever death or accident occurred in the service, including therein death or disability from certain occupational diseases. In the United States, a number of states have abolished the fellow servant rule and made other changes so far as railroads are concerned,[58] and several states have adopted employers' liability acts substantially similar to the Eng-

Little v. Southern Ry. Co., 120 Ga. 347, 102 Am. St. Rep. 104, 66 L. R. A. 509; Western Stone Co. v. Muscial, 196 Ill. 382, 89 Am. St. Rep. 325; Taylor v. Evansville, etc., R. Co., 121 Ind. 124, 16 Am. St. Rep. 372, 6 L. R. A. 584; Fraudsen v. Chicago, etc., R. Co., 36 Iowa, 372; Fox v. Chicago, etc., Ry. Co., 86 Iowa, 368, 17 L. R. A. 289; Shaver v. Home Telephone Co., 36 Ind. App. 233, 114 Am. St. Rep. 373; St. Louis, etc., R. Co. v. Morris, 76 Kan. 836, 13 L. R. A. (N. S.) 1100; Pullman Co. v. Geller, 128 Ky. 72, 129 Am. St. Rep. 295; McKee v. Tourtellotte, 167 Mass. 69, 48 L. R. A. 542; Chicago, etc., Ry. Co. v. Bayfield, 37 Mich. 204; Schroeder v. Chicago, etc., R. Co., 108 Mo. 322, 18 L. R. A. 827; O'Hare v. Cocheco Mfg. Co., 71 N. H. 104, 93 Am. St. Rep. 499; Mason v. Richmond, etc., R. Co., 111 N. C. 482, 32 Am. St. Rep. 814, 18 L. R. A. 845; Noble v. Roper Lumber Co., 151 N. Car. 76, 134 Am. St. Rep. 974; Schiglizzo v. Dunn, 211 Pa. 253, 107 Am. St. Rep. 567; Patterson v. Pittsburg, etc., R. Co., 76 Pa. 389, 18 Am. Rep. 412; East Tenn., etc., R. Co. v. Duffield, 12 Lea (Tenn.), 63, 47 Am. Rep. 319; Tuckett v. American Steam Laundry Co., 30 Utah, 278, 116 Am. St. Rep. 832.

[57] Dougherty v. Dobson, 214 Pa. 252, 31 Am. St. Rep. 777; Kehler v. Schwenk, 151 Pa. 505, 13 L. R. A. 374; Lowe v. Southern Ry., 85 S. Car. 363, 137 Am. St. Rep. 904.

[58] Arkansas: Acts 1911, p. 56.

lish employers' liability act of 1880.[59] Recently still more sweeping legislation, either in the form of liability acts, compensation acts, or

Florida: Stats. of 1906, § 3150.

Georgia: Code of 1895, §§ 2610, 2323, 2297. Code of 1911, §§ 2751, 2782–4, 3129, 3602.

Indiana: Burns' Code 1901, § 7083 (limited to railroads by construction. See Indiana cases cited, *post*).

Iowa: Supp. 1907, § 2071; Laws 1909, ch. 124.

Kansas: Gen. Stat. 1901, § 6312; Laws of 1905, p. 540; Laws of 1909. § 6999.

Maine: Laws of 1909, ch. 258.

Minnesota: 1905 Stats. § 2040.

Mississippi: Const., § 193; Code 1906, § 4056.

Missouri: Rev. Stats. § 2873–4–5–6; Laws of 1911, p. 157 (as to railroads and mines).

Montana: 1907 Rev. Stats. § 5251; Laws of 1911, ch. 29.

Nebraska: Ann. Stats. 1909, § 2803.

North Carolina: Rev. Stats. 1905, § 2646.

Oklahoma: Const. Art. IX, § 36.

South Carolina: Const. Art. IX, § 15.

Texas: Laws 1897, p. 14, ch. 6; Sayre's Code, § 4560; Laws 1905, ch. 163; Laws 1909, ch. 10.

Utah: Comp. Laws of 1907, § 1343.

Vermont: Laws 1910, p. 101.

Wisconsin: Stat. 1898 § 1816; Laws of 1903, ch. 448; Laws of 1907, p. 495.

Statutes abolishing the fellow-servant rule only with reference to railroads have been uniformly held constitutional against contentions that they are founded on an arbitrary classification, a denial of equal protection of the laws, etc., on the ground that it is an occupation that is peculiarly and inherently hazardous. See Missouri Pac. Ry. Co. v. Castle, 224 U. S. 541 (upholding the Nebraska act); Mobile, etc., R. Co. v. Turnipseed, 219 U. S. 35 (upholding Mississippi act); Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205, 32 L. Ed. 107 (upholding the Kansas law); Missouri Pacific Ry. Co. v. Haley, 25 Kan. 35; Boggs v. Alabama, etc., Iron Co., 167 Ala. 251, 140 Am. St. Rep. 28; Johnson v. St. Paul Ry. Co., 43 Minn. 222, 8 L. R. A. 419; Deppe v. Chicago, etc., R. Co., 36 Iowa, 52; Callahan v. St. Louis, etc., Ry. Co., 170 Mo. 473, 94 Am. St. Rep. 746, 60 L. R. A. 249; Swoboda v. Union Pac. R. Co., 87 Neb. 200, 138 Am. St. Rep. 483; Chesapeake & Ohio Ry. Co. v. Hoffman, 109 Va. 44; Schradin v. N. Y. Cent., etc., R. Co., 103 N. Y. Supp. 73, s. c. 109 N. Y. Supp. 428; Missouri, etc., R. Co. v. Smith, 45 Tex. Civ. App. 128, 4 Ann. Cas. 644; Missouri, etc., R. Co. v. Bailey, 53 Tex. Civ. App. 295; Mobile, etc., R. Co. v. Hicks, 91 Miss. 273, 124 Am. St. Rep. 679; Construction Co. v. Heflin, 88 Miss. 314; Kiley v. Chicago, etc., R. Co., 138 Wis. 215; Lewis v. Northern Pacific Ry. Co., 36 Mont. 207; Pittsburg v. Leitheiser, 168 Ind. 438; Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L. R. A. (N. S.) 418; Indianapolis, etc., Co. v. Kinney, 171 Ind. 612, 23 L. R. A. (N. S.) 711; Louisville, etc., R. Co. v. Melton, 127 Ky. 276; Pittsburg, etc., Ry. Co. v. Montgomery, 152 Ind. 1, 71 Am. St. Rep. 301, 69 L. R. A. 875; Hancock v. Norfolk, etc., R. Co., 124 N. C. 222; Pierce v. Van Dusen, 78 Fed. 693 (upholding the Ohio statute).

[59] Alabama: Code of 1907, § 3910.

Indiana: Burns' Code 1901, § 7083.

Massachusetts: Rev. Stats. 1902, p. 932.

New York: Laws 1902, ch. 600, p. 1748.

Virginia: 1904 Stats. § 1294k; Const. § 162.

See also, Arkansas: Kirby's Digest,

insurance acts, has been enacted,[60] most of which has been upheld by the courts.[61]

1904 § 6658–60. Mississippi: Const. § 193; Code 1906, § 4056. South Carolina: Const. Art. IX, § 15.

[60] *Arizona*—Laws of 1912, Chap. 89, p. 491 does away with fellow-servant rule and minimizes assumption of risk. Special Session 1912, Chap. 14, p. 23, Workmen's Compensation Act. Employee may refuse benefits of act and sue. Act compulsory as to railroads, mines, factories, etc., and also optional where not compulsory.

California—Statutes of 1911, Chap. 399, p. 796. State Constitution, 1911, Art. 20, Sec. 21 abolishes contributory negligence, fellow-servant rule, assumption of risk as a defense, but adopts comparative negligence doctrine as to assessment of damages. Employer may escape liability of suit, by electing to become subject to compensation features of the act.

Colorado—Session Laws of 1911, Chap. 113, p. 294 abolishes fellow-servant rule.

Illinois—Rev. Stat. 1911, pp. 1136–44, Optional Workmen's Compensation Act. If not accepted, the defenses of contributory negligence, fellow-servant, and assumption of risk are abolished. Election of employer presumed, unless notice to contrary is given.

Indiana—Acts of 1911, Chap. 88, p. 145 abolishes fellow-servant rule; and assumption of risk and contributory negligence when in obedience to orders of master or where master knew or should have known of defect, or where a violation by master of statutory duty places burden of proof on employer.

Kansas—Laws of 1911, Chap. 218. A compulsory Workmen's Compensation Act, as to railroads, factories, etc., employing over fifteen. Optional with others. Abolishes defenses of fellow-servant, assumption of risk, contributory negligence to employers not under it, and allows by employers under it as against employers who seek to recover damages.

Maryland—Laws of 1912, Chap. 837, p. 1624. Optional workmen's insurance, under which employer is relieved of common-law liabilities, except as to a safe place of work.

Massachusetts—Acts of 1909, Chap. 514, § 127; Acts of 1911, Chap. 751; Acts of 1912, Chaps. 251, 571, 666. By Act of 1911, an optional workmen's compensation system was adopted. For those employers not accepting the same, the defenses of fellow-servant, contributory negligence, and assumption of risk were abolished.

Michigan—Howell's Rev. Stat. 1912, Chap. 63, §§ 3939 to 4008, Chap. 64, §§ 4110–18. Optional workmen's compensation act. For those employers not accepting the same, the defenses of contributory negligence, fellow-servant, and assumption of risk are abolished. As to railroads, defenses of fellow-servants, assumption of risk, and contributory negligence are abolished.

Nevada—Rev. Laws of 1912, §§ 1915–28. Compulsory compensation act applying to certain hazardous

[61] The New York statute of 1910 was declared unconstitutional in Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912 B. 156. The Wisconsin Compensation Act of 1911 was upheld in Borgnis v. Falk Co., 147 Wis. 327, 37 L. R. A. (N. S.) 489. The Massachusetts Act of 1911, in opinion of Justices, 209 Mass. 607. The Washington Act of 1911, in State v. Clausen, 65 Wash. 156, 37 L. R. A. (N. S.) 466. The Ohio Act of 1911, in State v. Creamer, 85 Ohio St. 349, 39 L. R. A. (N. S.) 694.

§ 1680. ——— Congress, which of course has jurisdiction in the matter only so far as it can be deemed a regulation of interstate commerce, has manifested considerable activity. A number of statutes have been enacted designed to secure the adoption of safety appliances. In 1906 an act was passed imposing liability upon all common carriers engaged in the commerce over which congress has jurisdiction. This act was declared unconstitutional because not sufficiently limited in its terms to persons engaged in the commerce which congress had the power to regulate.[62] In 1908 a new statute was passed affecting all

callings, e. g. railroads, mines, construction work, etc., and abolishing defenses of fellow-servant, contributory negligence, and assumption of risk under same.

New Hampshire—Laws of 1911, Chap. 163, p. 181. Optional workmen's compensation act, abolishing for those employers who do not accept it the defenses of fellow-servant, and assumption of risk. Contributory negligence may be a defense.

New Jersey—Acts of 1911, Chap. 95, p. 134. Optional compensation act, abolishing for those employers who do not elect to come under the act, the defenses of fellow-servant, and assumption of risk.

New York—Birdseye, Cumming & Gilbert's Consolidated Laws, pp. 3080–95. Affects common-law remedy to some extent as regards assumption of risk, and superintendence. Laws of 1910, Chaps. 352, 674, enacting a workmen's compensation law, declared unconstitutional.

Ohio—Laws of 1910, pp. 195–9; Laws of 1911, pp. 524–33. An optional workmen's insurance act, abolishing for employers not complying with act defenses of fellow-servant rule, assumption of risk, and contributory negligence.

Oregon—Lord's Laws 1910, p. XXX. Sec. 5057a abolishes defense of fellow-servant and contributory negligence in certain hazardous callings if master or superintendent are negligent or violate statute.

Pennsylvania—Purdon's Digest, 1910, p. 5464–5 abolishes fellow-servant rule, when injury is due to defect in plant, negligence of superintendent, or in obedience to orders of superior.

Rhode Island—Acts of 1912, pp. 204–228. Optional workmen's compensation act, abolishing defenses of fellow servant, contributory negligence and assumption of risk for those employers who do not elect to come under provisions of the act.

Washington—Laws of 1911, Chap. 74, p. 345. Compulsory workmen's compensation act on manufacturing, construction work, mining, etc., and optional to all others.

Wisconsin—Statutes 1911, § 2394, Sec. 1816 as to railroads, abolishes assumption of risk, fellow-servant doctrine, and substitutes comparative for contributory negligence. An optional workmen's compensation act, which to all employers, who do not accept the same, denies the common-law defenses of assumption of risk, and of fellow servant.

United States—Public Laws, Vol. 35, Part 1, Chap. 149, pp. 65–66; Vol. 36, part 1, Chap. 143, p. 291; Chap. 160, Sec. 4, p. 299. As to railroads engaged in interstate business, abolishes fellow-servant rule, assumption of risk when due to statutory violation by employer, and substitutes comparative for contributory negligence doctrine.

[62] Employers' Liability Cases, 207 U. S. 463.

common carriers by railroad while engaged in commerce between any of the several states, etc., and this act has been upheld.[63] This act imposes liability for death or injury resulting in whole or in part from the negligence of any officers, agents or employees of the carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. It provides that the contributory negligence of the employee shall not bar a recovery but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, but that contributory negligence shall have no effect where the violation by the carrier of any statute enacted for the safety of employees, contributed to the injury or death of the employee, and that the doctrine of assumption of risks shall not apply in such a case. It declares void any contract or regulation, the purpose and intent of which shall be to exempt the carrier from the liability imposed by the act, but provides that any insurance or relief benefit or indemnity which the carrier shall have paid to the injured servant shall be deducted from his recovery.

A general compensation act, to supersede this liability act, is now before congress.

9. Contracts Waiving Master's Liability.

§ 1681. Agreements to waive liability invalid.—It is frequently attempted by employers to obtain from their employees, at the time of entering upon the service and in consideration of it, a waiver of the liability of the master for injuries that may happen through the negligence of the master or of other servants. Such waivers, however, are quite generally held to be opposed to public policy and void,[64] though

[63] Second Employers' Liability Cases, 223 U. S. 1; Philadelphia, etc., R. Co. v. Schubert, 224 U. S. 603.

[64] Johnston v. Fargo, 184 N. Y. 379, 6 Ann. Cas. 1, 7 L. R. A. (N. S.) 537; Little Rock, etc., Ry. Co. v. Eubanks, 48 Ark. 460, 3 Am. St. Rep. 245; Tarbell v. Rutland, etc., R. Co., 73 Vt. 347, 87 Am. St. Rep. 734, 56 L. R. A. 656 (statutory liability); Kansas Pac. Ry. Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630, 11 Am. & Eng. Ry. Cases, 260; Atchison, etc., R. Co. v. Fronk, 74 Kan. 519; Blanton v. Dold, 109 Mo. 64; Railway Co. v. Spangle, 44 Ohio St. 471, 58 Am. Rep. 833; Roesner v. Hermann, 10 Biss. (U. S. C. C.) 486, 8 Fed. 782; Purdy v. Rome, etc., Ry. Co., 125 N. Y. 209, 21 Am. St. Rep. 736; Newport News, etc., Co. v. Eifert, 15 Ky. Law Rep. 575; Johnson v. Richmond, etc., R. Co., 86 Va. 975; Louisville, etc., R. Co. v. Orr, 91 Ala. 548; Richmond, etc., R. Co. v. Jones, 92 Ala. 218; Ault v. Nebraska Tel. Co., 82 Neb. 434, 130 Am. St. Rep. 686; Pugmire v. Oregon Short Line, 33 Utah, 27, 126 Am. St. Rep. 805, 13 L. R. A. (N. S.) 565.

they have been sustained in England,[65] and in some of our States, as, for example, in Georgia.[66]

Even statutory duties have been held in England to be capable of such waiver. Many of the statutes in the United States have expressly forbidden it.

VI.

AGENT'S RIGHT TO A LIEN.

§ 1682. In general.—Having ascertained the rights of the agent to commissions, reimbursement and indemnity, it becomes material to determine the means by which those rights may be enforced. The most important of these is the agent's right of lien.

Liens of various sorts, in recent times, are provided and regulated by statute, but it is not the intention here to determine how far the statutes have protected agents. So liens or charges may be created by the express contract of the parties, but these, also, are not now to be considered. The lien to be here considered is that which exists by the common law, as distinguished from statutory liens and those created by express contract.

[65] Griffiths v. Earl of Dudley, 9 Q. B. Div. 357.

[66] Western, etc., R. R. Co. v. Bishop, 50 Ga. 465; Western, etc., R. R. Co. v. Strong, 52 Ga. 461; Galloway v. Western, etc., R. R. Co., 57 Ga. 512; New v. Southern Ry. Co., 116 Ga. 147, 59 L. R. A. 115.

It is held, however, that a contract made between a porter and the Pullman company, or a messenger and an express company, by a term of which the employee releases all claims, against the railroad company which may transport the cars of his employer, is valid, and the railroad company may use it as a defense to an action for personal injury. Russell v. Pittsburg, etc., Ry. Co., 157 Ind. 305, 87 Am. St. Rep. 214, 55 L. R. A. 253; Pittsburg, etc., Ry. Co. v. Mahoney, 148 Ind. 196, 62 Am. St. Rep. 503, 40 L. R. A. 101; Chicago, etc., R. Co. v. Hamler, 215 Ill. 525, 106 Am. St. Rep. 187, 3 Ann. Cas. 42, 1 L. R. A. (N. S.) 674; Denver, etc., R. Co. v. Whan, 39 Colo. 230, 12 Ann. Cas. 732, 11 L. R. A. (N. S.) 432.

Where an employee participates in or contributes to a relief department maintained by his empolyer, an agreement made by him that if he accepts the benefits thereof he releases all claims for damages against the railroad, and if he prosecutes his action against the railroad he releases all claim to the relief fund, has almost uniformly been held valid. Oyster v. Burlington Relief Dept., 65 Neb. 789, 59 L. R. A. 291; Donald v. Chicago, etc., R. Co., 93 Iowa, 284, 33 L. R. A. 492; Eckman v. Chicago, etc., R. Co., 169 Ill. 312, 38 L. R. A. 750; Johnson v. Charleston, etc., Ry. Co., 55 S. C. 152, 44 L. R. A. 645; Owens v. Baltimore, etc., R. Co., 35 Fed. 715, 1 L. R. A. 75. But see Chicago, etc., R. Co. v. Healy, 76 Neb. 783, 124 Am. St. Rep. 830, 10 L. R. A. (N. S.) 198.

§ 1683. Lien defined—General and particular liens.—A lien at common law has been defined to be the right of detaining the property on which it operates until the claims which are the basis of the lien are satisfied.[67] It has also been defined as an obligation which, by implication of law and not by express contract, binds real or personal estate for the discharge of a debt or engagement, but does not pass the property in the subject of the lien.[68]

The main distinction between common law liens and other liens is that possession is essential to the former class and not always to the latter.[69]

Liens are either general or particular. A general lien is a right to retain the property of another to cover and secure a general balance due from the owner to the person who has possession.[70] A particular or specific lien is a right to retain particular property of another for charges incurred, or trouble undergone, with respect to that property.[71]

The former being regarded as an encroachment on the common law, is not favored by courts of law or equity, and will be strictly construed. It can, in the absence of an express contract, be claimed only as arising from dealings in a particular trade or line of business in which the existence of a general lien has been judicially proved and acknowledged, or upon express evidence being given that, according to the established custom, a general lien is claimed and allowed.[72] Particular liens on the other hand are favored.[73]

§ 1684. Foundation of the claim of lien.—The common law lien found its origin in principles of natural equity and commercial necessity. Its earliest form was the particular or specific lien, and it was first applied for the protection of those who were required by law to render services or to receive goods for all who sought their aid, as in the case of common carriers and innkeepers.[74] Manifest justice re-

[67] Ames v. Palmer, 42 Me. 197, 66 Am. Dec. 271; Oakes v. Moore, 24 Me. 214, 41 Am. Dec. 379; Hammonds v. Barclay, 2 East, 235.

[68] Fisher on Mortgages, § 149; Evans on Agency, 362.

[69] Quimby v. Hazen, 54 Vt. 132.

[70] McIntyre v. Carver, 2 Watts & Serg. (Penn.) 392, 37 Am. Dec. 519 and note; Evans on Agency, 363.

[71] See cases cited in preceding note.

[72] McIntyre v. Carver, *supra;* Rushforth v. Hadfield, 7 East, 229; Bevan v. Waters, 3 C. & P. 520; Scarfe v. Morgan, 4 M. & W. 283; Houghton v. Matthews, 3 Bos. & Pul. 494; Bleaden v. Hancock, 4 Car. & P. 156.

[73] Scarfe v. Morgan, *supra;* Bevan v. Waters, *supra;* McIntyre v. Carver, *supra.*

[74] Naylor v. Mangles, 1 Esp. 109; Carlisle v. Quattlebaum, 2 Bailey (S. C.), 452; Quimby v. Hazen, 54 Vt. 132; Grinnell v. Cook, 3 Hill (N. Y.), 485, 38 Am. Dec. 663.

quired that those who were thus obliged to serve should have some compulsory means of obtaining compensation. A lien was also allowed to those who had, by their own peril, labor and expense, rescued, from loss or destruction at sea, the goods or property of another who was unable to protect them. Here, too, obvious equity, as well as commercial necessity, demanded that if the owner would reclaim his goods he should first pay the reasonable charges of him by whose exertions they had been preserved.[75]

It was, however, soon extended to the case of those who, while not required by law to render service, yet by their skill or labor had imparted additional value to the goods or property of another.[76] That these persons, also, should have a lien upon the goods or property for the reasonable value of their services was obviously just and so plainly conducive to confidence and security in the transaction of affairs, that this principle has become firmly established in our law, and has in modern times been extended by statutory enactments to a great variety of cases not contemplated by the common law.

§ 1685. Nature of lien.—This lien conferred by the common law does not create an estate or title in the property over which it prevails. It is a simple right of retainer merely, and is neither a *jus ad rem* nor a *jus in re.*

[75] Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33. As to goods lost upon land, see Wood v. Pierson, 45 Mich. 313; Preston v. Neale, 12 Gray (Mass.), 222; Cummings v. Gann, 52 Pa. 484; Wentworth v. Day, 3 Metc. (Mass.) 352, 37 Am. Dec. 145.

[76] "The right of lien has always been admitted where the party was bound by law to receive the goods; and in modern times the right has been extended so far that it may be laid down as a general rule, that every bailee for hire, who by his labor and skill has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. This includes all such mechanics, tradesmen, and laborers as receive property for the purpose of repairing or otherwise improving its condition." Bronson, J., in Grinnell v. Cook, 3 Hill (N. Y.), 485, 38 Am. Dec. 663. To same effect are Morgan v. Congdon, 4 N. Y. 551; Nevan v. Roup, 8 Iowa, 207; Wilson v. Martin, 40 N. H. 88; Moore v. Hitchcock, 4 Wend. (N. Y.) 292; Gregory v. Stryker, 2 Den. (N. Y.) 628.

But except where there is an obligation by law to take and care for property, no lien for simply keeping and caring for it exists at common law, upon the ground that the bailee has added no value to the property. Thus agisters and livery stable keepers have no lien for keeping animals in the absence of a statute or an express contract to that effect. Grinnell v. Cook, *supra;* Lewis v. Tyler, 23 Cal. 364; Goodrich v. Willard, 7 Gray (Mass.), 183; Wills v. Barrister, 36 Vt. 220; Wallace v. Woodgate, 1 Car. & P. 575; Bevan v. Waters, 3 Car. & P. 520; Judson v. Etheridge, 1 Cromp. & M. 743; Jackson v. Cummins, 5

It is purely personal to the lien holder, and is neither assignable by him, nor can it be attached as personal property or as a chose in action of the person who is entitled to it.[77] Being thus a personal privilege, no person but the lien holder can avail himself of it. It cannot be set up by a third person as a defense to an action brought by the owner of the goods.[78]

§ 1686. Requisites of lien—Possession.—The common law lien being thus a mere right of retainer, it follows that the exclusive possession of the property by the person claiming the lien, is indispensable to its existence and continuance.[79] If the person holds the property in subordination to the will and control of another, no right of retainer attaches. No lien exists, therefore, in favor of the mere workman or servant of the contractor.[80] But the possession of such a workman or servant is the possession of the employer or master, and is sufficient to maintain the latter's right of lien.[81]

§ 1687. Possession must have been lawfully acquired.—In order to sustain the lien, the possession of the property must have been obtained in good faith, and from one having the power and the right to confer it. A person can neither acquire a lien by his own wrongful

Mees. & Wels. 342; Miller v. Marston, 35 Me. 153, 56 Am. Dec. 694; McDonald v. Bennett, 45 Iowa, 456; Allen v. Ham, 63 Me. 532; Mauney v. Ingram, 78 N. C. 96.

But on the ground of increased value, the horse trainer has a lien. Harris v. Woodruff, 124 Mass. 205, 26 Am. Rep. 658; Bevan v. Waters, *supra;* Towle v. Raymond, 58 N. H. 64; so has the horse doctor; Lord v. Jones, 24 Me. 439, 41 Am. Dec. 391; so has the owner of a stallion for the services of the stallion; Scarfe v. Morgan, 4 Mees. & Wels. 270; Sawyer v. Gerrish, 70 Me. 254, 35 Am. Rep. 323.

[77] Barnes Safe & Lock Co. v. Block Bros. Tobacco Co., 38 W. Va. 158, 22 L. R. A. 850; Meany v. Head, 1 Mason (U. S. C. C.), 319, Story, J.; Lovett v. Brown, 40 N. H. 511; Holly v. Huggeford, 8 Pick. (Mass.) 72, 19 Am. Dec. 303; Jones v. Sinclair, 2 N. H. 321, 9 Am. Dec. 75; Daubigny v. Duval, 5 T. R. (Durnf. & E.) 606.

[78] Holly v. Huggeford, *supra;* Jones v. Sinclair, *supra.*

[79] McIntyre v. Carver, 2 Watts & Serg. (Penn.) 392, 37 Am. Dec. 519; Jenkins v. Eichelberger, 4 Watts (Penn.), 121, 28 Am. Dec. 691; Tucker v. Taylor, 53 Ind. 93; Nevan v. Roup, 8 Iowa, 207; Oakes v. Moore, 24 Me. 214, 41 Am. Dec. 379; *Ex parte* Foster, 2 Story (U. S. C. C.), 131; McFarland v. Wheeler, 26 Wend. (N. Y.) 467; Collins v. Buck, 63 Me. 459; Robinson v. Larrabee, 63 Me. 116; Miller v. Marston, 35 Me. 153, 56 Am. Dec. 694; Rice v. Austin, 17 Mass. 197; Winter v. Coit, 7 N. Y. 288, 57 Am. Dec. 522; Heard v. Brewer, 4 Daly (N. Y.), 136; Sawyer v. Lorillard, 48 Ala. 332; Elliott v. Bradley, 23 Vt. 217; Donald v. Hewitt, 33 Ala. 534, 73 Am. Dec. 431; Peoples' Bank v. Frick Co., 13 Okla. 179.

[80] Hollingsworth v. Dow, 19 Pick. (Mass.) 228; McIntyre v. Carver, *supra;* Wright v. Terry, 23 Fla. 160.

[81] Heard v. Brewer, *supra;* Elliott v. Bradley, *supra;* Wenz v. McBride, 20 Colo. 195; King v. Canal Co., 11 Cush. (Mass.) 231.

act, nor can he retain one when he obtains possession of the property without the consent of the owner express or implied.[82]

If, therefore, the person claiming a lien acquired possession by misrepresentation or fraud, or from an agent or servant or other person having no right or power to confer it,[83] he cannot maintain the lien although he might have done so if he had acquired the possession fairly.

§ 1688. Possession must be continuous.—It is also indispensable that the possession should be continuous.[84] A voluntary surrender of the property, therefore, to the owner or some one on his behalf, terminates the lien, unless it is consistent with the contract, course of business or intention of the parties that it should continue.[85] And having once voluntarily relinquished the property, the party cannot regain his lien by recovering possession of the goods, without the consent or agreement of the owner.[86] If, however, the property be taken from the possession of the party claiming the lien by fraud or misrepresentation, the lien is not lost [87] and will revive if his possession be restored.[88]

The lien is not lost by a mere temporary parting with the possession

[82] Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; Madden v. Kempster, 1 Camp. 12; Burn v. Brown, 2 Stark N. P. 272; Peoples' Bank v. Frick Co., 13 Okla. 179; Randel v. Brown, 2 How. (U. S.) 406, 11 L. Ed. 318.

[83] An exception to this general rule exists in the case of an innkeeper who is bound to receive the guest and cannot stop to inquire whether he is the true owner of the property he brings or not. Yorke v. Grenaugh, 2 Ld. Raym. 867; Johnson v. Hill, 3 Stark, 172; Snead v. Watkins, 1 C. B. (N. S.) 267; Grinnell v. Cook, 3 Hill (N. Y.), 485, 38 Am. Dec. 663; Jones v. Morrill, 42 Barb. (N. Y.) 626; Turrill v. Crawley, 13 Q. B. 197; Threfall v. Borwick, 26 L. T. Rep. N. S. 794, affirmed in the Exchequer Chamber, L. R. 10 Q. B. 210; Manning v. Hallenbeck, 27 Wis. 202.

This exception has not been made in this country in the case of common carriers. Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; Robinson v. Baker, 5 Cush. (Mass.) 137, 51 Am. Dec. 54; Clark v. Lowell, etc., R. R. Co., 9 Gray (Mass.), 231; Gilson v. Gwinn, 107 Mass. 126, 9 Am. Rep. 13; Everett v. Saltus, 15 Wend. (N. Y.) 474; Brower v. Peabody, 13 N. Y. 121; Martin v. Smith, 58 N. Y. 672.

[84] Tucker v. Taylor, 53 Ind. 93; Nevan v. Roup, 8 Iowa, 207; Oakes v. Moore, 24 Me. 214, 41 Am. Dec. 379; *Ex parte* Foster, 2 Story (U. S. C. C.), 144; McFarland v. Wheeler, 26 Wend. (N. Y.) 467; Walcott v. Keith, 22 N. H. 196; Collins v. Buck, 63 Me. 459; Sawyer v. Lorillard, 48 Ala. 332; Way v. Davidson, 12 Gray (Mass.), 465, 74 Am. Dec. 604; Bowman v. Hilton, 11 Ohio, 303; Sears v. Wills, 4 Allen (Mass.), 212; Rowland v. Dolby, 100 Md. 272, 3 Ann. Cas. 643.

[85] Welker v. Appleman, 44 Ind. App. 699; Robinson v. Larrabee, 63 Me. 116; Spaulding v. Adams, 32 Me. 212; Nash v. Mosher, 19 Wend. (N. Y.) 431.

[86] Nevan v. Roup, *supra*.

[87] Bigelow v. Heaton, 6 Hill (N. Y.), 43; Ash v. Putnam, 1 Id. 302; Wallace v. Woodgate, 1 C. & P. 575.

[88] Wallace v. Woodgate, *supra*.

for a special purpose, when there was no intention to relinquish or release the lien.[89]

§ 1689. Possession must have been acquired in course of employment.—In order to maintain the lien upon a specific chattel the possession must have been acquired in the course of the employment in respect of which the lien is claimed.[90] A mere creditor happening to have the goods of his debtor in his possession has no lien thereon to secure payment of the debt.[91] Nor does the mere fact that a person occupies a position, or pursues a calling, in respect to which a lien ordinarily attaches give him a lien upon property which chances to be in his possession. The possession must have been acquired by virtue of his position, or in the pursuit of the calling in which he is engaged.[92]

Thus a factor can only claim a lien upon goods which came into his possession as factor;[93] an attorney only upon the deeds and papers which came into his hands in the character of an attorney;[94] a broker only upon the property which was delivered to him in that capacity.[95]

§ 1690. No lien if contrary to intention of parties—Waiver.—A lien is presumed to be something of value. It may in its inception be waived or given up without any valuable consideration, but when it has once attached, an executory agreement to waive or surrender it will not be obligatory unless based upon a legal consideration.[96]

A lien will not attach if it be inconsistent with the terms upon which possession was obtained.[97] The existence of a special contract is not, of itself, inconsistent with a lien, but if it expressly or impliedly waives it, the lien can not exist.[98]

So it is a general principle that an agreement to give credit, or a

[89] Hays v. Riddle, 1 Sandf. (N. Y.) 248; Reeves v. Capper, 5 Bing. N. C. 136; Robinson v. Larrabee, 63 Me. 116.

[90] Scott v. Jester, 13 Ark. 438; Thacher v. Hannahs, 4 Robert (N. Y.), 407.

[91] Allen v. Megguire, 15 Mass. 496.

[92] Dixon v. Stansfeld, 10 C. B. 398 ("A man is not entitled to a lien simply because he happens to fill a character which gives him such a right unless he has received the goods or done the act in the particular character to which the right attaches." Jarvis, C. J.).

[93] Drinkwater v. Goodwin, 1 Cowp. 251.

[94] Stevenson v. Blakelock, 1 Maule & Sel. 535.

[95] Dixon v. Stansfeld, *supra*.

[96] Danforth v. Pratt, 42 Me. 50.

[97] Crawshay v. Homfray, 4 Barn. & Ald. 50; Chase v. Westmore, 5 Maule & Sel. 180.

[98] Farrington v. Meek, 80 Mo. 578, 77 Am. Dec. 627; Leese v. Martin, L. R. 17 Eq. 224; Brandao v. Barnett, 12 Cl. & F. 787.

Contract held not to amount to a waiver, there being nothing inconsistent. Fisher v. Smith, 4 App. Cas. 1.

special contract for a particular mode of payment,[99] or the taking of a note, acceptance or other similar instrument payable at a future time,[1] or an agreement to deliver the property before payment or before the time of payment arrives,[2] is a waiver of the lien. An agreement to pay a fixed price is no waiver.[3]

§ 1691. Waiver by inconsistent conduct.—The lien will, however, be waived by a general refusal of the person, to whom it inures, to deliver the property, accompanied by a claim of title in himself, or by a claim to retain it on other grounds distinct from his lien.[4] But a claim of right to detain the goods in respect of two sums, as to one only of which the person has a lien, has been held not to be a waiver.[5]

[99] Chandler v. Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; Hutchins v. Olcutt, 4 Vt. 549, 24 Am. Dec. 634; Moore v. Hitchcock, 4 Wend. (N. Y.) 296; Stoddard Woolen Manufactory v. Huntley, 8 N. H. 441, 31 Am. Dec. 198; Stevenson v. Blakelock, 1 M. & S. 535; Raitt v. Mitchell, 4 Camp. 146; Cowell v. Simpson, 16 Ves. Jr. 280.

[1] Hutchins v. Olcutt, 4 Vt. 549, 24 Am. Dec. 634; Hewison v. Guthrie, 2 Bing. N. C. 755; Cowell v. Simpson, 16 Ves. Jr. 275; Au Sable Boom Co. v. Sanborn, 36 Mich. 358; Bunney v. Poyntz, 4 B. & Ad. 568. Unless the paper be dishonored while the property yet remains in the agent's hands. Feise v. Wray, 3 East, 93. It makes no difference whether the note is payable on demand or at future time, or whether negotiable or not. Hutchins v. Olcutt, *supra*. A factor's lien for money and supplies to make a crop is not waived by taking personal security for such money and supplies. Story v. Flournoy, 55 Ga. 56. The mere taking of some other form of security is not *per se* a waiver of the lien. Joslyn v. Smith, 2 N. Dak. 53 (a statutory lien in this case). To have that effect there must be something in the nature of the security, the length of time, or the other circumstances, fairly inconsistent with an intention to rely upon the lien. Rosenbaum v. Hayes, 10 N. Dak. 311 (citing many cases); Security Trust Co. v. Temple Co., 67 N. J. Eq. 514.

[2] Chandler v. Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193.

[3] Hutton v. Bragg, 7 Taunt. 14; Raitt v. Mitchell, 4 Camp. 146; Stoddard Woolen Manufactory v. Huntley, 8 N. H. 441, 31 Am. Dec. 198; Mathias v. Sellers, 86 Pa. 486, 27 Am. Rep. 723; Hanna v. Phelps, 7 Ind. 21, 63 Am. Dec. 410.

[4] White v. Gainer, 9 Moore, 41, 2 Bing. 23, 1 Car. & P 324; Boardman v. Sill, 1 Camp. 410 Note; Dirks v. Richards, 5 Scott's N. R. 534; Weeks v. Goode, 6 Com. B. N. S. 367; Cannee v. Spauton, 8 Scott's N. R. 714 s. c. 7 Man. & G. 903; Dows v. Morewood, 10 Barb. (N. Y.) 183; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Everett v. Saltus, 15 Wend. (N. Y.) 474; Judah v. Kemp, 2 Johns. (N. Y.) Cas. 411; Rogers v. Weir, 34 N. Y. 463; Picquet v. McKay, 2 Blackf. (Ind.) 465; Hanna v. Phelps, 7 Ind. 21, 63 Am. Dec. 410; Leigh v. Mobile, etc., R. R. Co., 58 Ala. 165.

"Where one wrongfully converts property upon which he has a lien, such lien is extinguished." Peoples' Bank v. Frick Co., 13 Okla. 179.

[5] Scarfe v. Morgan, 4 Mees. & Wels. 270 (compare Kerford v. Mondel, 5 H. & N. 931.)

But a demand for more than is due or for that to which the claimant is not entitled, especially where the lawful and the unlawful are united in

Whether the lien is lost by a general refusal to deliver the goods, without specifying any grounds, is a question upon which the authorities are in conflict, but the better opinion is thought to be that it is.[6]

§ 1692. Claim of lien no waiver of personal remedies.—In general, the lien holder has recourse to the personal responsibility of the debtor as well as the lien upon the goods,[7] but he may waive this personal responsibility if he so elects. Whether he has done so in any given case, is a question of fact to be determined from its own circumstances.[8] So although there may have been an undertaking to resort to the goods in the first instance, this will not prevent recourse to the debtor after the proceeds of the goods are exhausted, unless there has been an agreement to look exclusively to the goods.[9]

§ 1693. How lien may be enforced.—It is a general rule that a mere lien can not, in the absence of a statute authorizing it, be enforced by sale of the property.[10] In such a case, either the ordinary proceedings at law to an execution upon which the property may be seized and sold, must be resorted to, or recourse must be had to the more appropriate remedy of an action in equity. An exception, however, is made in the case of factors, who may, as will be hereafter seen,[11]

one sum, is usually held to work a forfeiture of the lien. Hamilton v. McLaughlin, 145 Mass. 20; Bowden v. Dugan, 91 Me. 141; Stephenson v. Lichtenstein, 72 N. J. L. 113; Viley v. Lockwood, 102 Tenn. 426. But see, Kirtley v. Morris, 43 Mo. App. 144. In Kelley v. Kelley, 77 Me. 135, it is said if the claimant has so mingled and intermixed the matters concerning which he is entitled to a lien with those as to which he is not entitled, that they cannot be separated, he loses his lien. But a mere refusal to furnish upon request "a full and itemized account of all claims and charges" for which the lien was claimed was held not a waiver in the absence of any statutory provision to that effect. Sutton v. Stephan, 101 Cal. 545.

[6] Hanna v. Phelps, *supra;* Dows v. Morewood, *supra;* Spence v. McMillan, 10 Ala. 583. *Contra:* see Everett v. Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Buckley v. Handy, 2 Miles (Penn.), 449.

[7] Graham v. Ackroyd, 10 Hare, 192; Peisch v. Dickson, 1 Mason (U. S. C. C.), 9 Fed. Cas. No. 10,911; Beckwith v. Sibley, 11 Pick. (Mass.) 482; Colley v. Merrill, 6 Greenl. (Me.) 50; Upham v. Lefavour, 11 Metc. (Mass.) 174; Richards v. Gaskill, 39 Kan. 428.

[8] Burrill v. Phillips, 1 Gall. (U. S. C. C.) 360, Fed. Cas. No. 2,200; Peisch v. Dickson, 1 Mason (U. S. C. C.), 9 Fed. Cas. No. 10,911.

[9] Gihon v. Stanton, 9 N. Y. 476; Parker v. Brancker, 22 Pick. (Mass.) 40; Burrill v. Phillips, *supra;* Peisch v. Dickson, *supra;* Stoddard Woolen Mfg. Co. v. Huntley, 8 N. H. 441, 31 Am. Dec. 198.

[10] Briggs v. Boston, etc., R. R. Co., 6 Allen (Mass.), 246, 83 Am. Dec 626; Fox v. McGregor, 11 Barb. (N Y.) 41; Hunt v. Haskell, 24 Me. 339, 41 Am. Dec. 387; Crumbacker v Tucker, 9 Ark. 365; Bailey v. Shaw, 24 N. H. 297, 55 Am. Dec. 241.

[11] See *post*, chapter on Factors.

sell the goods in their possession to reimburse themselves for their advances. So where the case amounts to a bailment or a pledge of the property, or to a deposit by way of security for a loan, a different rule applies and the bailee or pledgee may, after reasonable demand and notice, sell the property at public sale.[12]

§ 1694. How these rules apply to agents.—It is not the purpose here to go minutely into the question of the right of lien as applied to agents of various kinds, but rather to state the most important principles governing liens in general, leaving their particular application to be considered hereafter when treating more fully of the more prominent classes of agents.[13]

But, in general, it has been said that there "exists a particular right of lien in the agent for all his commissions, expenditures, advances and services in and about the property or thing intrusted to his agency, whenever they were proper or necessary or incident thereto." [14]

The foundation of this lien, in the absence of a statute conferring it, must, as in the case of other common law liens, be either that the agent, like a bailee for hire,[15] has by his skill or labor added to the value of some specific thing, or that by advancing his own money or property

[12] Parker v. Brancker, 22 Pick. (Mass.) 40; Porter v. Blood, 5 Pick. (Mass.) 54; Howard v. Ames, 3 Metc. (Mass.) 308; Potter v. Thompson, 10 R. I. 1.

[13] See *post* as to the liens of Attorneys, Auctioneers, Factors, and Brokers in the respective chapters devoted to those agents.

[14] Story on Agency, § 373; Richards v. Gaskill, 39 Kan. 428; McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291.

[15] McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291; McIntyre v. Carver, 2 W. & S. (Penn.) 392, 37 Am. Dec. 519; Nevan v. Roup, 8 Iowa, 207; Morgan v. Congdon, 4 N. Y. 552; Grinnell v. Cook, 3 Hill (N. Y.), 485, 38 Am. Dec. 663; Gregory v. Stryker, 2 Den. (N. Y.) 631; Wilson v. Martin, 40 N. H. 88; Farrington v. Meek, 30 Mo. 581, 77 Am. Dec. 627; Lovett v. Brown, 40 N. H. 511; Moore v. Hitchcock, 4 Wend. (N. Y.) 292; Mathias v. Sellers, 86 Pa. 486, 27 Am. Rep. 723.

Accountants employed to examine and investigate the accounts contained in certain books have no lien upon the books for their services. Scott Shoe Mach. Co. v. Broaker, 35 N. Y. Misc. 382. Said the Court: "They have done nothing to the books, but have merely made an examination of them. After their examination the books remained as they were before, nothing whatsoever having been added to their value. The object of the examination made by an accountant is the preparation of a report. The report may be something of value, or it may not, but the books themselves are not the least changed or improved by the investigation."

In Grauman v. Reese, 18 Ky. Law Rep. 683, it was held that a traveling salesman had a lien on the samples entrusted with him by his employer, for his commissions.

In the absence of a statute, however, it is difficult to see how this decision can be upheld. It does not

he has obtained or produced the thing,[16] or that he has made advances to his principal in reliance upon the security of the property or thing confided in his custody.

Thus it is said by a learned judge in New York, "An agent may have a lien on the property or funds of his principal for moneys advanced or liabilities incurred in his behalf; and if moneys have been advanced or liabilities incurred upon the faith of the solvency of the principal, and he becomes insolvent while the proceeds and fruit of such advances or liabilities are in the possession of the agent, or within his reach, and before they have come to the actual possession of the principal, within every principle of equity, the agent has a lien upon the same for his protection and indemnity."[17]

So where a principal consigns goods to an agent to sell under an agreement that the agent will accept bills drawn upon him by the principal, it is said to be a necessary inference that the bills were drawn and accepted upon the credit of the goods, and the agent has a lien upon the goods in his hands for the amount of his acceptances.[18]

§ 1695. ——— Illustrations.—In accordance with these principles, it has been held that an agent employed to obtain a loan upon a commission, has a lien for the same upon the loan which he secures:[19]

appear that the agent produced the samples by his own labor, nor by the expenditure of his own means, nor that they were enhanced in value in any way by the services which he rendered. Missouri Glass Co. v. Roberts, —— Tex. Civ. App. ——, 137 S. W. 433, practically denies the right to any such lien.

[16] Johnston v. Gerry, 34 Wash. 524. Agent who has advanced money to buy land for his principal is entitled to lien for his reimbursement. Arnold v. Arnold, 83 Kan. 539; Robertson v. Rawlins Co., 84 Kan. 52. So of a stock broker who has advanced his own money to pay for stock he was directed to purchase and receive for his principal. Hope v. Glendinning, [1911] App. Cas. 419.

[17] Muller v. Pondir, 55 N. Y. 325, 14 Am. Rep. 259. In Underhill v. Jordan, 72 N. Y. App. Div. 71, which relied upon and followed Muller v. Pondir, *supra*, an agent who had had the general management of the property of non-residents, and who had expended a large sum of his own money in the management of the property was held to be entitled to a lien on funds of theirs remaining in his hands, at least to the extent of his expenses and disbursements. Although not strictly a lien, yet where an agent, at the direction or request of his principal, takes title to land for the principal in the agent's name, the agent (or in this case his heirs) will not be compelled to convey it to the principal except upon being reimbursed for taxes properly paid by him. Warren v. Adams, 19 Colo. 515. Expense of executing such a trust said to be a lien on the estate. Johnson v. Leman, 181 Ill. 609, 19 Am. St. Rep. 63, 7 L. R. A. 656.

[18] Nagle v. McFeeters, 97 N. Y. 196. See also, Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Bank v. Jones, 4 N. Y. 497; *In re* Pavy's Co., 1 Ch. Div. 531.

[19] Vinton v. Baldwin, 95 Ind. 433. Where the owner of real estate, be-

that a real estate agent who has conducted negotiations for an exchange of property, drawn the deeds of conveyance, made expenditures in procuring a change in the terms of an incumbrance so that the exchange could be made, and at the request of the principal has received delivery of the deed running to him, has a lien upon that particular deed for his commissions and advances due from the grantee therein;[20] that an agent who, at the request or consent of his principal carries on a general mercantile business of the latter in the agent's name, with authority to buy, sell and exchange, and thereby incurs personal obligations, has a lien upon all the property in the business for his advances, expenses and liabilities, incurred in the proper management of the business;[21] that an agent for the sale of agricultural machinery who, upon the unjustifiable termination of his employment by the principal, is forced to incur expense in caring for and storing machinery for the principal's protection, has a lien upon it for such expenses;[22] that an agent directed by his principal to obtain possession of personal property, *e. g.*, goods in the hands of a carrier, which could only be obtained by paying certain charges upon it, and who pays the charges with his own money, was entitled to a lien upon the property for the money so advanced.[23]

ing indebted to real estate agents, executed a contract, which was recorded, by which he agreed to place in their hands for sale and to give them the exclusive control of the sale of the land, and to pay them out of the proceeds in the event of a sale, it was held that the contract gave the agents an equitable lien upon the land. Tinsley v. Durfrey, 99 Ill. App. 239. See also, Gresham v. Galveston Co. (Tex. Civ. App.), 36 S. W. 796.

[20] Richards v. Gaskill, 39 Kan. 428. "The accidental possession of a deed will not sustain a lien; so, also, if a deed is acquired under an express contract, or circumstances showing an implied contract inconsistent with a lien, the real estate agent or broker cannot claim any lien upon a deed so received." *Id.*

"Real estate brokers have no lien on money or papers placed in their hands to use in the purchase of land." Robinson v. Stewart, 97 Mich. 454.

In Peterson v. Hall, 61 Minn. 268, it was held that a real estate broker, to whom had been delivered a note and mortgage upon which he undertook to secure a loan, and who did, within the reasonable time to which the court held he was entitled, actually procure the loan, had a lien upon the note and mortgage to secure the payment of his commission as against his principal who sought to get back the papers and repudiate the employment after the agent had begun negotiations, but before he had had time to receive the money.

[21] Dewing v. Hutton, 40 W. Va. 521, s. c. 48 Id. 576. The code made all such property liable for the debts of the person carrying on the business and incurred therein. It was also said that the agent would have the right to sell to satisfy the liabilities.

[22] Deering Harvester Co. v. Hamilton, 80 Minn. 162, citing Haebler v. Luttgen, 61 Minn. 315.

[23] White v. Sheffield, etc., Ry. Co., 90 Ala. 253.

§ 1696. Agent's lien ordinarily a particular lien.—It will be seen hereafter, in cases which stand upon distinctive grounds, that an agent may have a general lien, as in the case of bankers, factors and attorneys. But the lien of an agent employed for a specific transaction is ordinarily a particular lien, and is confined to the retention of the property for services and disbursements in reference to that property only, and not for a general balance of account, nor for services in reference to other property or affairs, unless by general usage, special agreement or mode of dealing, a general lien has been established.[24]

§ 1697. For what sums the lien attaches.—Except by virtue of a special agreement, the lien attaches only for debts which are certain and liquidated, and not for contingent, prospective or speculative damages or liabilities.[25] The debts must also have been incurred by the express or implied authority of the principal, and not as the result of the agent's own wrong, neglect or breach of instructions.[26] They must also have been incurred for lawful and legitimate purposes, and must be due as a matter of right and not as mere matter of favor.[27]

The lien attaches also, in the absence of an express agreement enlarging its scope, only to debts arising or incurred in transactions had in the particular character by virtue of which the agent claims the lien, and not from other and dissimilar transactions;[28] and the demand must be due from the person whose goods are sought to be retained, and not from a stranger, and must accrue to the agent who claims the lien.[29]

VII.

AGENT'S RIGHT OF STOPPAGE IN TRANSIT.

§ 1698. Agent liable for price of goods, may stop them in transit.—An agent who has made himself liable for the price of goods consigned by him to his principal, by obtaining them in his own name, and on his own credit may stop them while in transit if the principal becomes insolvent.[30] The principle upon which this rule is based is that

[24] Carpenter v. Momsen, 92 Wis. 449; McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291; Jarvis v. Rogers, 15 Mass. 389; Barry v. Boninger, 46 Md. 59. See also, Stevens v. Robins, 12 Mass. 180; Adams v. Clark, 9 Cush. (Mass.) 215, 57 Am. Dec. 41; Rushforth v. Hadfield, 6 East, 519; Wright v. Snell, 5 B. & Ald. 350; Castillain v. Thompson, 13 C. B. (N. S.) 105.

[25] Story on Agency, § 364.

[26] See *ante*, § 1683.

[27] Story on Agency, § 364, *ante*, § 1683.

[28] See *ante*, § 1689.

[29] Story on Agency, § 365.

[30] Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489; Seymour v. Newton, 105 Mass. 272; Feise v. Wray, 3 East, 93; D'Aquila v. Lambert, 1 Amb. 399;

the relation of the parties under such circumstances is rather that of vendor and vendee than of principal and agent.[31]

The right, however, will not exist if at the time of the consignment the agent is indebted to the principal on a general balance of account to a greater amount than the value of the goods, and if such consignment has been made in order to cover this balance.[32] Nor does the right exist if the agent is only a surety for the price of the goods.[33]

So the right is lost where the agent, in pursuance of a contract between the principal and a third person who has bought the goods of the principal and paid him for them, delivers the goods to a carrier to be shipped to the purchaser, taking the shipping receipt in the name of the principal, although the principal fails to pay the agent for the goods, before they are delivered to the purchaser.[34]

§ 1699. **Right exercised as in other cases.**—The agent's right of stoppage *in transitu* is to be exercised in the same manner, and is subject to be defeated by the same contingencies as in the case of the exercise of the same right by any other vendor.[35]

§ 1700. **Right of such an agent to retain the title until paid for.**—Where an agent purchases goods intended for his principal, but, according to the express or implied agreement of the parties, buys them upon his own credit or with funds furnished by himself, he may retain a hold upon the goods until they are paid for by the principal.[36]

This rule has been well stated by Folger, J., as follows: "When commercial correspondents, on the order of a principal, make a purchase of property ultimately for him, but on their own credit, or with funds furnished or raised by them, and such course is contemplated when the order is given, they may retain the title in themselves until they are reimbursed. One of the means by which this may be done, is by taking the bill of sale in their own names, and, when the property is shipped, by taking from the carrier a bill of lading in such terms as to show that they retain the power of control and disposition of it.

s. c. 2 Eden, 75; Tucker v. Humphrey, 4 Bing. 516; Hawkes v. Dunn, 1 Cromp. & Jer. 519. See also, Muller v. Pondir, 55 N. Y. 325, 14 Am. Rep. 259; Hollins v. Hubbard, 165 N. Y. 534.

[31] Newhall v. Vargas, *supra*.

[32] Wiseman v. Vandeputt, 2 Vern. 203; Vertue v. Jewell, 4 Camp. 31; Ewell's Evans on Agency, 377.

[33] Siffken v. Wray, 6 East, 371; Ewell's Evans on Agency, 377. But now in England, under the Mercantile Law Amendment Act, 19–20 Vict. C. 97, § 5, see Imperial Bank v. London, etc., Dock Co., 5 Ch. Div. 195.

[34] Gwyn v. Richmond & Danville R. R. Co., 85 N. C. 429, 39 Am. Rep. 708.

[35] See Parsons on Contracts, Vol. 1, Chap. VI; Benjamin on Sales, §§ 829—868; 2 Mechem on Sales, §§ 1605–1607.

[36] Farmers', etc., Bank v. Logan, 74

This results necessarily from the nature of the transaction. It is not, at once, an irrevocable appropriation of the property to the principal. It rests for all of its efficiency and prospect of performance, upon the intention to withhold and the withholding the right to the property, so that the right may be used to procure the money with which to pay. It contemplates no title in the principal until he has reimbursed to his correspondents the price paid by them or to the person with whom they have dealt, the money obtained from him, with which to pay that price. From the start, the idea formed and nursed is, that the property shall be the means of getting the money with which to pay for it, and that the title shall not pass to him who is to be the ultimate owner until he has repaid the money thus got.

"Although such correspondents act as agents, and are set in motion by the principal who orders the purchase, yet their rights as against him, in the property are more like those of a vendor against a vendee in a sale not wholly performed, where delivery and payment have not been made and where delivery is dependent upon payment. * * *

"If the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order and does so, not as agent or on behalf of the purchaser but on his own behalf, he thereby reserves to himself a power of disposing of the property, and consequently there is no final appropriation and the property does not on shipment pass to the purchaser. So if the vendor deals with, or claims to retain, the bill of lading in order to secure the contract price, as when he sends it forward with a draft attached, and with directions that it is not to be delivered to the purchaser until payment of the draft, the appropriation is not absolute, and until payment, or tender of the price, is conditional only, and until then the property of the goods does not pass to the purchaser. We see no principle which distinguishes the case of a vendor and vendee, in this respect, from that of a correspondent or agent, buying for another, yet paying the price from his own means, or from moneys by agreement raised upon the property, or upon his own credit, and holding the property

N. Y. 568; Turner v. Trustees, 6 Exch. 543; Mirabita v. Imperial, etc., Bank, L. R. 3 Exch. Div. 164; Shepherd v. Harrison, L. R. 4 Q. B. 196; Ogg v. Shuter, 1 C. P. D. 47.

Whether what is retained is the general property or only a special property in the goods depends largely upon the circumstances. The Uniform Sales of Goods Act, § 20, p. 2, provides that where the title would have passed except for the form of the bill of lading, the seller's property shall be deemed to be only for the purpose of securing performance.

as security until the principal has made reimbursement. Such is the purpose of the parties. There is no intent that the property shall be appropriated until payment is made. And unless third parties are unavoidably misled to their harm, they have no cause to complain of a purpose so reasonable and productive of so good results."[37]

VIII.

RIGHTS OF SUB-AGENT AGAINST PRINCIPAL.

§ 1701. When principal liable for his compensation.—The right of the sub-agent to recover his compensation from the principal depends upon considerations already discussed. As has been seen, the general principle is *delegatus non potest delegari.* The principal, however, may, either expressly or by implication, consent that a substitute may be employed, and he may do this upon one or the other of two conditions: *first,* he may consent merely that the agent may employ an assistant as his, the agent's, servant or agent, without at all consenting that any privity of contract shall be created between himself and the assistants so employed. Or, *secondly,* he may expressly or by implication, authorize the appointment of a substitute or assistant for him, the principal, and as his, the principal's, agent. In this case, privity of contract will exist between the principal and the sub-agent.[38]

In the second of these classes of cases where the appointment of the sub-agent as the agent of the principal, is expressly or impliedly authorized by the principal, the latter is liable for the sub-agent's compensation,[39] but where the agent, having undertaken the performance of some duty to his principal, employs upon his own account a servant or sub-agent to assist him, the sub-agent must look to his immediate employer,—the agent,—and not to the principal.[40]

[37] Farmers', etc., Bank v. Logan, 74 N. Y. 568; Moors v. Kidder, 106 N. Y. 32. But such a correspondent cannot, even with the consent of the principal, acquire a general lien for other indebtedness which will prevail against another correspondent jointly interested in the same way in the same goods. Drexel v. Pease, 133 N. Y. 129.

[38] See *ante,* Book I, Chap. VI.

[39] See Eastland v. Maney, 86 Tex. Civ. App. 147; Cotton States Life Ins. Co. v. Mallard, 57 Ga. 64; Cf. U. S. Life Ins. Co. v. Hessberg, 27 Ohio St. 393.

[40] See *ante,* Chap. VI. Text quoted with approval. Houston Co. Oil Mills & Mfg. Co. v. Bibby, 43 Tex. Civ. App. 100; Nat. Cash Register Co. v. Hagan & Co., 37 Tex. Civ. App. 281; Williams v. Moore, 41 Tex. Civ. App. 402. Mere bond salesman has no implied authority to employ a broker to assist him at his principal's expense. Fudge v. Seckner Contracting Co., 80

§ 1702. ——— Effect of ratification.—Although at the time of the appointment, the employment of a sub-agent may not have been authorized, this defect can, as in other cases, be cured by the subsequent ratification by the principal.[41] It should be kept in mind, however, although it seems frequently to be overlooked, that the thing

Ill. App. 35. A real estate broker, employed to sell land for a commission, has no implied authority to obtain assistants at the principal's expense. Carroll v. Tucker, 2 N. Y. Misc. 397; Southack v. Ireland, 109 N. Y. App. Div. 45; Kohn v. Jacobs, 4 N. Y. Misc. 265; Hanback v. Corrigan, 7 Kan. App. 479; Hill v. Morris, 15 Mo. App. 322; Cleaves v. Stockwell, 33 Me. 341.

[41] In Carroll v. Tucker, 2 N. Y. Misc. 397, one Thompson, a broker employed by defendant to sell land, had, without express authority, employed plaintiff to assist him and agreed to pay him a commission. Plaintiff found a purchaser to whom defendant sold, and now sued for commissions. *Held*, that he could not recover. "The respondent argues," said the court, "that by consummating the sale which he negotiated, the appellants are estopped to question his authority, upon the ground that the enjoyment of the fruits of an agent's act charges the principal with responsibility. The principle upon which the respondent relies is of recognized and salutary operation; but he misapprehends its import and application. The rule as propounded in a leading case of this state is, that 'when an agent, acting within the scope of his actual authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he thereby adopts the fraudulent acts of his agent.' Smith v. Sweeny, 35 N. Y. 291; Mayer v. Dean, 115 *id.* 556, 5 L. R. A. 540. Here, the act of Thompson in substituting plaintiff as broker, if there were such substitution, was beyond the scope of Thompson's authority; and the transaction, the enjoyment of the fruits of which is supposed to estop the appellants, was not the transaction of their agent but of a stranger. The rule was never applied, and in reason can never be applied, so as to validate a delegation of his agency by a broker; else the principal would be at the mercy of his broker, and might be burdened with liability to as many deputies as the broker should choose to appoint."

In Homan v. Brooklyn Life Ins. Co., 7 Mo. App. 22, where a life insurance solicitor, employed by defendant's agent without authority, was suing for payment for services, the court said: "Where a person is employed by an agent, the mere fact that the principal of the agent knows that the person so employed is acting in the business committed by the principal to his agent, and accepts such employment as beneficial, does not prove an agreement on the principal's part to pay for the services of the person so employed. To hold the principal to payment, the element of privity of contract between the principal and subagent should appear. So, acts of recognition and the acceptance of services on the part of the principal do not necessarily tend to prove ratification in the sense here claimed; for the question arises, ratification of what? If, for example, Cole and Taylor [general agents of the company], relying on what Wilson [the agent] seems to have done (that is, hired the plaintiff under the obligation to pay him), accepted the plaintiff's services as the employee of and to be paid by Wilson, the acts of Cole and Taylor in this behalf in no way prove, or tend to prove, their

which is thus ratified, like the thing that might be originally authorized, may be either the appointment of a sub-agent at the agent's risk and expense, or the appointment of a sub-agent at the principal's risk and expense. It must be kept in mind also that there can ordinarily be no effective ratification without full knowledge on the part of the principal of all the material facts. The mere fact that the principal knew that a sub-agent had been employed would not warrant the inference that he knew that this sub-agent was employed at the principal's expense. The fact that the principal has received the benefit of an act is often evidence of a ratification, but full knowledge of the facts or a voluntary waiver of such knowledge, is just as essential here as in other cases of ratification. The retention of the benefits of an act is also often evidence of a ratification. But as has been pointed out in another place, this retention must be voluntary and can ordinarily be operative only where the alternative of restoring the benefit was open to him.

§ 1703. Same rules govern reimbursement and indemnity.—The same general principles would govern the sub-agent's claim for reim-

acceptance or ratification of any employment of the plaintiff as a subagent to be paid by the company."

In Williams v. Moore, 24 Tex. Civ. App. 402, it appeared that the principal had authorized an agent to endeavor to sell land, and that the agent had employed a broker to assist him and had promised him a commission. It was contended that with knowledge of these facts the principal had made a sale to a purchaser found by the broker. It was held that even if these facts be conceded there was not such a ratification as would make the principal liable to pay the broker's commission. The distinction between employment of a subagent as the agent's agent and as the principal's agent was pointed out, and it was said that inasmuch as the owner has a natural and inherent right to sell his property the mere fact that he sold to a person whose attention was called to the property by the subagent was not necessarily a ratification of the promise made by the agent to the subagent. To the argument that the principal may not adopt a part of a contract and repudiate the residue, it was said that the contract the principal adopted was the contract of the purchaser to buy the land (which he adopted in full) and not the contract between the agent and subagent. Hanback v. Corrigan, 7 Kan. App. 479, is substantially to the same effect.

In Hornbeck v. Gilmer, 110 La. 500, an agent employed to sell land arranged with the plaintiff, Hornbeck, to assist him. The agent wrote to his principal, the defendant, that he had made this arrangement and said "if the sale is made to Hornbeck's party, he will expect part of the commission which I assume you will be willing to pay." Defendant made no objections, and had some correspondence directly with Hornbeck. After this defendant made the sale to a buyer produced by Hornbeck. *Held* (in a not very satisfactory opinion), to be such a ratification of Hornbeck's employment as to entitle him

bursement for expenses and indemnity against loss or injury.[42] Where the principal at the time was undisclosed, a sub-agent, who would be entitled to reimbursement or indemnity as against a disclosed principal, may enforce his claim against the previously undisclosed principal when disclosed upon the same conditions as any other person dealing with an undisclosed principal.[43]

§ 1704. How as to protection against injury.—So where in accordance with the principles referred to, the sub-agent is to be deemed the agent of the principal, he would be entitled to the same remedies as any other agent for an injury occasioned by the principal's negligence.[44] Where, however, he is the agent of the agent merely, the same rules would apply which govern the relation to the agents or servants of an independent contractor.[45]

§ 1705. When sub-agent entitled to a lien.—A sub-agent appointed without the express or implied authority of the principal and who is therefore regarded as the agent or servant of the agent merely, can, by virtue of that relation, acquire no lien or charge upon the goods or property of the principal confided to the possession of the agent.[46] But where the sub-agent, being appointed by the express or implied authority of the principal, is, in law, to be regarded as the agent of the latter, such sub-agent is entitled to a lien to the same extent as any other agent.[47] So although the appointment of the sub-agent was originally unauthorized, yet if his appointment has been subsequently ratified by the principal, by availing himself of the pro-

to recover commissions from the defendant.

The case of Hurt v. Jones, 105 Mo. App. 106, is substantially to the same effect. No reference is made to Homan v. Brookyln Life Ins. Co., *supra*.

So in Dewing v. Hutton, 48 W. Va. 576, where an agent had been employed to buy land and engaged another person to assist him for a compensation, it was held that if the principal accepted the purchases made he became responsible for the commissions of the subagent, upon the ground that if he takes the benefits of the services he must pay for them. However sound the conclusion in this case may be, the opinion is not a very convincing one.

[42] See *ante*, §§ 649–651.

[43] Barrell v. Newby, 62 C. C. A. 382, 127 Fed. 656.

[44] See *ante*, § 652 *et seq.*

[45] See *ante*, § 1642.

[46] Story on Agency, § 389; Maanss v. Henderson, 1 East, 335; Man v. Shiffner, 2 East, 523; Westwood v. Bell, 4 Camp. 348.

The right of lien does not extend to one not in privity with the principal. Meyers v. Bratespiece, 174 Pa. 119; Clark v. Hale, 34 Conn. 398; Hollingsworth v. Dow, 19 Pick. (Mass.) 228.

[47] Story on Agency, § 389; McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291.

ceeds or benefits accruing from his acts, or otherwise, the sub-agent's lien will attach.[48]

At the same time, however, the sub-agent, though appointed without authority, "will be at liberty to avail himself of his general lien against the principal to the extent of the lien particular or general, which the agent himself has against the principal, by way of substitution to the rights of the agent, if the acts of the latter or his own are not tortious." [49]

So, in many cases, proceeds Judge Story, "a sub-agent who acts without any knowledge or reason to believe that the party employing him is acting as an agent for another, will acquire a rightful lien on the property for his general balance. Thus, for example, if a sub-agent or broker, at the request of an agent, should effect a policy on a cargo, supposing it to be for the agent himself, but in fact it should be for a third person for whom the agent has purchased the cargo, and afterwards, and while the policy is in the broker's hands, he should make advances to the agent, before any notice of the real state of the title to the property, he will be entitled to a lien on the policy, and on the money received on it, to the extent of the money so advanced, and also (as it should seem), for his general balance of account against the agent." [50]

[48] Story on Agency, § 389; McKenzie v. Nevius, *supra*.

[49] Story on Agency, § 389; McKenzie v. Nevius, *supra;* Maanss v. Henderson, 1 East, 335; Man v. Shiffner, 2 East, 523; McCombie v. Davies, 7 East, 7; Solly v. Rathbone, 2 M. & S. 298; Cochran v. Irlam, 2 M. & S. 301, note; Schmaling v. Thomlinson, 6 Taunt. 147.

[50] Story on Agency, § 390; Mann v. Forrester, 4 Camp. 60; Westwood v Bell, 4 Camp. 349.

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